BPT Tonga Ltd v Tohi

Supreme Court, Nuku'alofa
Hampton CJ
C.968/95

22, 23 February & 4 March 1996

Contract - warranty or condition
Tort - negligent advice
Negligence - advice - servant

The plaintiff sued for a balance of purchase price of a van and subsequent servicing and repairs. The defendant counterclaimed alleging breach of conditions or warranties of purchase, or misrepresentation; and/or negligence by the plaintiff in certain repair work and advice subsequent to the purchase.

Held:

1. The claimed figures of the plaintiff (excluding a $20 lawyers fee for a letter of demand) had been proved.
2. The conversation of the plaintiff's salesman did not amount to representations sufficient to form a condition or warranty of the contract, or a collateral contract; and nor was there any misrepresentation.
3. There was negligent advice to the defendant however by a mechanic employed by the plaintiff to keep driving the van notwithstanding a warning light still kept coming on. The defendant relied on that negligent advice. Damage to the engine of the van followed. Many of the repair accounts sued for by the plaintiff followed from that. That work was not the responsibility of the defendant but rather of the plaintiff. It flowed from, and was a direct consequence of, the negligence of the plaintiff's servant.
4. The defendant had not proved his claim for loss of use of the van, while it was off the road.
5. From the proved claim the proved amounts attributable to the plaintiff's own negligence should be deducted.
6. In the circumstances the parties should bear their own costs.

Counsel for plaintiff : Mrs Vaihu
Counsel for defendant Mr W. Edwards

Judgment

I intend giving a judgment now on the claim and the counter-claim. It is important that I do so as soon as possible bearing in mind that the first of the evidence in this case was heard on the 22nd and 23rd of February of this year. I want to give a judgment while certain matters are still present in mind in relation to the evidence and in particular as to witnesses - what they said and the way they said certain things.

I bear in mind at all times that so far as the claim is concerned the burden of proof is on the plaintiff on the balance of probabilities and so far as the counterclaim is concerned there is likewise the burden of proof on the defendant on the balance of probabilities.

I turn first to the claim which I deal with on a simple and straight forward basis. Notwithstanding the vagaries of modern computerised accounting the palintiff has proved that there is an outstanding balance of $4,455.68 being a balance on the purchase price of this Toyota van (the purchase going back to November 1993); and a balance on repairs and servicing subsequently carried out on that van, less a certain credit and payments made by the defendant. I say that amount rather than the $4,475.68 which is sought because I have a very clear view that the extra $20 sought for the lawyer's letter costs is not appropriately included in the claim; but is something that, if ultimately the plaintiff succeeds, will be reflected in the costs that are awarded to a successful plaintiff.

So, I find the figure established as correct by the plaintiff at $4,455-68 but that is subject to what I now go on to consider in terms of the defence and the counter-claim that has been lodged on behalf of the defendant.

The first part of that defence and counter-claim alleges in paragraph 7, that there were presentations made by the plaintiff's agents or employees to the defendant prior to the purchase, namely that the van was a good bargain, it was in excellent condition and the engine in good running order.

From all evidence I have heard, I do not find that those things, such as that it was a good bargain and with an engine in good running order, did amount to such representations sufficient to form a condition or conditions of the contract or indeed a condition of a collateral contract.

It seems to me that those things said were no more than the mere conversation of a salesman and even if they could be converted into being some sort of condition or warranty of the contract (which I find they are not) there is not sufficient evidence in front of me to prove that there has been, or that there was, a breach of such a representation or condition or warranty.

I find that the defendant was not misled in any way as to this van. I take into account such factors as the evidence of the previous owner of the van who brought it in from Hawaii, who had it for some time and who had then sold it as a trade in, in effect, to the plaintiff, ASCO MOTORS. His evidence, uncontradicted in effect, was that the van for him ran well and was trouble-free. He sold it on to ASCO and they sold it then to the defendant, in a very short time.

On that basis there was not ground for the plaintiff to believe that the van was not in good order. They were not the servicing agent for the vehicle whilst it was in the hands of the previous owner. It was a vehicle that was secondhand when purchased in Hawaii. It was purchased there for some 7,500 US dollars. It had done some 85,000 kilometres, at least, before it was sold on in Tonga. From the evidence I have heard it had done some

considerable miles in Hawaii before it came to Tonga.

I take into account, also, the fact that the defendant was given, and took, the opportunity to test-drive the vehicle. He had the opportunity for someone else to look at it if he thought that necessary. He was satisfied enough to buy the vehicle as he found it. It seems to me that there is no basis made out on that first allegation in the statement of claim i.e. to set aside the purchase agreement as sought.

Nor is there any basis, on the evidence before me, to find that there was in fact a fraudulent mis-representation as to the state of this van; it being claimed by the defendant that the previous owner had sold that van to ASCO MOTORS because the van "was troublesome and regularly required engine repairs". That "the engine was not in good running order" and that there were problems, in effect, with the cooling system of the engine.

The allegation on behalf of the defendant is that the plaintiff knew these things from the previous owner but, without taking care and without taking responsibility and being reckless, sold it on to the defendant without telling him of those difficulties. On the evidence (particularly that of the previous owner) I cannot find those allegations made out; and so, likewise, I do not see any basis on the evidence I have heard to cancel this agreement to purchase the vehicle.

That is not the end of the matter from the defendant's point of view because the statement of counter-claim goes on to deal, in paragraphs 13 and following, with an allegation that the plaintiff was any effect negligent in terms of certain work that it did or did not do on this van for the defendant at an early stage of the defendant's ownership of the van.

I accept on the evidence that the plaintiff knew that the defendant was using the van as a taxi. I accept on the evidence that it is true that the defendant became concerned when a warning light on the dashboard panel came on and being concerned as to that, went in to the plaintiff, to seek the plaintiff's advice.

On the balance of probabilities, I am satisfied that the defendant, having sought that advice from the Motor Engineers to whom he usually went and on whom he relied and from whom he had bought this van, was told to keep driving the van, notwithstanding that the warning light was still keeping coming on. In effect he was told to ignore the light and to keep on driving the van.

I prefer the evidence of the defendant to that of the plaintiff's witnesses in relation to this and in particular I prefer the evidence of the defendant to that of the plaintiff's mechanic Manase Tu'ungafasi. I made particular note of what the mechanic said in his evidence. Initially that witness said in his evidence in chief that when the van was brought in, the light was on on the dashboard. He said he fixed the radiator, something to do with a cap amongst other things, ran the vehicle as a test, and the light was still on. But nonetheless he gave the van back to the defendant. He later changed that evidence by saying that once he had done his work, the overheating was fixed and the light was off but I find it significant that initally he said that after he had done his work the light was still on. I found him an unimpressive witness; he was hesitant, he was evasive and it seemed to me that he was an unreliable witness.

As I have said I prefer the evidence of the defendant in relation to this issue and I find, on the balance of probabilities, that as he claimed he was told to ignore the warning light and to keep on driving the van.

I find that that was indeed negligent advice on the part of the mechanic employed by the plaintiff. It was irresponsible advice. On the evidence which I have heard it seems clear that if a motor is allowed to continue to run and overheat, it can cause a cylinderhead to crack. It seems from what I have heard that the problems, or a very considerable number of the problems, which this van's engine subsequently encountered relate to overheating issues and damage done to the cylinderhead of the van.

I find on the balance of probabilities that the defendant relied on the negligent advice, he continued to drive the van. Initially the light would be off and then once the engine heated up the light would come on. He would continue to drive it in accordance with the advice. The engine overheated and damage to the cylinderhead resulted.

It seems to me that subsequent problems concerning the cylinderhead, and many of the repair accounts which are part of the claim against the defendant, follow from that advice. He was not properly advised, he drove the van, the work followed from that. That work, it seems to me, is not, and should not be, his responsibility but rather that of the plaintiff. It flows from, and is a direct consequence of, the negligence of the plaintiff's servant.

I have looked at all the accounts that have been presented on behalf of the plaintiff and indeed some of them are copied in the documents of the defendant. The only ones that seem to me to be relevant to the findings I have made on the evidence, are some four and they are as follows, (details and amounts were then given. The judge then continued):

That is from the $4,455-68 should be deducted the sum $2,775-47 which would leave a balance of $1,680-21.

On the evidence which I have heard none of the other accounts charged are relevant to, or flow from, the negligent advice; or on the evidence before me are the subject of separate negligent advice. In the statement of counter-claim, claim is also made for other losses by the defendant flowing it is claimed as a result of the plaintiff's negligence. In particular there is a claim that he lost income from the non-use of the van as a taxi for certain periods of time whilst it was being repaired.

I do not accept, on the evidence, that any loss of use or loss of income from the van has been properly proved. The defendant accepts in evidence that the plaintiff made another vehicle available to him while the van was off the road. He says it was smaller than the van i.e. the vehicle which was made available to him. It was only a car. He does not seem to have complained of that, and he still had another vehicle, his previous vehicle, available to him. There was no actual firm evidence provided to me that would show that he in fact suffered any lessening of income, any loss of income, during the period of time when the van was off the road. There would have had to have been demonstrated to me, to my satisfaction on the balance of probabilities, that the use of the alternative vehicle provided by the plaintiff company, as well as the defendants own additional vehicle, and the income that those vehicles generated, the net income they generated, was less than what would have been generated by the van. That has not been shown.

On the evidence which I have heard, it seems that the van was used as a taxi through until August of 1995, when it then broke down as a result, from what I have been told, of electrical problems. It has not been used since, although from what I have heard from the defendant in evidence, he has not tried to get anyone to repair the vehicle since then; let alone returned it to the plaintiff, ASCO, for them to look at, to see what is wrong. As at August 1995 the defendant had had the vehicle for something like one and three quarter

years.

On the evidence I have heard I am not prepared to hold, nor is there any basis on which I could hold, that the plaintiff was in some way responsible for these electrical problems. For example, no evidence of any further negligent advice by the plaintiff to the defendant in relation to those difficulties.

Overall then, I have come to the view, as I have expressed, that the plaintiff has proved the figures to establish, on its face, a debt of $4,455-68. From that should be deducted the amount of $2,775-47 being figures which are included in the plaintiff's
200 accounts and which are, on my findings on the evidence, amounts directly attributable to and flowing from the negligence of the plaintiff or the negligent advice of the plaintiff to the defendant. If that amount is deducted, then the amount properly owing in my judgment to the plaintiff by the defendant is $1,680-21.

There will be judgment for that sum. It has been a long and costly hearing over comparatively small amounts. The defendant has been substantially successful but ends up still owing an amount to the plaintiff. In all those circumstances I have reached a clear view that justice would be served by an Order being made that each party bear their own costs in relation to the matter.