In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. HBC 101 of 2007

Between: Empire Autoparts Limited

Plaintiff

And: Pacific Agencies Limited

Defendant

Appearances: Mr I.Fa for the plaintiff

Ms Bhavna Narayan for the defendant

Date of hearing: 2nd July,2013

Judgment

1. The plaintiff, an importer of second hand Japanese spare parts imported a motor vehicle from Singapore to Fiji.The defendant, is the agent in Fiji,of the shipping line, which shipped the vehicle.It is alleged that the vehicle met with an accident, due to the negligence of an employee of the defendant, while the vehicle was being off-loaded onto the wharf in the Suva Port.The plaintiff claims compensation for the damage caused to the vehicle.The plaintiff also claims the loss arising from the inability to sell the vehicle to a customer who declined to purchase it, in the aftermath of the accident and consequential repair. The defendant disputes the claims.

2. ***The statement of claim***

The plaintiff, in its statement of claim states that on 27th July,2006,it had received a purchase order from one Dr Angco, for a Toyota Lexus LS 430 vehicle for an estimated price of $150,000.

The plaintiff, then, purchased a Toyota Lexus LS 430 vehicle from Singapore in September,2006.The vehicle was shipped via the "*Tasman Orient Line*" to Suva.The "*Tasman Orient Line*" arrived at the Suva Port on 10th October,2006.On 12th October,the plaintiff was informed at the Suva wharf, that the rear right hand corner of the vehicle had been damaged.The plaintiff advised the defendant of the accident and lodged a claim for damages.

On 14th and 19th October,2006, two assessors namely, Fleet Serve and Moape were sent by the defendant to assess the damages. Fleet Serve assessed the damages at $17,740.The plaintiff states that since there was a delay in the processing of the claim, it was agreed by both parties that the plaintiff would have the vehicle repaired. The invoice for the repair costs, in a sum of $16410, was forwarded to the defendant.

The statement of claim proceeds to state that on 20th November,2006, the vehicle was repaired and registered.Dr Angco was informed, but he declined to purchase the vehicle, since it had been repaired and repainted.

The plaintiff claims damages in a sum of $17,740, a sum of 150,000.00 arising from the loss of the sale of the vehicle to Dr Angco and costs on a solicitor-client basis.

3. ***The statement of defence***

The defendant, in its statement of defence stated that the vehicle was damaged on the wharf and not while it was in the ship or being unloaded. It was contended that the liability is with the cargo underwriter and action has been wrongly instituted against the defendant. Alternatively, that the defendant was acting as an agent of the disclosed principal and is hence not liable to the plaintiff for any loss it may have suffered.

4. ***The hearing***

PW1

4.1. PW1,(Abdul Faiyaz) a director of the plaintiff company testified. He said that on 18th July,2006, he received a verbal request from Dr Angco, who wanted to purchase a Lexus car. PW1 advised him of the estimated price of $ 150,000. On 27th July,2006, Dr Angco confirmed the purchase order in writing.

4.2. On 13th September,2006, the vehicle was purchased in Singapore and shipped to Suva on the *"Tasman Orient Line"*.The vehicle arrived at the Port on 10th October,2006. When PW1 went to the Port on 12th October,2006, he was informed by Mr Timoci of Pacific Agencies (Fiji) Ltd that the vehicle had met with an accident. During the off-loading of the vehicle from the ship, it had got damaged, while being driven by a casual workman of the defendant, as endorsed on the delivery docket no.46322 issued by the defendant.PW1 called Messrs Ashok and Martin of the defendant and advised them of the accident. The plaintiff lodged a claim for damages. Pictures of the damaged vehicle, the bill of lading, invoice issued by "*BENZCAR*" to the plaintiff for Sing$ 20,000 and delivery docket

no.46322 of 12th October, 2006, issued by the defendant were also produced.An estimate given by Fleet Serve (Fiji) Ltd to repair the vehicle, in a sum of $ 17,740 and the invoice of expenses submitted by the plaintiff was also led in evidence. The vehicle was repaired by the plaintiff, as they could not wait until the defendants does so. PW1 concluded his evidence in chief stating that Dr Angco, who had ordered the vehicle declined to purchase the vehicle for $ 150,000, since it was damaged. A letter dated 27th July,2006, from Dr Angco to the plaintiff placing the order, declaration to FIRCA,a letter dated 27thNovember,2006,from Dr Angco cancelling the order and two market valuations of the vehicle were produced.

4.3. In cross-examination, it was put to PW1 that there was no price referred to in Dr Angco's letter ordering the vehicle. It was also put to him that the total landed cost of the vehicle, as set out in the FIRCA document, was Sing $ 22191.25. This was equivalent to FJD 43,000. There was a vast difference between S43,000 and $ 150,000, even on a 100% profit margin.It transpired that the vehicle was a 2001 model and five years old.When asked if attempts were taken to sell the vehicle to anyone else,PW1 answered in the negative.The reason adduced was the institution of these proceedings. It was suggested that the plaintiff is claiming the cost of repairs as well as the loss arising from the inability to sell the vehicle, in sum of $150,000. PW1 maintained that the plaintiff is claiming $ 17740 and not only the expenses of repair of $16410, since additional costs for travel to Singapore were incurred. The witness said he did not have a record of the expenses.

4.4.Next, PW1 denied that the vehicle was damaged when it was driven by an casual worker of the Ports Authority. He said it was driven by a casual staff of the defendant company as set out in the "*CART NOTE*".

4.5. In re-examination,Mr Fa counsel for the plaintiff asked the witness whether the agreement with Dr Angco was partly in writing and the rest, oral.The answer was in the affirmative.The plaintiff had done business with Dr Angco. This was a special order for a *"top of the line*" Lexus model.The witness said that no other company gets Lexus vehicles.

PW2

4.6. PW2,(Dr Angco) in his evidence in chief, said that he was happy to pay $ 150,000 for the vehicle, when he was shown pictures of the vehicle. There was no

price written in his letter of 27th July,2006,to the plaintiff placing the order.He cancelled the order, since the car was badly damaged.

4.7.In cross-examination,PW 2 was asked how he agreed to pay a price of $ 150,000 for the vehicle, when it cost Sing$ 20,000 equivalent to FJD 24,122.80.The landed costs was FJD 43,000.His reply was that the plaintiff quoted $159,000 and he bargained for $ 150,000.

4.8.His letter of cancellation stating that the vehicle was repaired "*very magnificently*" was put to him. It was suggested that this letter was inconsistent with paragraph 15 of his statement of evidence, which provided that the repairs had "*totally changed the image of the car*". His response was that it was "*butchered*" inside.He said he asked the plaintiff to get another vehicle, but the plaintiff did not agree.

4.9. It emerged that PW2 had not taken action against the plaintiff for not providing him the vehicle or alternatively,failing to provide another vehicle. He said that the plaintiff were his friends .He was a good customer .

4.10. In re-examination, PW2 said that his letter of cancellation and paragraph 15 of his affidavit meant the same thing. A passage of three years had lapsed since he wrote that letter.

DW1

4.11. DW1,(Ronal Kumar) Accountant and Financial Controller of the defendant company said that they declined liability, as their responsibility ceased on the discharge of the vehicle from the vessel. Thereafter, the stevedores are responsible. He said it was not clear how the damage was caused, despite the defendant's endorsement on the "*CART NOTE*" no.46322 of 12th October, 2006. The damage was not caused by the defendant's casual employees. He explained the several reasons why the defendant company declined the claim. Albeit the vehicle was repaired at a cost of $ 16410,multiple claims were received from the plaintiff for the value of the car in a sum of $ 24102.80 and for $ 150,000. The plaintiff did not attempt to sell the vehicle or hold the purchaser in default.

4.12. In cross-examination, DW1 admitted that his office issued the "*CART NOTE*". He confirmed that it was prepared by the operation staff of the defendant company.The "*CART NOTE*" was stamped by the Customs and Ports. He said that the purpose of the "*CART NOTE*" was to clear the cargo and the manifest registered with FIRCA.

5. *The determination*

5.1 The primary facts are undisputed.The vehicle imported by the plaintiff arrived on the "*Tasman Orient Line*" at the Suva Port on 10th October,2006,and was damaged during off-loading .

5.2 The first question for determination is whether the defendant is liable to the plaintiff for the damages caused to the vehicle.

5.3 The defendant was the agent for the ship "*Tasman Orient*",and was responsible for the safe unloading of the plaintiff's vehicle in the Port.

5.4 It was not seriously disputed at the hearing, that the defendant was responsible for the damage caused to the vehicle and the cost of repairs.Mr Fa asked DW1, the sole witness for the defence how he could deny liability, in the light of the defendant's endorsement on their delivery docket termed "*CART NOTE*". In my view, his answer, which I have referred to above, is irreconcilable with the endorsement.

5.5 The manuscript in the "*CART NOTE*" no 46322 issued by the defendant to the plaintiff on 12 October,2006,(containing the seal of Customs Fiji, the Fiji Ports and the defendant) reads as follows:

> *DAMAGED WHILE D/CHARGED BY* ***OUR OPERATION CASUAL***
> (emphasis added)

5.6 Mr Fa, in his closing submissions, quite correctly concludes that it is clear and beyond dispute that the defendant caused the damage.

5.7 In my judgment, the defendant is liable for the damage and the resulting expenses incurred in repairing the vehicle, in a sum of $ 16410.

5.8 The plaintiff claims the estimated costs of $17,740, on the basis that it incurred other expenses. But none were proved. This claim fails.

5.9 I now turn to the claim of $ 150,000.00, for the loss of the sale of the vehicle to PW2.

5.10 Paragraphs 1 and 2 of the witness statement of PW1 reads :

> ***ON*** *the 18th of July,2006, I received a verbal request personally from .(PW2) who wanted to purchase a 1 only Lexus LS430.*
> ***ON*** *or about the next 3 days or so I advised (PW2) of the estimated price ..of $ 150,000...*

5.11 PW2, by letter of 27th July,2006, placed the order for the vehicle.The letter, addressed specifically to PW1 commenced:

> *Dear Mr Abdul Faiyaz,*
> *RE: ORDER FOR LS430*
> *As per our meeting this morning I would like to place an order for one only Lexus LS430 motor vehicle.* ***The detail and other specification of the vehicle are to be discussed upon your purchase of Lexus at the Lexus dealer.***
>
> *A cash settlement will be done upon the delivery of the motor vehicle.* (emphasis added)

5.12 It is significant that this contemporaneous document provides that the "*detail and other specification of the vehicle are to be discussed upon purchase*". There is no reference to the sum of $150,000.In my judgment, this letter refutes the plaintiff's contention in its statement of claim that on 27th July,2006, it "*received a purchase order from one Dr Angco, for a Toyota Lexus LS 430 vehicle for an estimated price of $150,000*" and PW1's statement of evidence.

5.13 I find reference to the sum of $150,000 subsequently, in PW2's letter of cancellation of 27th November,2006. This reads:

> *Dear Mr Abdul Faiyaz,*
> *Re: Cancellation of Order For LS430*
> *Faiyaz I have already inspected your Lexus LS430 yesterday afternoon and would like to advise you that the vehicle is not in the same condition as you have shown me in the pictures earlier.*
>
> ***The paintwork*** *on the vehicle seems to be* ***slightly different from the actual Lexus colour although the accident has been repaired very magnificently.*** *As you know Faiyaz I don't expect my Lexus car to be repainted especially when* ***I am paying something like $150,000.00***
>
> *Taking the repair works into consideration I am still not satisfied with the car and therefore I would like to cancel my order dated 27th July 2006.*
>
> *My sincere apology for that and* ***should you think of getting another LS430 in the near future and if accident free I would be very much pleased to look into that.*** (emphasis added)

5.14 Ms Narayan, put to DW2 in cross-examination,that this letter is in conflict with paragraph 15 of his witness statement. Paragraph 15 reads:

> ***THAT*** *my dissatisfaction was due to the fact that the car would still be an accident vehicle and that* ***the repairs had totally changed the image of the car*** *and that* ***the paint job was not the same as the original paint*** *on the said vehicle, and I was not in a position to buy an accident vehicle.*(emphasis added)

5.15 I do find PW2's current assessment of the repairs to be contradictory to what he wrote, in the immediate aftermath of the repair. On the face of his letter, is his statement that the paintwork on the vehicle is "*slightly different*"from the original colour and "*repaired very magnificently*".In contrast, in his statement of evidence, he says the repairs "*had totally changed the image of the car and that the paint job was not the same as the original paint".*

5.16 Moreover, I find it inconceivable that PW2 or rather any person with sufficient understanding of the affairs of the world, would agree to purchase a motor vehicle for $ 150,000, when its value was $ 65,000 to $ 75,000 (as valued by Carpenters Motors and by Sakura Carz Ltd).Ms Narayan,pointed out to PW2, in cross-examination, that the sum of $ 150,000 constituted more than a 100% margin. It also transpired that the vehicle was a 2001 model.

5.17 PW2 said he was a friend of the plaintiff and a good customer. Accordingly, he had not taken action against the plaintiff for not providing him the vehicle or alternatively,failing to provide another vehicle.He left it to the plaintiff to contact him "*should* (they) *think of getting another LS430 in the near future"* –his letter of 27th July,2006.

5.18 I do not accept the evidence of PW2.I did not find him to be a truthful witness.

5.19 The law on this point is clear. A party claiming breach arising from the delivery of damaged goods is entitled to claim only the market value of the goods, unless the special sub-contract price was made known to the other party.

5.20 Ms Narayan, has extensively quoted passages from ***McGregor on Damages***,(17th Ed,2003), in her closing submissions. I would refer to the following passages:

At para to 27-004 on pages 897 and 898 :

> ***Where the goods are delivered in a damaged condition the normal measure looks to the amount by which the market value of the goods has been diminished by the damage;*** (emphasis added)

At para 27-006 to 27-007 on pages 899 and 900 provides:-

> *.apart from being evidence of the market value of the goods,* ***the price at which a third party has agreed to buy the goods from the claimant is irrelevant and should not be taken in lieu of the market value: this is so whether such a price is higher or lower than the market value.*** (emphasis added)

5.21 ***McGregor*** refers to the case of ***Rodocanachi v Milburn,*** (1887)18 QBD 67 where the claimant consigned a cargo for carriage by the defendant's ship.It was lost due to the master's negligence. The claimant had sold the cargo at a price which turned out to be less than the market price prevailing at the port of delivery, at the time when the cargo should have arrived. It was held by the Court of Appeal that the relevant price was the market price and not the claimant's sale price, for the value must be taken "*independently of any circumstances peculiar to the plaintiff.*"

5.22 ***Heskell v Continental Express,***(1950)1All ER1033 as also cited by ***McGregor,***reiterates the basic principle in the law of contracts that any special contract must be in the contemplation of the parties. In that case, it was held that the claimant could not recover his loss on his sale,because it was an exceptionally lucrative sale which the defendant did not have actual or implied knowledge of.

5.23 It is trite law that an aggrieved party must take steps to mitigate his loss. The plaintiff was required to put the vehicle on the market, but no evidence was adduced that any effort was made in this regard .

5.24 I decline the claim for a sum of 150,000.

6. ***Orders***

(a) The defendant shall pay the plaintiff a sum of $ 16410.

(b) The plaintiff's claim for a sum of 150,000.00 is declined.

(c) The defendant shall pay the plaintiff costs summarily assessed in a sum of $ 2000.

16th September, 2014

A.L.B Brito-Mutunayagam

Judge