

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No.: HBC 234 of 2011

BETWEEN : AUTOWORLD TRADING (FIJI) LIMITED

PLAINTIFF

AND : SURUJ NARAYAN

FIRST DEFENDANT

AND : RAJENDRA NARAYAN

SECOND DEFENDANT

AND : LAND TRANSPORT AUTHORITY

THIRD PARTY

Counsel : Plaintiff: Mr. Shelvin Singh  
: Defendant: Mr. Fillipe M and Mr. Tomaci Tuitoga  
: Third Party: No appearance  
Date of Judgment : 21<sup>st</sup> March, 2019

**JUDGEMENT**

**INTRODUCTION**

1. This is an action filed by the Plaintiff, an importer and dealer of used vehicles against the two defendants, the purchaser of a tow truck and a car and purported guarantor of the said purchase. I used the word purported as the signature on the guarantee is denied, and

stated that on the date of the execution of guarantee 2<sup>nd</sup> Defendant was not present in Suva, and much emphasis was made on that with an that, Second Defendant was engaged in a towing and taxi business, and had requested to import a tow truck for his business. Accordingly, a used tow truck was imported and was sold along with another used car. The vehicles were sold to 1<sup>st</sup> Defendant who was the father of the 2<sup>nd</sup> Defendant. At the time of sale Bill of Sale was entered for two vehicles and the sale was considered as one transaction. Both vehicles were sold at a combine price of \$75,000. No evidence to distinguish value of the two. From that only \$300 was paid at the time of sale for both vehicles and rest was paid through instalments with interest, as per the conditions of the Bill of Sale. It is admitted that chassis of the tow truck was cracked at the time of sale. The official of Land Transport Authority (LTA) said that he had informed the Plaintiff, that chassis of the tow truck needs to be replaced within 12 months. He said registration of vehicles with broken chassis is rare and there were no equipment to test the strength of chassis with LTA. The first registration was refused without welding the broken parts of chassis, and once it was done conditional registration was granted. This welding was done at a private local garage and 1<sup>st</sup> Defendant, was not informed about this and LTA officer could not state the material or gauge of metal part used in welding. There is no evidence of Plaintiff informing the condition of the chassis at the time of sale or that conditional registration of tow truck. LTA subsequently within 2 years, issued a defect order against the tow truck, and refused to register the tow truck, without replacing entire chassis. The tow truck could not be used for its purpose without registration. The Plaintiff was informed of the issue of defect order. Since there were defaults on the Bill of Sale, both tow truck and car were repossessed by Plaintiff and they were re-sold. There is evidence that even when tow truck was re-sold the defect on the chassis was not informed and refusal to register by LTA without replacement of chassis, was also not informed. Strangely, despite defect order to replace chassis, a registration was obtained in 2007 without replacement of chassis. The Plaintiff state that tow truck was sold "As is where is" basis hence there was no warranty on the condition of the chassis. The chassis of a tow truck absorbs an immense force on the truck as a heavy duty vehicle, depending on the weight of towing object and also speed, the manner of towing, road condition etc., and it is essential for chassis to be in perfect condition for towing, to withstand any

insertion of force and broken chassis in a tow truck is not suitable for its purpose. There was no scientific method utilized to test the suitability of chassis after welding and LTA official said it is a rare thing for LTA to register vehicles with cracked or broken chassis. Plaintiff admits that it was aware of the defective chassis. In the defence, Sections 54, 55 and 56 of Fair Trading Act, 1992<sup>1</sup> are pleaded. The said provisions prohibits Misleading and deceptive conduct, unconscionable conduct, and False and Misleading representation, respectively, in relation to trade and commerce. According to the statement of defence Plaintiff's conduct of sale of a heavy duty vehicle with a broken chassis to be used in towing business is unconscionable, misleading, and deceptive.

## FACTS

2. The Plaintiff and Defendant filed minutes of pre-trial conference, between them where the following facts were agreed between them. Third party neither participated in pre-trial conference nor at the hearing. There are no pleadings filed by third party.
  1. *The Plaintiff is a company duly incorporated in the Fiji Islands and is engaged in the sale of new and second hand imported motor vehicles and financing of purchase of motor vehicles to approved customers.*
  2. *On 18 October 2006, the Plaintiff, at the request of the first Defendant agreed to sell motor vehicles having registration numbers FB917 and FB119 to the first Defendant for the sum of \$75,000.00.*
  3. *On 18 October 2006, the first Defendant entered into and executed a Bill of Sale over motor vehicles having registration numbers FB917 and FB119 in favour of*

<sup>1</sup> See Section 3 of Interpretation Act, 1967, the word 'Decree' in Fair Trading Decree, 1992 is replaced with word 'Act'

In terms of Section 160, of Fijian Competition and Consumer Commission Act, 2010 Fair Trading Act, 1992 and its amendments are repealed from 1.7.2010.

The comparable provisions are contained in Sections 75-85 in Fijian Competition and Consumer Commission Act, 2010 and more exhaustively dealt. Some of more common forms of deceptive and misleading acts such as Pyramid selling schemes(Section 87A) - Bait Advertising( Section 86), Referral selling(Section 87) etc are specifically dealt more exhaustively.

*the Plaintiff to, inter alia, secure the payment of all the monies due and owing by the first Defendant to the Plaintiff together with agreed interest and other charges*

3. *The Bill of Sale entered between the parties stated,*

- (i) The sum advanced to the first Defendant was \$75,000.00*
- (ii) Interest was payable on the said sum at the rate of 10% per annum at a flat rate*
- (iii) The sum advanced plus interest and charges were to be paid in 60 months time*
- (iv) The total sum secured amounted to \$112,500 plus charges*
- (v) The first Defendant was required to make a payment of a minimum of \$1,875.00 per month until full payment*

4. *The Plaintiff in the statement of claim stated,*

- a. On 18 October 2006, it sold motor vehicle registration numbers FB917 and FB119 to the first Defendant for the sum \$75,000.00*
- b. Both vehicles were fully financed by the Plaintiff*
- c. The agreed interest charge was 10% over 5 years time totalling \$37,500.00*
- d. The loan was personally guaranteed by the second Defendant and he executed a guarantee document which was dated 18.10.06*
- e. The first defendant defaulted on his payments as a result of which the vehicles were repossessed, advertised and sold by the Plaintiff*
- f. The residual debt as at 20 July 2011 was \$59,244.09 and the Plaintiff claimed this sum from both defendants*
- g. The claim against the 1<sup>st</sup> Defendant is based on the Bill of Sale and for 2<sup>nd</sup> Defendant based on the purported Guarantee, a separate instrument which the 2<sup>nd</sup> Defendant denies*
- h. Plaintiff is also claiming interest at the rate of 1.5% per month from 20 July 2011.*

5. The Defendants in the statement of defence stated :

- (a) They admit that the first defendant purchased the vehicles for the price.
- (b) Admit the purchase was financed by the Plaintiff and paid instalments till June, 2008.
- (c) Deny that the second Defendant signed a personal guarantee.
- (d) They claim that motor vehicle FB917 had a cracked chassis and Plaintiff was given 1 year from first registration to replace it.
- (e) Plaintiff did not disclose the defective chassis to the Defendants.
- (f) On 09 October 2008, a defect order was issued by LTA (Third Party) to the Defendants and could not get the registration for tow truck, and Plaintiff was notified of it.
- (g) Plaintiff promised to change the chassis at no cost. Despite this, Plaintiff took possession of both vehicles under Bill of Sale, from the Defendants compound on 10 December 2008.
- (h) On 11 December 2008, on request Defendants were advised that it was on a joint account so both needed to be taken and both will be released once the chassis was fixed.
- (i) Both vehicles were sold and money recovered by Plaintiff.
- (j) The Defendants had also included counter claim.

6. In counter claim, *inter alia* pleaded,

- (a) That sale of vehicles under Bill of Sale was unconscionable - misleading hence in violation of Section 54, 55 and 56 of Fair Trading Act, 1992
- (b) The defects in the chassis of tow truck was known and Plaintiff had misled the buyer, when they were fully aware that the said vehicle cannot be registered or used for long period of time without replacement of entire chassis.
- (c) The sale of the vehicles was unlawful and the Plaintiff is precluded from claiming under said transaction

7. In reply to the counter claim, Plaintiff stated

- (a) *The vehicles were sold to the defendants on an as is where is basis.*
- (b) *The Defendants had inspected the vehicles prior to purchase and knew or ought to have known the condition of the motor vehicles.*
- (c) *The Defendants themselves obtained a certificate of road worthiness (from the Land Transport Authority in 2007.*
- (d) *Payments stopped from 04 June 2008.*

8. The defendants also stated that *Plaintiff failed to notify them of the defects whereas LTA had advised them on that. The LTA officer had overlooked the cracked chassis on the second time that they inspected the vehicle. Chassis had been welded and the Plaintiff knew that the said chassis needed to be changed before the vehicle came into the Defendants.*

9. **The Defendants filed its third party notice on 24 July 2012.** The Defendants also filed its claim against the Third Party and claimed as follows;

- a. *A declaration that the Defendants are entitled to be indemnified by the Third Party against the whole of the Plaintiff's claim.*
- b. *Judgment against the Third Party for any and all amounts which the Defendant's may be adjudged to pay the Plaintiff.*
- c. *Judgment against the Third Party for the entire Counterclaim.*
- d. *The Third Party indemnify or contribute the whole of the Plaintiff's claim for damages, together with the Defendant's costs of Defending this action and the costs of the Third Party Proceedings, that may be awarded by the Court.*
- e. *Pre Judgment interest of 13% per annum from 20 September 2011 to the date of judgment pursuant to section 3 of the Law Reform (Miscellaneous Provision) (Death and Interest) Act Cap 27.*

*f Post Judgment interest of 4% per annum from the date of judgment to the date of full payment pursuant to section 4 Law Reform (Miscellaneous Provision) (Death and Interest) Act Cap 27 as amended by section 2 of the Law Reform Miscellaneous Provision) (Death and Interest) Decree 2011.*

10. There was no pleadings filed on behalf of third party notice and third party did not participate at the hearing.
11. At the hearing Plaintiff's Managing Director gave evidence and there were two other ex-employees of the Plaintiff who gave evidence as to presence of the Defendants at the time of execution of the Bill of Sale and guarantee of the transaction. The person who served demand notices for default of instalment payments in terms of Bill of Sale, also gave evidence for the Plaintiff.
12. For the Defence, 2<sup>nd</sup> Defendant and two officials of LTA including the person who approved conditional registration of tow truck when it was first registered gave evidence. There were other witnesses who gave evidence in support of the contention that on the said date of execution of guarantee 2<sup>nd</sup> Defendant was in a different location.
13. Both defendants filed written submissions and third party did not file any submission.
14. The managing Director of the Plaintiff gave evidence and stated that it had been conducting business as second hand vehicle dealer since 1996. He stated that the second Defendant approached him and requested him to import a heavy duty tow truck. He further stated that the Defendants purchased the tow truck and FB119 (the motor car) from the Plaintiff Company, under single Bill of Sale and receipt for purchase was for both vehicles.
15. He stated that the first Defendant executed a Bill of Sale dated 18 October 2006 for the tow truck and the motor car and second Defendant executed a Guarantee on 18 October

2006 for the first Defendant, who was the father of 2<sup>nd</sup> Defendant. The terms of the Bill of Sale are contained therein.

16. According to said witness the cracks on the chassis was informed to the 2<sup>nd</sup> Defendant and he had not taken it as a serious issue. The documents for transactions are prepared by the employee of Plaintiff. These included the documents that were executed by the Defendants on 18 October 2006.
17. Plaintiff provided finance for sale of tow truck and a car. Second Defendant was already a customer who had purchased some vehicles from the Plaintiff Company, and having a proven track record; hence finance was granted on the existed goodwill between the parties.
18. On 18 October 2006 the Defendants and the second Defendant's wife all came to the Plaintiff Company's office and executed the documents. He further stated that Robin Anish Lal, Aswin Kumar witnessed to the said documents and they also gave evidence at trial. Robin Anish Lal and Aswin Kumar were ex-employees of the Plaintiff.
19. He further stated that when customers defaulted in payments, the procedure was for the Plaintiff to send them notices and demand letters. According to the witness, the Defendants had an outstanding amount of \$59,244.09. He was referred to P7 as account summary of the account relating to tow truck and car.
20. He stated that the Defendants were sent demand notices regarding defaults of installments. He further stated that the Defendants did not adhere to the Notices. The Plaintiff Company then exercised its rights to repossess the vehicles from the Defendants.
21. He further stated that the vehicles were sold on an as is where is basis. This was stated in the delivery docket which is document 1 of the Plaintiff's Bundle of Documents.



22. The Plaintiff admitted that its employee took tow truck for first registration as done in any other unregistered vehicle, where second hand vehicle dealer takes the vehicle to LTA for inspection for first registration. According to him the broken chassis in tow truck was informed to 2<sup>nd</sup> Defendant, and he had not taken it seriously.
23. The Bill of Sale was not registered with LTA and this was admitted.
24. Said witness also said both tow truck and car were repossessed for default of payments and this was after defect notice was issued to tow truck for complete replacement of chassis.
25. 2<sup>nd</sup> Defendant also gave evidence at the hearing and denied that he had any knowledge about the broken chassis and its repair done locally. He said that he would not purchase such a heavy duty vehicle if it was revealed that its entire chassis was to be replaced within a short period of time.
26. 2<sup>nd</sup> Defendant also said he only paid \$300 and entire value of the two vehicles were financed by Plaintiff as he was a known customer, who had good relationship with the Plaintiff as he had bought number of vehicles from the Plaintiff.
27. When the Defect order was issued in 2008, Plaintiff was promptly informed and according to him Plaintiff had promised to import a used chassis for the replacement of broken chassis of tow truck. Plaintiff did not do that, but had repossessed the two vehicles and also sold both vehicles.
28. The Defendant had also called two officials from LTA. One official confirmed that there was no indication of existence of Bill of Sale regarding tow truck prior to 2009 and this confirmed that Bill of Sale entered between Plaintiff and 1<sup>st</sup> Defendant was not reported to LTA.

29. The official of LTA who was involved in the first registration of tow truck said since one side of the chassis Ilai Masi gave evidence and said that in 2009 he was employed as team leader technical with LTA office at Valelevu. He held that post from 2000 to March 2014. He recalled inspecting the tow truck and said the condition of the broken chassis needed welding for first registration and it was allowed only for 12 months, and this was informed to the Plaintiff's employee who came with the unregistered vehicle.
30. He stated that Plaintiff had to rectify broken chassis it before it was first registered and he was satisfied that welding of the chassis was adequate though he could not test the strength of such welding for roadworthiness.

#### ANALYSIS

31. Statement of Defence pleaded Sections 54, 55 and 56 of *Fair Trading Act 1992*<sup>2</sup> and they state the sale of tow truck was unconscionable, deceptive and misleading since they were not informed about the conditional registration that was granted by LTA.
32. The Plaintiff admits that it was aware of broken chassis of the tow truck before registration. On the balance of probability, as an importer of used vehicles who was in the said business for over a decade at that time should know about the physical condition of chassis of a heavy duty vehicle. The procedure in relation to inspection of such vehicles before shipping and also purchase would under normal conditions known to the purchaser.
33. The Plaintiff who had been in the business for over 10 years in 2006 should be reasonably aware of the condition of the vehicles it imports for sale. On the evidence it is probable that the Plaintiff was aware of split chassis of tow truck at the time of import and or at the time of purchase overseas.

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<sup>2</sup> *ibid*

34. If the broken chassis of tow truck was not known, they should inform the seller or the party who sold such roadworthy vehicle for importation.
35. Defendants had also pleaded illegality as the conduct of Plaintiff was prohibited in terms of Sections 54,55 and 56 of Fair Trading Act, 1992<sup>2</sup>(see paragraph 26 of Statement of Defence)
36. The Plaintiff was aware of the condition of the tow truck and according to the evidence of Managing Director of Plaintiff 2<sup>nd</sup> Defendant approached him in 2006 and requested to import a **heavy duty tow truck for his towing business**.
37. The Plaintiff was aware of the use of the vehicle and the import of tow truck was specifically done for the 2<sup>nd</sup> Defendant. (see paragraph 14 of Plaintiff's written submission).
38. A person who is engaged in towing as a business would not purchase a tow truck only to be used for one year. Broken chassis of tow truck was not mentioned in the Bill of Sale or in any other documentation.
39. So, at the time of sale Plaintiff was aware of the use and purpose of the sale of tow truck to 1<sup>st</sup> Defendant. It is for heavy duty purpose and split or broken chassis is bound to aggravate with insertion of force in towing business.
40. The Plaintiff having known the 2<sup>nd</sup> Defendant and his business and the purpose for which tow truck would be used, had imported a tow truck with a broken chassis. It was also stated in the evidence that importation of tow truck was done on the request of the 2<sup>nd</sup> Defendant.
41. The Plaintiff was requested to import a tow truck for the use of towing business of 2<sup>nd</sup> Defendant, but the imported tow truck was a broken chassis that needed even welding before first registration.

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<sup>2</sup> (ibid)

42. The Plaintiff must know of the condition of vehicles that it imports. It had imported a vehicle that was unsuitable for its purpose as tow truck.
43. The chassis needed welding for first registration. So, the vehicle imported by the Plaintiff was unsuitable for registration, due to broken chassis, and there was no evidence of condition of the welded part of chassis.
44. The Plaintiff takes refuge under hand written statement in the receipt where it was stated that sale "as where is basis".
45. When such a welding to chassis of a heavy duty vehicle such as a tow truck is done it cannot last long. The strength of repair part is not tested scientifically to ascertain whether it is suitable for its purpose. Plaintiff was informed by LTA that registration is granted on the welded chassis for one year on the condition that it would be replaced in 12 months.
46. Due to an unexplained reason LTA had granted registration in 2007, but in year 2008 a defect notice was issued requiring fully replacement of the chassis.
47. It is proved that Plaintiff sold tow truck and a car for \$75,000 and also provided finance for the purchase. It had also obtained Bill of Sale for the said two vehicles.
48. The Plaintiff is prohibited from import of used vehicles that are not roadworthy even at first registration, in terms of Sections 54 and 55 of Fair Trading Act, 1992<sup>4</sup>. Importation of heavy duty vehicles for sale with a broken chassis is unconscionable, deceptive, and misleading.

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<sup>4</sup> *ibid*.

49. Sections 54, 55 and 56 of the *Fair Trading Act 1992*<sup>5</sup> states as follows:

***54. Misleading or Deceptive Conduct.***

*(1) A person shall not, in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

*(2) Nothing in this Division shall be taken as limiting by implication the generality of subsection (1).*

***54. Unconscionable Conduct.***

*(1) A person shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services to a person (in this section referred to as the customer), engage in conduct that is, in all the circumstances, unconscionable.*

*(2) Without limiting the matters to which regard may be had for the purpose of determining whether a supplier has contravened subsection (1) in connexion with the supply or possible supply of goods or services, regard may be had to—*

*(a) the relative strengths of the bargaining positions of the supplier and the customer;*

*(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;*

*(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services;*

*(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer (or person acting on behalf of the customer) by the supplier in relation to the supply or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and*

*(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier.*

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<sup>5</sup> *Ibid*

(3) A supplier shall not be taken for the purposes of the section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a customer only because the supplier institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services to a customer -

(a) regard shall not be had to any circumstances that were not reasonably foreseeable at the time of the alleged contravention, and

(b) regard may be had to conduct engaged in, or circumstances existing, before the commencement of this Decree.

(5) Any person who fails to comply or contravenes this section is guilty of an offence.

#### **55. False or Misleading Representation.**

(1) A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services -

(a) falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use which they do not have,

(b) represent that services are of a particular standard, quality or grade they do not have,

(c) represent that goods are new or unused, if they are not or are reconditioned or reclaimed,

(d) represent that a particular person has agreed to acquire goods or services when that other person has not,

(e) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

*(f) represent that the person has a sponsorship, approval, or affiliation that person does not have;*

*(g) make a representation concerning that a price advantage of goods or services exists if it does not;*

*(h) make a representation concerning the availability of facilities for the repair of goods or of spare parts for goods when they are not;*

*(i) make false or misleading representation concerning the place of origin of goods;*

*(j) make a false or misleading representation concerning the need for any goods or services;*

*(k) make representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy that person does not have.*

*(2) A person who contravenes this section shall be guilty of an offence.*

50. There is no dispute as to the sale of the vehicles under the Bill of Sale was 'trade or commerce' in terms above provisions.
51. The conduct of the Plaintiff is unconscionable in terms of Section 55 of Fair Trading Act, 1992. As a licenced importer of used vehicles there is a responsibility towards the customers as well as other road users and sale of tow truck with broken chassis will endanger other road users as well.
52. From the evidence given on behalf of Plaintiff it is admitted that tow truck was imported on the request of the 2<sup>nd</sup> Defendant for his towing business. Plaintiff did not notify 1<sup>st</sup> Defendant that tow truck was having a serious defective chassis that prevented it being even registered for the first time without welding it.
53. Though the Managing Director of Plaintiff stated that it was informed, I cannot accept that as correct position. A reasonable person engaged in towing business would know the repercussions in purchasing a tow truck with broken chassis. The vehicle with welded

chassis was approved for registration on the condition that it would be fully replaced within the year according to the LTA official who approved the registration. This was again not revealed to 1<sup>st</sup> Defendant who was the purchaser of the vehicle.

54. If the crack on the chassis was not a serious defect, it would have been registered for the first time in Fiji. So the Plaintiff had imported a heavy duty vehicle that had serious defect that prevented it been registered upon importation.
55. So, Plaintiff had got the chassis welded locally and got a conditional registration, that chassis would be replaced in full within the first year of registration. None of this was revealed to the purchasers of tow truck including 1<sup>st</sup> Defendant.
56. When the vehicle was not registered for the first time due to serious defect such as broken chassis it should be revealed in writing to purchasers by Plaintiff. The Plaintiff as a licenced motor vehicle dealer of LTA is bound by conditions imposed on the said licence and precluded from acting in misleading and or deceptive manner.
57. Upon the default of payments under Bill of Sale entered between the Plaintiff and 1<sup>st</sup> Defendant the vehicles subject to said Bill of Sale were repossessed by Plaintiff. According to evidence instalments were paid till June, 2008 and defect notice was issued in October, 2008.
58. After repossession of the vehicle it was re-sold to another party, without informing the refusal to register by LTA. This subsequent purchaser gave evidence at the hearing and confirmed that he was not informed of the defect notice issued to the vehicle. Again despite this defect notice of LTA and requirement to replace the chassis, LTA had registered the vehicle without replacement of chassis.
59. The conduct of Plaintiff is unconscionable as it had sold a vehicle subject to defect notice without informing serious defect. This is a serious fault on the part of Plaintiff and this reinforces and proves on the balance of probability that Defendants were never informed about the defective chassis and conditional registration granted for tow truck.



60. The Plaintiff had acted in unconscionable manner and had conducted in misleading and deceptive conduct in the sale of tow truck to 1<sup>st</sup> Defendant. The Plaintiff's conduct is prohibited in terms of Section 54, 55 and 56 of Fair Trading Act, 1992.<sup>6</sup>
61. In Ashmore, Benson, Pease and Co Ltd v Dawson [1973] 1 W.L.R. 828 the UK Court of Appeal held that when the Plaintiff is involved in illegal activity they cannot claim for such illegal activity, though initial agreement was not illegal. In that case Plaintiff was a manufacturers of heavy engineering equipment entered into a contract of carriage with road hauliers. The contract between manufacturers and hauliers was legal. The hauliers overloaded the vehicles, in breach of road traffic regulations, and one of the lorries toppled over during the journey as a result of the driver's negligence. The manufacturers' transport manager was present when the goods were loaded and was aware of the overloading. A claim by the manufacturers for the cost of repair of the damaged load was rejected on grounds of illegality.
62. Since the conduct of Plaintiff in importing a tow truck with broken chassis for sale is unconscionable, deceptive and misleading which is prohibited trade the sale of tow truck to 1<sup>st</sup> Defendant is illegal, and Plaintiff cannot rely on the said unlawful sale for a claim. Broken chassis in such a heavy duty vehicle makes it useless or not fit for its purpose and if used would pose a great danger.
63. In St John Shipping Corpn v Joseph Rank Ltd [1957] 1 Q.B. 267 at p288. (Per Devlin J) held,
- "If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed*

*by regulations of one sort or another, which may easily be broken without wicked intent" (emphasis added)*

64. It is clear provisions contained in Section 54, 55 and 56 of Fair Trading Act, 1992 were specifically enacted to deal with contractual relationships in trade in order to prohibit unconscionable and or deceptive and or misleading trade practices for the protection of consumers. So this is implementation of public policy through social legislation for the protection of general public from undesirable trade practices.
65. The public policy behind prohibition of unconscionable conduct and deceptive, misleading conducts in trade is for the protection public, including the people engaged in trade and industry in general, as opposes to errant trader. If one trader conducts trade in unconscionable, deceptive and or misleading manner it will loose trust in the industry as a whole and impact of such activity on the industry as a whole is undesirable for other players.
66. By engaging in deceptive, misleading, unconscionable trade practice may not only affect the one or more consumers who were involved but others as well. In this action a tow truck with cracked or broken chassis was imported and also sold by the Plaintiff to be used for towing business of the 2<sup>nd</sup> Defendant. Any innocent person who engaged towing using this tow truck as well as driver of this tow truck and other road users are all in great danger from accident due to unsuitable chassis. This is the rationale behind LTA's defect notice and also conditional registration.
67. In more recent Singapore Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui* [2018] 3 SLR 617 held that first the court should consider whether expressly or impliedly a statute prohibits the contract entered between the parties or prohibition through public policy.
68. Since the conduct of the Plaintiff in the sale of tow truck to 1<sup>st</sup> Defendant is deceptive, and misleading and unconscionable the conduct is prohibited action in terms of Sections

54, 55 and 56 of Fair Trading Act, 1992<sup>7</sup>. Though, said statute is fully repealed by Fijian Competition and Consumer Commission Act, 2010, similar provisions are contained in that Act. The public policy in prohibition of deceptive, misleading and unconscionable conduct in trade and commerce is reinstated. So the sale of tow truck is unlawful and sale of both vehicles are tainted with illegality as the transaction cannot be separated for two vehicles.

69. Since the sale of tow truck and car was considered as one transaction valued at \$75,000 before addition of interest and there was no evidence to separate the two items, entire transaction needs to be considered as illegal, and claim of the Plaintiff fails on illegality.
70. The Defendants had counter claimed in terms of Section 127 of Fair Trading Act, 1992 which states as follow:

*"127. Compensation and other Remedial orders.*

*(1) If in proceedings instituted under, or for an offence against, this Decree the Court is satisfied that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by reason of a contravention of this Decree, then whether or not any other order is made or relief granted in those proceeding, the Court may, for the purpose of compensating that person or preventing or reducing the extent of the loss or damage, make orders under this section against the person committed the contravention or a person involved in the contravention.*

*(2) Whether or not other proceedings have been instituted under this Decree in relation to a contravention of this Decree, the Court may -*

*(a) on the application of a person who has suffered, or is likely to suffer, loss or damage by reason of the contravention; or*

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<sup>7</sup> Ibid

*(b) on the application of the Director on behalf of one or more such persons made with the written consent of each such person, make orders under this section for the purpose of compensating such a person or preventing or reducing the extent of the loss or damage against the person who committed the contravention or a person involved in the contravention.*

*Without limiting the foregoing, an application referred to in paragraph (b) may be brought in the course of proceeding in which a person is found guilty of an offence against this Decree constituted by the contravention.*

*(3) An application under subsection (2) may be commenced -*

*(a) in the case of a contravention of section 55 at any time within two years after the day on which the cause of action accrued; or*

*(b) in any other cases at any time within three years after the day on which the cause of action accrued.*

*(4) For the purpose of determining whether to make an order under this section in relation to a contravention of section 54, the Court may have regard in the conduct of the parties to the proceedings since the contravention occurred.*

*(5) The orders that may be made under this section are of the following kinds:-*

*(a) an order for payment of the amount of the loss or damage;*

*(b) an order avoiding, or refusing to enforce, in whole or part, a contract or instrument;*

*(c) an order for the variation of a contract or instrument;*

*(d) an order directing the refund of money or the return of property;*

*(e) an order directing the repair of, or provision of parts, for goods or the supply of specified services;*

*(f) an order directing the payment of an amount of money in lieu of some other act required by an order being done;*

*(g) any other order the Court thinks appropriate*

*An order may be expressed to take effect from a date prior to the making of the order;*

*(6) It shall not be competent to the Court to make an order under this Section by reason only of loss or damages suffered or likely to be suffered by a person because of a contravention of section 54 or section 55 unless the person is a consumer.'*

71. This action was commenced in 2011 and counterclaim of the Defendant was filed on 11.09.2011 which is outside the time period stipulated in Section 127(2) of Fair Trading Act, 1992, in order to claim compensation, hence no award can be claimed under said breached by the Defendants when the counterclaim was filed which was more than 5 years from the sale of two vehicles under Bill of Sale.

## CONCLUSION

Plaintiff had sold a heavy duty tow truck and a car and both sales were considered as one transaction with one total value. The tow truck was imported by Plaintiff on the request of the 2<sup>nd</sup> Defendant to be used in his towing business. The tow truck had a broken chassis and it was refused for registration without welding the chassis and it was done locally after inspection by LTA. Registration was subjected to the condition that entire chassis would be replaced within the first year, but this was not revealed and truck was sold to 1<sup>st</sup> Defendant. This is unconscionable, misleading and deceptive trade. When considering the danger it posed from damaged chassis it is unsuitable for sale as a towing truck. The conduct of the Plaintiff is prohibited under sections 54, 55 and 56 of Fair


Trading Act 1992. So the sale was illegal, hence the Plaintiff is precluded from claim under unlawful trade that is prohibited. Each party to bear their own cost.

#### **FINAL ORDERS**

- a. The writ of summons and statement of claim of the Plaintiff is struck off.
- b. Counter claim of the Defendant is partially granted, without an order for damages.
- c. No costs.

Dated at Suva this 21<sup>st</sup> day of March, 2019.



  
Justice Deepthi Amaratunga  
High Court, Suva