IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 2115

BETWEEN	**ROHAN McNELLIE**	**CLAIMANT**
AND	**LINSTON BRAMWELL**	**1ST DEFENDANT**
AND	**AVRIL WILLIAMS**	**2ND DEFENDANT**
AND	**KARL WILLIAMS**	**3RD DEFENDANT**

Mrs. Jacqueline Samuels-Brown and Mrs. T. Jordan instructed by Jacqueline Samuels-Brown for the Claimant.

Miss Marsha Smith instructed by Ernest A. Smith & Company for the 1st Defendant.

Miss Kerry-Ann Ebanks instructed by Bishop & Fullerton for the 2nd Defendant.

Heard 7th and 8th May 2009 and 6th November 2009

Breach of contract - Sale of goods - Term of the contract - Not fit for the purpose - Not merchantable - Goods damaged – Liability

BROWN J (Ag):

The Claimant sought to recover damages against the 1st Defendant for Fraud, Misrepresentation in breach of Contract arising out of the sale of a motor truck.

The 1st Defendant counterclaimed against the Claimant for the balance of the purchase price.

The 1st Defendant joined the 2nd and 3rd Defendants for indemnity or contribution. The latter appeared not to have been served.

The Claimant was a pharmacist and a Seventh day Adventist. He alleged that he obtained a contract from the Contractors of the North Coast Highway to haul aggregate. He did not have a truck. He sought the assistance of the 1st Defendant to locate a truck for the purpose. The 1st Defendant agreed to assist him. About one week later he offered to sell the Claimant his 1993 International truck for $900,000. The purchase price was agreed at $870,000.

The Claimant and one Jim drove the truck before purchasing it. He also took the truck to the Contractors of the North Coast Highway to be inspected. He paid a total of $800,000.00 leaving a balance of $70,000.00 and took possession of it.

The truck was used by the Claimant to transport aggregate on the North Coast Highway project. In June 2003 he informed the 1st Defendant that the truck had broken down and asked him to recommend two good mechanics. The Claimant alleged that the engine was defective and he had to install a new one. He also discovered that the truck was not a 1993 model but was a 1984 and, therefore, valued considerably less than the purchase price. He reported the matter to the Manchester C.I.B. who investigated the matter. The 1st Defendant was exonerated of any fraud.

The Claimant contended that;

(i) The 1st Defendant misrepresented that the truck was a 1993 model.

(ii) That it was a term of the contract that the truck was a 1993 International, was roadworthy and was of merchantable quality.

(iii)That the 1st Defendant was in the business of selling trucks.

There was no dispute that the 1st Defendant had purchased the truck from the 2nd and 3rd Defendants which was later sold to the Claimant.

The 1st Defendant said that after purchasing the truck he did substantial repairs to it. He used it for about seven months to haul goods for contractors. The Claimant asked him to assist him to find a truck and he agreed. About one week later he offered to sell him his truck. He sold the truck 'as is, where is.' This was denied by the Claimant.

It was the 1st Defendant's contention that the Claimant had it examined and driven by one Jim. He also rode in the truck as it was transporting goods to see how it performed. The Claimant also drove it and they were both satisfied as to its fitness and road worthiness. About three months later the Claimant told him that the truck had broken down and asked him to recommend a good mechanic. He later discovered that the truck was also involved in an accident.

The Claimant also advised him that the vehicle was not a 1993 International Truck but was a 1984 model. He demanded that the 1st Defendant should return a portion of the purchase price.

The Claimant claimed that the 1st Defendant represented to him that the truck was a 1993 model and was a term of the oral contract. He maintained that the 1st Defendant had breached the contract and he was therefore entitled to damages.

He relied on Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd (1965) 1 WLR 623. The Defendant, a motor car dealer, stated to a private seller that the vehicle had only done 20,000 miles. It had in fact done 100,000 miles. It was held that the statement was a contractual term. The dealer was held liable.

On the other hand, in Oscar Chess Ltd v Williams (1957) 1WLR 370 *the Defendant sold the plaintiff a motor car. He told them that the car was a 1948 model and the car log book showed that it had been first registered in 1948. The car was discovered to be a 1939. The English Court*

of Appeal held that the Seller's statement was not a term of the contract but a representation not giving rise to any action for breach of contract. The seller was held not liable to the purchaser.

The facts in this instant case appeared similar to Oscar Chess Ltd v Williams, however the Claimant sought to rely on the Dick Bentley case. It was their contention that under the Sale of Goods Act, private individuals who may not have an established business, that is, business premises or adopting business patterns of behavior, may yet sell in the course of a business if they deal with sufficient regularity and with a view to a profit, even if they may not always make a profit. (Stevenson v Beverly Bentinck Ltd [1976] 1 WLR 483 and also The Sale of Goods by Michael Bridge at page 292).

In Oscar Chess Denning L.J. said "*when the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant, intending that the buyer should act on it, and he does so, it is easy to infer a warranty: see Couchman v Hill, where the farmer stated that the heifer was unserved, and Harling v Eddy, where he stated that nothing was wrong with her. So if he makes a promise about something which is or should be within his own control: see Birch v Paramount Estates, Ltd. (unreported), decided on October 2, 1956, in this court, where the seller stated that the house would be good as the show house. But if the seller, when he states a fact, makes it clear that he has no knowledge of his own but got his information elsewhere, and is merely passing it on, it is not so easy to imply a warranty. Such a case was Routledge vMcKay [1954] 1 W.L.R. 615, 636, where the seller "stated that it was a 1942 model and pointed to the corroboration found in the book," and it was held no warranty.*"

In Dick Bentley case, the court made a distinction between a sale by an innocent seller and one by a dealer. Lord Denning M.R. said "*it seems to me that if a representation is made in the*

course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it. [His Lordship referred to the Oscar Chess case and continued: ... in the present case it is very different. The inference is not rebutted. Here we have a dealer, Mr. Smith, who was in a position to know, or at least to find out, the history of the car. He could get it by writing to the makers. He did not do so. Indeed it was done later. When the history of this car was examined, his statement turned out to be quite wrong. He ought to have known better. There was no reasonable foundation for it."

It was the Claimant who contacted the 1st Defendant to assist him in finding a suitable truck to purchase as "*they were from the same area and attended the Knockpatrick Seventh Day Adventist Church.*" He knew the Defendant to be knowledgeable about trucks *"in his long-standing capacity as a truck driver."*

The 1st Defendant never denied his knowledge of trucks and described himself as a trucker for over 7 years. I interpreted the word 'trucker' to mean a truck owner and/or operator. He also admitted previously owning many trucks over the years and had sold them. He was not a mechanic by trade but could do simple repairs for himself. He was not in the business of selling trucks. On the 26th of June 2002 he purchased the truck from the 2nd Defendant. He did the minor repairs to it and had a mechanic do the major ones before using it to haul goods.

The discussions between the Claimant and the 1st Defendant about his knowledge of trucks were made before the latter had offered to sell him his truck. It was not made to induce him to enter into any contact with him but to assist his church brother to find a suitable dumper truck. The evidence showed that he had made efforts to find a suitable one for him. The Claimant knew that he was never in the business of selling trucks. It was clear that he was then in the business of transportation goods i.e. a haulage contractor and was knowledgeable about trucks. He said he offered to sell him his truck in order to repay a loan to his brother. I therefore reject the Claimant's contention that the 1st Defendant was selling in the course of a business.

It was the fulcrum of the Claimant's case that the truck was a 1984 and not a 1993 International as stated in the Certificate of Title. Mr. Michael Adams is employed to Kingston Industrial Agencies Ltd. as the General Manager of the 'After Sales Division' who is the dealer in Jamaica. He was able to access the manufacturer's website. In his witness statement he said "upon our research of the manufacturer's database, we discovered that the International truck, bearing the VIN number 1HSRDJSRXFHB11284, in relation to which both queries were made, was in fact manufactured on the 22nd day of August 1984 and sold by the manufacturer as a model year 1985."

The Claimant said he discovered that the model was a 1984 truck and told the 1st Defendant of the mistake. He said that he made several request to the Defendant to return his money and take back the truck. He refused to do so and he decided to try and recoup some of his losses by fixing up the truck and hiring it out for haulage contract.

He claimed that the 1st Defendant ought to have known that the truck was not a 1993 model as described on the Certificate of Title by merely looking at it. He based his opinion on what

somebody told him. This was clearly hearsay and therefore inadmissible. On the other hand Mr. Adams had to use the VIN number to determine the year it was manufactured. I accepted Mr. Adams' testimony that the model was indeed a 1984 and not a 1993 as represented by the 1st Defendant at the time of the sale.

It was the Claimant's contention that the age was a term of the contract and the 1st Defendant was in breach. He was therefore entitled to damages. It was clear that the former was seeking to purchase a truck that was not over 10 years old and had made this known to the latter. They both relied on the Certificate of Title that was on hand. The 1st Defendant had purchased the truck from the 2nd Defendant who gave him the title. It was still registered in the 3rd Defendant's name. He showed it to him and later gave him. I am satisfied that the 1st Defendant had no reason to dispute the title and relied on it to prove the age. He never gave a guarantee that it was a 1993 model. Thus, the statement was one of belief and not a contractual promise. He cannot be held liable.

It was clear that the Claimant and the 1st Defendant were indeed the innocent purchasers who were duped in buying the vehicle and were both entitled to rescind their respective agreements. It was the 3rd Defendant who imported the truck and passed it off as a 1993 model. He is not before the court today. However in July 2003 the Claimant was unable to return the truck as it was involved in an accident. He had not disclosed this to the Defendant although he said he made repeated request to rescind the contract.

It was also the Claimant's submission "that as a matter of law and fact this court must find that the roadworthiness and fit for the purpose formed a term of the contract." He claimed that the truck was mechanically unsound and broke down within three (3) months of purchase. He said

the engine was damaged and sought the 1st Defendant's assistance to recommend a good mechanic. He replaced the engine and did repairs to the spring, the suspension and jack. The truck was in Mr. Thomas' garage for three months.

It was their contention that the 1st Defendant was in breach of Section 15 of the Sale of Goods Act. It reads;

> Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—
>
> (a) *Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be a manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.*
>
> (b) *Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.*
>
> (c) *An implied warranty or condition as to the quality or fitness for a particular purpose, may be annexed by the usage of the trade.'*

The Claimant in this case said he had expressly made it known to the 1st Defendant the truck was to be used to haul aggregate for construction of the North Coast Highway. He did not have a mechanic examined the truck before he purchased it. He relied solely on the seller's skill and judgment. He had Jim drive it to see if he could do so and not to examine it for defects.

In his witness statement dated the 21st day of December 2006 at paragraph 15 to 16 he stated, "After I received the truck, I used it for a period of about two months to haul aggregate on the Falmouth by-pass in Trelawny. However, by June 2003, it broke down as the engine failed and I was forced to take it to a mechanic for servicing". This clearly showed that the truck was fit for the purpose for which it was bought. He needed a tipper truck to haul aggregate and did so until the truck broke down.

At paragraph 16 he continued "the mechanic told me that the truck's engine was in a deplorable condition and that it would not be economical for me to repair it. He also alerted me to the fact that the truck was not a 1993 model, but was in fact a 1984 model; and that anyone with knowledge of trucks would know that it could not have been a 1993 model." This paragraph was certainly inadmissible as hearsay.

The 1st Defendant on the other hand offered an explanation for the engine failure. At paragraph 13 of his witness statement dated the 6th day of December 2006, he alleged as follows; "I asked McNellie what had caused the damage to the engine of the truck. He said there was a broken seal which caused the gas oil to mix with the engine oil. The engine oil became very thin and this damaged the crankshaft. I commented that this could not have occurred if the truck was being serviced regularly. He said he did not know if the driver was checking the engine oil on a regular basis."

It was for the Claimant to establish on a balance of probability that the Sale of Goods Act was applicable. This was indeed a sale between two private individuals. He was not in the business of selling used trucks or dealing in used trucks. The Act did not apply in this instant case.

There was no credible evidence before the court that the truck was either not merchantable or not fit for the purpose of hauling aggregate. The Claimant gave three different time periods for when he was using the truck before the engine failed, i.e., two to three weeks, two months and three months.

I accepted the 1st Defendant's evidence that he sold the truck 'as is where is.' The Claimant had the truck examined by Jim and it was in good mechanical condition. It was used to haul aggregate on the Falmouth leg of highway construction. The engine was damaged due the Claimant's neglect in not servicing the truck after he had bought it. He had the engine replaced and continued to operate it to haul aggregate.

The 1st Defendant later found out that the truck was involved in an accident on the 8th of July 2003 with two motor cars when the 2nd Defendant sent him a letter of demand she had received from Guardian Insurance Brokers Ltd. This letter was dated 20th August 2003. The Claimant had not advised him of this accident. He then discovered that the truck's cab was extensively damaged and subsequently replaced with another one. He saw the original cab in a gully at the Claimant's mother's home in Trelawny.

The Claimant was neither a reliable nor a trustworthy witness. His evidence lacked sincerity and credibility. He did not even mention in his witness statement that the truck was extensively damaged as a result of the accident. At paragraphs 23 to 24 of his witness statement he said "I decided to try and recoup some of my losses by fixing the truck and hiring it out for haulage contracts. I have done repairs to the truck many times, such as in or about June to September, 2003 and in January and March 2004. All of this has been at a cost of over one million dollars and I annex hereto, copies of receipts relating to the expenses incurred in repairing the truck." In

June the only complaint about the truck was the defective engine and that was replaced. He was now seeking to recover money spent as a result of the accident.

The Claimant also had the truck assessed and valued by MSC McKay (Ja.) Ltd. on the 28th May, 2004. The assessor's report valued the truck for $380,000.00 which was considerable less than the purchase price. However, the chassis, the cab and the engine were not the same ones that were sold to the Claimant in 2003. This corroborated the 1st Defendant's account that the truck was seriously damaged and cast a great doubt on the Claimant's claim that the expenses incurred was due to its poor mechanical condition.

In this instant case the Claimant alleged that the 1st Defendant had sold him a defective and old truck that was not roadworthy. He had the truck repaired by a Mr. Pinnock in Old Harbour and Mr. Thomas in Devon Manchester. At Paragraph 8 of the Particulars of Claim states "the Claimant discovered several serious defects in the said motor truck rendering it unfit and effectively not roadworthy."

However, he did not call any mechanic as witness to testify as to the condition of the truck but relied on his own inexperience and lack of knowledge. He was not a mechanic. It was also significant that the only mechanical defect mentioned in the particulars of breach of contract was "the damage to the engine was irreparable or otherwise not worth repairing." The 1st Defendant on the other hand gave an explanation for the engine failure which was never contradicted. This was fatal to his case.

I am satisfied that the 1st Defendant genuinely believed that the truck was a 1993 International truck as stated on the Certificate of Title and relied on it. He had no reason to suspect that the age had been altered. I rejected the Claimant's claim that the age of the truck was a term of the sale.

This was an innocent representation which entitled the Claimant to rescind the contract. He could not have done so as the truck was damaged from the accident.

I am also satisfied that the truck was roadworthy and was not in a poor condition as alleged by the Claimant. It was the negligence of the Claimant and his driver that caused the damage to the engine and truck.

There was no dispute that the purchase price was agreed at $870,000.00 and the Claimant owed a balance of $70,000.00. In view of the acknowledgement of the debt, the 1st Defendant is entitled to the balance of the purchase price.

The documentary evidence clearly showed that the truck was registered in the name of the 3rd Defendant and not the 2nd Defendant. It was never challenged that she sold the truck as the 3rd Defendant's agent and had no knowledge of the discrepancy on the title. I agree with the written submissions of her counsel that she was acting for a disclosed principal and only the 3rd Defendant could be held liable under the contact as he is the principal.

In the circumstances the actions against the 1st and 2nd Defendants are dismissed.

Judgment shall be entered for the 1st Defendant on the claim and on the counterclaim for $70,000.00 with costs to be agreed or t axed.

Judgment for the 2nd Defendant against the 1st Defendant with costs to be agreed or taxed.