

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1732 of 2003

BETWEEN:

PATRICIA BLACKMAN PLAINTIFF

AND

B S&T MOTORS INC. DEFENDANT

Before: The Hon. Madam Justice Kaye Goodridge, Judge of the High Court.

2008: October 13, 14, 15

November 17

2011: October 18

Mr. Albert Sealy and Miss Tracelyn Rollock Attorneys-at-Law for the Plaintiff.

Mrs. Sherica J. Mohammed Cumberbatch of Carrington & Sealy, Attorneys-at-Law for the Defendant.

DECISION

Nature of Action

- [1] This is an action brought by the plaintiff under the **Sale of Goods Act, Cap. 318 (the Act)** in respect of the sale of a motor vehicle to the plaintiff by the defendant.

THE PLEADINGS

The Plaintiff's Claim

- [2] In the Statement of Claim, the plaintiff alleged that in 1998 she negotiated with the defendant for the purchase of a 1999 Rover 216 S1 motor car. During the course of those negotiations the defendant represented that the vehicle was of good and merchantable quality.
- [3] In reliance on those representations, the plaintiff purchased the said vehicle. After taking delivery, the vehicle developed various problems which required several visits to the defendant's garage in order to remedy the faults.
- [4] The plaintiff alleged that she suffered loss and damage and has sued the defendant for the following relief:
- (1) rescission of the agreement for the sale and purchase of the motor vehicle;
 - (2) repayment of the sum of \$57,234.28 being the cost of the vehicle;
 - (3) alternatively, damages for breach of contract and breach of warranty as to merchantable quality;
 - (4) damages for inconvenience and loss of business; and,
 - (5) interest and costs.

The Defence

- [5] In its defence, the defendant admitted (i) changing the cylinder head of the gasket of the vehicle in April 2000; (ii) advising the plaintiff that the engine in the vehicle needed to be replaced in January 2001 and (iii) changing the fuel pump in September 2002. It denied the allegations made by the plaintiff and further denied that the plaintiff is entitled to the relief claimed. In sum, the defendant claimed that the vehicle was of merchantable quality.

The Plaintiff's Case

- [6] The plaintiff testified that in December 1998 she spoke to Mr. Trevor Blenman, one of the defendant's salesmen. He advised her that the Rover motor car was a top of the line vehicle and was perfect for her personal uses and as part of her business. At the time the plaintiff was a fashion designer and interior decorator. Mr. Blenman assured her that the company "Rover" was reputable and that she could expect long, excellent service from the car.
- [7] The purchase was made and the plaintiff took delivery of the vehicle on 2 December, 1998. The purchase was financed by a loan from the Barbados National Bank in the amount of \$75,000 and was secured by a bill of sale over the vehicle.
- [8] According to the plaintiff, she did not receive long and good service. On or about 21 December 1998, the car shut down completely. The defendant's technician came to her home and diagnosed the problem as an electrical fault; fuses were blown. The problem was rectified.
- [9] In January 1999, bulges appeared on all the tyres except the spare and when the plaintiff took the vehicle to the defendant, she was told they were not liable as the tyres were "Dunlop" and there was no representative on the Island at the time. She replaced the tyres on her own.
- [10] In 2000 and 2001, there were oil leaks which were reported to the defendant and rectified on each occasion.

- [11] The plaintiff testified that she adhered to the service schedule for the vehicle. In 2000 the car started to rust around the tailgate and sunroof although the car had been treated with rust protection and carried a 6 year warranty. The plaintiff was told that if the protection did not last for the specified time, treatment would be done at no cost.
- [12] In 2001 the plaintiff was driving to a business appointment when she heard a noise, fluid came out of the car and it stalled. The car was towed to the defendant and she was informed that the engine needed to be replaced. The car was still under warranty and the defendant replaced the engine.
- [13] The plaintiff stated that there were problems with the brakes. The discs were faulty and had to be replaced on three occasions.
- [14] In 2002 the fuel pump had to be replaced and the seats started to come apart. The engine shut down and once again the car was towed to the defendant. The plaintiff was told that the car needed a new engine and she was asked to pay 50% of the cost.
- [15] After the engine was replaced, the plaintiff was taken for a test drive. She heard a “whirling” noise and the defendant’s representative informed her that the transmission was breaking down, but it would hold for a little while longer.
- [16] Some months later the transmission broke down and the car remained at the defendant’s premises for about five months awaiting a transmission. During this time the plaintiff had no transportation. Subsequently the defendant told the plaintiff that a transmission would cost \$13,000 and she would have to bear the cost. At this point the plaintiff told the defendant that she could not bear the cost and that she would be seeking legal advice.
- [17] Under cross-examination, the plaintiff acknowledged that there was no record in the service history of the defendant’s representative’s visit to her home in December 1998. She recalled taking the vehicle in for its first service in January 1999, but denied being mistaken as to the date when the electrical shutdown occurred.
- [18] The plaintiff agreed that she did a fair amount of driving because of the nature of her business. She stated that the cost of the new transmission prevented her from having it replaced. The plaintiff stated that she had no idea where the vehicle was at present but assumed that it was still at the defendant’s premises because she did not collect the car after taking it there. She did not recall receiving a letter from the defendant’s attorneys-at-law requesting that the vehicle be removed.
- [19] When questioned about the car loan the plaintiff said that she had experienced problems servicing the loan and had paid late occasionally. She contended that she had repaid over \$50,000 and said that she had stopped paying the loan sometime in early 2003 after she had been told of the cost of the transmission. As far as she was aware, interest was not accruing on the loan and the bank had agreed to wait until the matter was concluded. The plaintiff said that she did not know if the bank had repossessed the vehicle.

The Defendant’s Case

- [20] The defendant called two witnesses, Mr. Dennis Michael Marsh, former Managing Director and Mr. Lardis Gale Cumberbatch, Workshop Manager.
- [21] Mr. Marsh testified that the defendant was the sole distributor for Rover vehicles in Barbados and was responsible for the importation, sale, service and stocking of parts for such vehicles in Barbados. Mr. Marsh produced the service history record for the plaintiff’s vehicle.
- [22] During cross-examination, Mr. Marsh said that he was aware that the plaintiff experienced problems with her vehicle. He stated that brakes were a consumable item and how frequently they had to be changed depended on a number of factors, for example, the number of miles traveled, the road conditions and the driving style of the driver. He admitted that any problem relating to the engine could be major but he could not be more specific.
- [23] When questioned about the oil leaks, Mr. Marsh said that he was not sure of the cause but he would not expect a new car to have an oil leak within a year. The witness then said that, with the exception of carelessness on a driver’s part, one would not normally expect to replace an engine twice in 4 years. He was not sure whether other Rover cars had a rust problem but he noted that the plaintiff’s car had such a problem. Mr. Marsh stated that without the defects he would have expected the car to give the plaintiff satisfactory service.

[24] Mr. Cumberbatch testified that he is a qualified auto technician who had many years experience with the Rover brand of vehicles. He was examined and cross-examined at length about the service history of the plaintiff's vehicle. In his opinion, most of the problems which the vehicle had were minor and the vehicle was properly maintained by the defendant.

The Issues

[25] The issues which the court must determine are as follows:

- (i) Was the motor vehicle sold by the defendant to the plaintiff of merchantable quality?
- (ii) If the vehicle was not of merchantable quality, then to what remedy is the plaintiff entitled?
- (iii) If the plaintiff is entitled to damages, what is the measure of damages?

Issue No. 1 – Was the motor vehicle sold by the defendant to the plaintiff of merchantable quality?

[26] **Section 15** of the **Act** provides:

“15. 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 purpose of goods supplied under a contract of sale, except as follows, that is to say-

(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 the manufacturer or not) there is an implied condition as that the goods shall be reasonably fit for such purpose:

Provided that in the case of a contract for 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 is 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 quality or fitness for a particular may be annexed by the usage of trade:

(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[27] There is no definition of the term “merchantable quality” in the **Act**. In the case of **Bernstein v Pamson Motors (Golders Green) Ltd [1987] 2 All E.R. 220, Rougier J** said at page 226:

“Merchantability is to be tested by reference to the condition of the car at the time of delivery. In

practice the argument whether a car was of merchantable quality only arises when, after accepting delivery, the buyer becomes aware of some defect.”

[28] According to **Bernstein**, in determining whether any particular defect or feature rendered a new car unmerchantable, the court had to look at the following factors:

(i) whether the car was capable of being driven safely;

(ii) the ease or otherwise with which the defect could be remedied;

(iii) whether the defect was of such a kind that it was capable of being satisfactorily repaired so as to produce a result as good as new, taking into account not only the part or parts at the site of the defect but also any other potential damage;

(iv) whether there was a succession of minor defects to be taken into consideration;

(v) in appropriate cases, any cosmetic factors.

[29] In the present case, there was implied into the contract for the sale of the motor vehicle a condition that the vehicle would be of merchantable quality. The plaintiff contended that the varied and persistent problems which she encountered with the vehicle is evidence of the seriousness of the various defects which, taken in totality, rendered the car sold to the plaintiff unmerchantable.

[30] It is the plaintiff's further contention that the fact that the plaintiff did not reject the car at the first sign of trouble, but persevered in her attempts to put it right, does not debar her right of rescission.

[31] On the other hand, the defendant submitted that the motor vehicle was of merchantable quality, taking into consideration all relevant factors. The defendant pointed out that, while the plaintiff alleged that the engine shut down on 21 December 1998 and an electrical problem was subsequently diagnosed by the defendant, the service history makes no reference to any electrical problems at that time, but referred to electrical problems in February 1999.

Discussion

[32] An examination of the service history of the plaintiff's motor vehicle has revealed that a number of issues arose with the vehicle. On 11 February 1999 less than 3 months after delivery, the vehicle had an electrical fault which caused it to shut down. This was a serious defect. That fault was corrected. It is noted that there is no record of any electrical problem being diagnosed in December 1998. It is the court's view that the plaintiff is mistaken as to the date on which the problem occurred.

[33] Thereafter, the brakes were serviced and adjusted three times, the throttle chamber replaced, the steppen motor adjusted, the left front repeater lamp replaced and the A/C belt adjusted. Between April and October 2000, the inhibitor switch was replaced three times, the cylinder head replaced, an oil leak to the power steering tank corrected, rust to tail gate rectified and the front brake discs refaced and pads refitted.

[34] In January 2001, the engine was replaced and the brake discs refitted. In February 2001, the engine mount was replaced. Between March and December 2002, the tailgate rusted and remedial work was done, and the radiator, fuel pump and engine were replaced.

[35] Applying the principles in **Bernstein** to the facts in this case, the court is of the opinion that the motor vehicle sold

to the plaintiff by the defendant had a number of defects which were of such a nature as to render it unmerchantable. It is the finding of the court that the defendant breached its obligations under the **Act** and the vehicle sold by the defendant to the plaintiff was not of merchantable quality.

Issue No. 2 - If the vehicle was not of merchantable quality, to what remedy is the plaintiff entitled?

- [36] Counsel for the defendant submitted that the plaintiff abandoned the vehicle, having regard to the fact that the plaintiff did not tell the defendant that she was not returning for the vehicle. Counsel also submitted that in the event that the court found that the defendant was in breach of the implied condition of merchantable quality, then damages are to be assessed on the basis of the provisions of **s. 52** of the **Act**.
- [37] Counsel for the plaintiff submitted that the plaintiff should be permitted to reject the vehicle and obtain a refund of the monies paid. Alternatively, he asked that damages be awarded to the plaintiff for the breach by the defendant.

Discussion

- [38] In **Bernstein** the court stated that “the fact that a purchaser does not reject the contract at the first manifestation of trouble, but persevered in his attempts to have the matter put right, does not debar his right of rescission, always assuming he is not deemed to have accepted the car”.
- [39] **Section 35** of the **Act** provides as follows:-

“35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them that is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains them without intimating to the seller that he has rejected them”.

- [40] According to **s.55** of the **Act**, what is a reasonable time is a question of fact which must necessarily be determined from all the circumstances of the case.
- [41] The evidence disclosed that the plaintiff took delivery of the vehicle in December 1998 and had possession of the vehicle from that time until December 2002, a period of four years. The evidence also disclosed that it was the cost of replacing the transmission which prevented her from having the car repaired. It is at this stage that the plaintiff sought to reject the vehicle.
- [42] On the evidence before me, I hold that the plaintiff accepted the vehicle. She had the use of the vehicle for a substantial period of time, despite the problems encountered and more than a reasonable time had elapsed before she sought to reject the vehicle. In the circumstances the plaintiff has lost the right to reject the vehicle. Her remedy lies in damages.

Issue No.3 – If the plaintiff is entitled to damages, what is the measure of damages?

- [43] Where there is a breach of the implied condition of merchantable quality, damages are to be assessed in accordance with **s. 52** of the **Act**. **Section 52 (2)** of the **Act** provides that the measure of damages is the estimated loss directly and naturally resulting from the breach of warranty. In case of the breach of warranty of quality such loss is *prima facie* the difference between the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
- [44] Counsel's contention is that the plaintiff should recover the cost of putting the vehicle right, estimated to be the cost of the transmission and any other consequential repairs. Counsel also submitted that the plaintiff should recover loss of use for the period of 5 months while she was without a vehicle, awaiting a transmission from overseas.
- [45] The court has been hampered in its assessment of the damages. The evidence shows that the motor vehicle was capable of being repaired by replacement of the transmission at a cost of \$13,000. However, the plaintiff did

not give any evidence of any attempts made by her to mitigate her loss.

- [46] It must also be borne in mind that the plaintiff did have the use of the motor vehicle for a considerable period of time, despite the problems encountered. Further, there is no evidence to establish that the transmission problems which last occurred are the fault of the defendant – in other words that the transmission was defective. I therefore cannot hold the defendant liable for the cost of repairs.
- [47] Difficulty arises with respect to the claim for loss of use for a period which falls outside of the 5 months which the plaintiff said she was without the vehicle because of faulty transmission. There is an invoice from Edghill's Car Rentals for rental of a vehicle in the sum of \$6,600 for the period 8 September 2003 to 8 December 2003. But it was in December 2002 that the transmission failed and the vehicle was taken to the defendant's premises in January 2003 where it remained. Even if this difficulty did not exist, having regard to my finding in relation to the transmission, the court will not award any damages for loss of use.
- [48] As stated earlier, although there were defects which rendered the vehicle unmerchantable, the evidence adduced did not provide a proper basis for assessment of damages. There is no evidence of the relative values of the vehicle without defects and the vehicle with defects. However, I feel constrained to award some damages which are a little more than nominal. For the inconvenience, loss of a vehicle of the quality and kind she was told she would have and the trouble free driving she would have experienced, I award the sum of \$5,000.

Disposal

- [49] In summary, the plaintiff is awarded damages in the sum of \$5,000 with interest at the rate of 6% from today until payment and costs certified for one attorney-at-law, to be agreed or taxed.

Kaye Goodridge

Judge of the High Court