



IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

2017: 67

BETWEEN:

DAMON BURGESS

APPELLANT

V

JANICE WHITE

RESPONDENT

JUDGMENT¹

Purchase of second- hand car- Whether car sold ‘in the course of a business’ under the Sale of Goods Act 1978- Whether a sales receipt bearing the words sold “As is “ means the purchaser accepts all defects in the car-Jurisdiction of Appellate Court

DATE OF HEARING: APRIL 12, 2018

DATE OF JUDGMENT: JUNE 6, 2018

The Appellant appeared in person

The Respondent appeared in person

¹ The Judgment was circulated to the parties without a hearing to save costs.

Introduction

1. On November 10, 2015, Ms. Janice White responded to an advertisement on the “eMoo” internet site offering for sale a 1998 Hyundai Atos motor vehicle license number 00794 (“the car”) which Mr. Damon Burgess was desirous of selling. The same day Ms. White and a friend attended Mr. Burgess’ home to view the car.
2. Mr. Burgess informed Ms. White that an elderly couple had previously owned the car; that there was an issue with the windshield which he would replace; and that he was still working on the car to ensure that it was roadworthy. Mr. Burgess also informed her that the tires were fine and that the car needed to be sprayed, but he would require the full purchase price before he rectified the rust and paint sprayed the car. Ms. White test drove the car.
3. On November 12, 2015, Ms. White paid Mr. Burgess \$4,500 in cash for the car which was sold with a receipt no. 4594741 which contained the following words: “As is after repair to windscreen and rust”. Central to the determination of this appeal is what legal consequences flow from the sale of a second-hand car when the sales receipt explicitly states the vehicle is sold “As is”.

Summary

4. For the reasons set out in this judgment, I dismiss Mr. Burgess’s Appeal. I order Mr. Burgess to pay Ms. White’s costs of the appeal.

The facts

5. Ms. White collected the car from Mr. Burgess on November 13, 2015. Approximately 7 or 8 minutes after she took possession of the car she pulled over because the brake light came on. On November 14, 2015, Ms. White noticed that the brake reservoir was empty, she filled the reservoir with two bottles of brake fluid. Ms. White called Mr. Burgess and requested that he take the car back and return her money. Mr. Burgess told her “No” saying he had carried out repairs to the car and that the car was sold “As is”.
6. On November 15, 2015, Ms. White checked the brake fluid and found brake fluid sprouting from behind the front tire. Mr. Burgess repaired the brake fluid hose, changed the windscreen and changed the starter motor which was making a lot of noise. Ms. White didn’t notice any difference in the starter motor. In the following weeks Ms. White noticed the speedometer of

the car would abruptly shoot up to 160 or 180 mph, there was mould on the headliner; the driver's door handle was loose ; the driver's side window came off its tracks and therefore could not be wound all the way up ; the air conditioning nor the radio worked; the interior light did not work; the hood didn't operate properly; the air duct under the hood was duct-taped; on rainy days the tires slid to the point of almost causing an accident, and excessive oil was sprayed around the engine area.

7. Ms. White contacted Mr. Burgess on more than one occasion demanding a refund for the car. Mr. Burgess refused to refund the purchase price.
8. On the 23rd November 2015, Ms. White commenced proceedings against Mr. Burgess in the Magistrates Court by Ordinary Summons claiming \$4500 for a defective car.

The proceedings in the Magistrates' Court

9. At the trial, the Senior Magistrate Juan Wolffe heard evidence from Ms. White and Mr. Burgess who were both unrepresented. The evidence of critical importance upon which he placed reliance was led by Ms. White who called Mr. Terry Heibroun as an expert witness. Mr. Heibroun is the service manager at Auto Solutions Limited ("Auto Solutions"). Mr. Heibroun is a qualified mechanic with 50 years' experience. He explained that Auto solutions sells Hyundai motorcars and that their mechanics are familiar with models like the car.
10. Mr. Heibroun gave evidence that on the 11th December 2015, Ms. White took the car to Auto Solutions to obtain an estimate for repair work. Auto Solutions produced a written estimate setting out the following repair work to be done and parts to be installed on the car for an estimated cost of \$4,420.80:

Diagnosis of rear defogger; clock; Front and rear wiper blades; 37 point inspection; Oil filter; Sump plug seal; Brake Cleaner; Windshield wash; Spark plug; Anti-freeze; New battery; PCV valve; Rocker cover gasket; Oil leak cleaning; Front shock absorbers; Alternator and fan belts; A/C belt; Wheel alignment/adjustment; Right front outer door handle; Right front window regulator; Left rear door check strap; Left rear window handle; A/C service and inspection; Interior light-festoon bulb; left rear door lock knob ; Breather box hose; and, diagnosis of speedometer.
11. Mr. Heibroun took the court through the written estimate and explained that: a defective rocker cover gasket could lead to an oil leak which could lead to the car's engine seizing up; leaking front shock absorbers could lead to the car becoming unstable; the cracked alternator belt could lead to the battery going flat; the A/C belt being cracked could lead to the A/C not working; two tires were below the legal level and needed to be replaced; the breather box issue caused the leaks and could lead to the engine not working properly; that the speedometer would shoot up

to 60 mph when it was only doing 10 mph; and that the oil around the engine could have caused a fire.

12. Mr. Heibroun gave evidence that the car was not fit for daily driving, needed urgent attention and the estimate of \$4,420.80 could have increased upon more detailed inspection.
13. Importantly, Mr. Heibroun said leaks in the car were fairly new; it was possible that some of the issues with the car happened from the time Ms. White purchased the car and the time she brought it into Auto Solutions. He went on to say that some defects in the car would not have been seen by the untrained eye and the TCD inspection is not as intensive as the inspection conducted by Auto Solutions. TCD only conducts a visual test. Accordingly, even though the car passed the TCD test, he could not say the car was fit to be driven on Bermuda roads.
14. Mr. Burgess gave evidence that the car was transfer tested by TCD and Ms. White stated she was satisfied with the condition of the car when she purchased it. He did agree that at the time Ms. White bought the car he said he would fix some minor body work at a mutually convenient time. He also accepted that shortly after she purchased the car Ms. White called him about the brakes and the starter.
15. Mr. Burgess' case was that Ms. White purchased the car because her car at the time, a BMW, had been taken by her ex-boyfriend. He believed that after Ms. White bought the car, she reunited with her ex-boyfriend and no longer needed the car. He also contended that Ms. White drove the car for a month before she said it was unfit for the road and got the car cut in half after Auto Solutions told her the cost to repair the car. Consequently, she was not entitled to have her money back for the car.
16. Under cross-examination, Mr. Burgess admitted that the starter could have been a problem, but countered that he could not fix every problem with used cars. Mr. Burgess rejected the suggestion he said he would buy back the car but did agree he said he would help Ms. White sell the car.
17. At paragraph 23 of the judgment, the Senior Magistrate found that Mr. Burgess sold the car to Ms. White "in the course of a business" under section 14(2) of the Sale of Goods Act 1978 ("the 1978 Act"). The Senior Magistrate came to this conclusion because, despite Mr. Burgess not expressly admitting he was in the business of selling second-hand cars, Mr. Burgess did say he had a business reputation and would not sell a defective car. He also found that the receipt for the purchase price of the car bore the hallmarks of a business receipt.

Section 14(2) of the Sales of Goods Act 1978 reads as follows:

“Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality”.

18. The Senior Magistrate accepted Ms. White’s evidence regarding the extent of the defective issues with the car which Mr. Burgess brought to her attention namely the windshield needing replacement and the rust. Crucially he found Ms. White was not in the business of buying second- hand motorcars and did not possess any professional knowledge about the mechanical aspects of motorcars. Consequently, the only issues which Ms. White could detect upon examination were limited to those which could reasonably be discovered or revealed by the untrained eye and to some extent how the car felt when she test drove it.
19. Because Ms. White was not a professional second-hand car dealer, the Senior Magistrate found she was entitled to and did reasonably rely upon Mr. Burgess’s representation or judgment about the limited extent of defects and repairs the car required contained in the sales receipt.
20. The Senior Magistrate went on to find that based on the evidence he accepted from Ms. White and Mr. Heibroun, there were many other major latent problems with the car identified in the Auto Solutions estimate which Ms. White, on reasonable examination, prior to purchase, would not have been able to discern such as the 37 point inspection.
21. Based upon these primary evidential findings, the Senior Magistrate found the car did not meet the standard that a reasonable person would regard as satisfactory quality and that as a result, Mr. Burgess sold the car in breach of the implied term of the contract of sale with Ms. White found in section 14 (2) of the 1978 Act.
22. The Senior Magistrate specifically addressed the argument concerning the adequacy of a TCD test approval. In paragraph 33 of his judgment, he found that because the car was transfer tested before it was sold to Ms. White that did not diminish the finding that the car was not fit for the purpose for which it was supplied. He concluded that the examination conducted by TCD was only a snapshot in time when TCD tested the car, and, that the test was not extensive enough to reveal many of the car’s latent problems.
23. Further, the Senior Magistrate found that the words “As is “on the sales receipt were not sufficient for Mr. Burgess to avoid liability. Because Mr. Burgess failed to draw Ms. White’s attention to the latent defects with the car, he could not rely upon the words “As is “as a get out clause. Just because the car was second hand that did not mean Ms. White accepted the car was not of satisfactory quality and took responsibility for all and any problems the car had.

24. Finally, the Senior Magistrate rejected Mr. Burgess' argument that the only reason Ms. White wanted her money back was because she and her ex-boyfriend reunited and she again had use of the BMW.
25. The Senior Magistrate exercised his discretion and awarded Ms. White the sum of \$2,285 representing half of the purchase to reflect her use of the car for one month and cutting the car in half which denied Mr. Burgess the opportunity to mitigate his loss by selling the car as a whole or for parts. Ms. White was also awarded the costs of the trial.

Particulars of Ground of Appeal

26. On October 13, 2017, Mr. Burgess filed a Notice of Appeal alleging that the Senior Magistrate erred in law because he overlooked relevant facts. In a two page letter also dated October 13, 2017, which accompanied the Notice of Appeal, Mr. Burgess set out his version of the history of the transaction with Ms. White repeating much of the evidence he gave at trial. Specifically, Mr. Burgess complained that 1. He sold Ms. White a good car that was TCD transfer tested and legally deemed fit for the road. 2. The car did not have any mechanical or transmission issues, and the body was in good condition. 3. Auto Solutions exaggerated the real condition of the car. 4. He fixed the brakes, the starter and the windscreen and called Ms. White to fix the rust however she was in church at the time he called and, they never rescheduled a convenient time to complete the bodywork.

The arguments on Appeal

27. At the appeal hearing, the Appellant Mr. Burgess repeated his central contention that he sold Ms. White a good car which was tested and passed by TCD. Consequently, as a matter of law, the car was fit to be driven on the roads of Bermuda. He also complained that the court had no idea of the real condition of the car because Ms. White cut the car in half before the trial. Mr. Burgess's next contended that the Auto Solutions report was exaggerated.
28. The Respondent Ms. White also repeated much of the same evidence she gave at the trial. Ms. White complained about the spongy brakes she experienced within minutes of purchasing the car and driving away from Mr. Burgess. She said problems with the car's speedometer and brakes are not cosmetic. When asked about why she cut the car in half Ms. White explained Mr. Burgess refused to take the car back and refund the purchase price and her conscience would not allow her to resell the car.

The Court's Appellate Jurisdiction

29. Section 14(4) of the Civil Appeals Act 1971 sets out the legal test an Appellant must surmount to succeed in a civil appeal. The section provides as follows:

Determination of appeals

14 (4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction

30. Mr. Burgess must, therefore, satisfy two tests. First, Mr. Burgess must establish the Senior Magistrate made an evidential error or misdirected himself on the law. Second, having satisfied either limb of the first test, he must demonstrate that the error or misdirection has occasioned substantial wrong or miscarriage of justice.
31. Mr. Burgess challenges the reliance the Senior Magistrate placed upon the evidence of Mr. Heibroun from Auto Solutions and the credibility of Mr. Heibroun's evidence. The circumstances in which an appellate court can interfere with factual findings found by the trial judge are limited. In *Jaquille Stowe v R [2016] Bda LR 44*, the Chief Justice set out the governing principles as follows:

"11. It is well recognised that an appellate court can draw its own inferences from facts found by the trial judge but can very rarely substitute its own primary findings based on the evidence of witnesses whose credibility the appellate court cannot properly assess. Mr Quallo referred the Court to two cases which illustrated these uncontroversial general propositions. In Benmax v Austin Motor Co Ltd [1955] AC 370 at 373, there is a statement which is both illustrative of these principles and the additional question (raised in Ground 3) as to what findings a trial judge ought to record. Viscount Simonds stated:

'This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say it would be difficult to for it to do so where the finding turned solely on the credibility of a witness But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here it must first be determined what the defendant in fact did and, secondly, whether what he did amounted in the circumstances (which must also so far as relevant be found as specific facts) to negligenceA judge

*sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent.
...'*

12. *Express reliance was placed by Mr Quallo on the following passage in the judgment of Lord Scott in Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands [2008] UKPC 31 where, after approving Benmax, he stated:*

"2 ... An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal ..."

Merits of the Appeal

32. I accept the finding made by the Senior Magistrate that Mr. Burgess sold the car to Ms. White in the course of his business selling second hand or used cars. In the two page letter Mr. Burgess filed in support of his Notice of Appeal, he confirmed he has been in the business of buying and selling used cars for four years and at the appeal hearing Mr. Burgess said he had sold 250 cars over the last four years.
33. Under Section 14 (2) of the 1978 Act, Mr. Burgess was subject to the implied term that the car he sold Ms. White under their agreement was of a satisfactory quality.
34. Based upon the arguments Mr. Burgess made at the appeal, I have not found that the Senior Magistrate made an error in law when he preferred the evidence of Ms. White and Mr. Heibroun over the evidence of Mr. Burgess. The evidence adduced at trial by Mr. Heibroun concerning the latent defects with the car is in my view compelling evidence the car was not of a satisfactory quality to be driven on the roads of Bermuda. Indeed, the evidence suggests it would have been dangerous to drive the car on the roads of Bermuda.
35. I also accept Mr. Heibroun's evidence that a TCD test would not necessarily detect latent defects in a car.
36. The words "As is " on the receipt of sale were relied upon by Mr. Burgess as conclusive proof that Ms. White had to take the car as she found it with all its defects. That argument would carry more weight if all the defects in the car were apparent. However, I do not accept that the

words “As is “on a sales receipt for a second-hand car sold in the course of a business mean that a seller can sell a second-hand car with latent defects under the 1978 Act.

37. The Senior Magistrate saw and heard the evidence of the witnesses and indeed is in a better place to judge the credibility of their evidence than an appellate court.
38. Mr. Burgess complains that Ms. White destroyed the car before the trial and thereby eliminated his opportunity to mitigate his damages. I have already said I have no basis to reject the Senior Magistrate’s conclusions regarding Mr. Heibroun’s evidence. That being said, although the car was not of satisfactory quality, in my view the Senior Magistrate fairly balanced the justice of the case by only awarding Ms. White half the purchase price of the car. This calculation took into account Mr. Burgess’ complaint concerning the destruction of the car.

Conclusion

39. In my view, Mr. Burgess has failed to establish any material misdirections regarding wrongful acceptance or rejection of evidence, let alone errors resulting in “substantial wrong or miscarriage of justice”, as the statute requires. Accordingly, I dismiss the appeal. Mr. Burgess shall pay Ms. White’s cost of the appeal which I summarily assess at \$50².

DATED this 6th day of June 2018.

DELROY B. DUNCAN
Assistance Justice

² The Respondent is entitled to recover a maximum of \$50 per hour for preparation and hearing time in a complicated Supreme Court case. This appeal was at the mid-level of difficulty at \$25 per hour. The appeal hearing lasted approximately 1 and a half hours plus half an hour preparation. My summary assessment is \$50.