

CITATION: *Forschinger v Hudsonfysh Pty Ltd* [2007] NTMC 049

PARTIES: ARMIN FORSCHINGER
v
HUDSONFYSH PTY LTD

TITLE OF COURT: Small Claims

JURISDICTION: Local Court

FILE NO(s): 20625998

DELIVERED ON: 8 August 2007

DELIVERED AT: Darwin – Posted to the Parties

HEARING DATE(s): 24 April 2007

JUDGMENT OF: Ms Jenny Blokland CM

CATCHWORDS:

SALE OF GOODS – MERCHANTABLE QUALITY – RECISION

Consumer Affairs and Fair Trading Act (NT) ss 64, 67

Aswan Engineering Establishment Co. v Lupdine Ltd [1987] 1 ALL ER 135,
Anthony v Esanda Ltd (1980) 30 ALR 627

REPRESENTATION:

Counsel:

Plaintiff: Mr Tranthem
Defendant: Mr Merrill/Mr Bevis

Solicitors:

Plaintiff: Darwin Community Legal Service
Defendant: Self

Judgment category classification: C
Judgment ID number: [2007] NTMC 049
Number of paragraphs: 26

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20625998

[2007] NTMC 049

BETWEEN:

ARMIN FORSCHINGER
Plaintiff

AND:

HUDSONFYSH PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 8 August 2007)

JENNY BLOKLAND CM:

Introduction

1. The plaintiff Mr Armin Forshinger claims the sum of \$10,000 from the defendant Hudsonfysh Pty Ltd t/a Buyrite Car Sales. The Statement of Claim provides:

“On 3 September 2006 I purchased a Toyota Landcruiser from the defendant for \$10,000 including the warranty, there were many problems with the vehicle and a report by NTAA on 11/9/06 show there were at least four serious defects. I believe the car was not in merchantable condition at the time of sale. I have tried on a number of occasions to have the defendant repair the defects but he has refused. On 12/10/06 I took the vehicle back to the defendant, told the defendant I had rescinded the contract and wanted my money back. I have not been given my money back”.

2. The defendants “Notice of Defence” states:

“The claim for rescission of contract and consequent refund of the purchase price of \$10,000 is rejected. The vehicle in question is roadworthy (copy of MVR report dated 23/10/06) is attached. The

vehicle is also of merchantable quality and fit for purpose. The claim for rescission was not carried out in accordance with s 76(1)(2) of the *Consumer Affairs and Fair Trading Act of 1992*".

Evidence called on behalf of the plaintiff.

3. Mr Forschinger gave evidence that he has owned about six vehicles in his life but has never paid \$10,000 for a vehicle prior to the purchase of the vehicle in question from the defendant. In September 2006 he identified a Landcruiser on the premises of the defendant and says he took it for a test run; he said it seemed to be running all right and he paid a deposit of \$400. He told the defendant's representative he would pay the rest on Monday. He said he paid the rest on the Monday and took the vehicle away.
4. He said "it didn't seem to be running ok"; he said it didn't run properly so he had a compression test done by "Preventative Maintenance". Exhibit P1 was tendered as a completed compression test on the vehicle. Mr Forschinger told the Court the number five cylinder was the worst as it was at the lowest compression (250 psi) and that they should have been around 600. He said the person doing the testing was not quite sure if their equipment was correct so they obtained a new gauge, completed the test again and it was the same. As a result of what Blake Smith from Preventative Maintenance said to him, Mr Forschinger said he believed the engine could "go at any time". He said as a result of the discussion with Blake Smith he went back to the defendant's premises. He told the Court "they just laughed at me". He said the Defendant's representative said "what do you want, it is an old vehicle, what do you expect? It is roadworthy." He said he took legal advice and as a result of that he had the vehicle tested at AANT.
5. The report from AANT dated 11 September 2006 indicates four "red light" areas of concern being the engine, electrical, transmission and brakes. The report advises that these areas are identified as "stop" meaning that *"significant repairs are/can be expected which would be expensive.*

Reliability and costs must bring continued ownership under question". The particular defects are also described on page 2 of the report. Overall this report indicates there are serious defects in all identified areas.

6. On 12 October 2006 Mr Forschinger returned his vehicle to the defendant. He also said his lawyers faxed the AANT report and he received a letter back. He said when he went to the defendant's car yard "Chris" was present and Mr Forschinger told him the keys were there and he wanted to rescind the contract. He said he tried to push the keys into his hands but Chris didn't want to take them. He said the door was opened and he walked in and put the keys on the desk. He said he didn't throw the keys on the desk, he put them on the desk and when he tried to walk out Chris blocked him. He said he was standing there and Chris didn't want him to come out of the office. He said his own girlfriend was present and he just stepped aside and kept walking and that was the last time he saw him.

7. In cross-examination Mr Merrill asked Mr Forschinger if he spent a long time inspecting the vehicle when he first looked over it; he said he did not spend long; he said he did see oil on the gearbox and he mentioned it to someone working at the defendant's premises. He said that person does do "touch-ups" on cars and that that person had come there with two big dogs that may have been Rottweilers when he was there on the first occasion. Mr Forschinger said it was "Chris" who he first dealt with over the contract and when he first paid the deposit it was also "Chris". Mr Forschinger agreed that he asked that the oil leak be fixed. Mr Forschinger said he didn't go through the contract but he thought that with "that amount of money" there should be no trouble with the vehicle. He said the vehicle seemed OK when he first got in it but when he took it for a drive it seemed to "surge". He agreed he did not contact Mr Merrill to say there was a problem before he took it to Blake Smith. He was asked whether he had taken the vehicle somewhere else to have the vehicle tested. He said he did ring a car yard and ask them what it would be worth and was told about \$6,000. It was

suggested to him that that was the true reason that he was not happy with the vehicle. Mr Forschinger disagreed saying it was because it had all the faults. He said that was the reason the vehicle shouldn't have been sold with all the things wrong with it and that it wouldn't get passed for road worthy in the condition it was sold in.

8. During questioning Mr Merrill told Mr Forschinger that the vehicle was taken to the Northern Territory Government inspector on 23 October 2006 and it was given road worthy status. He asked Mr Forschinger if he disputed that. Mr Forschinger replied "you are a car yard, you know people".
9. He was asked again what he did to rescind the contract. He said he walked to the office and handed over the keys, Chris didn't want to take the keys so he put them on the table. He said Chris blocked him so that he couldn't come out and that Chris wanted him to take the keys again and take the vehicle but he said he didn't want it any more. It was suggested to Mr Forschinger that he threw the keys at Chris and said the vehicle was "fucked". It was suggested to him that he purchased the vehicle on 3 September; the AANT report was done on 11 September and a copy was not sent to the defendant until 29 September. He was asked whether he was driving the vehicle in that period and he agreed he had been driving it. It was suggested to him that if he had wanted to rescind the contract it should have been done in "a reasonable time". He said he went to see Legal Aid and they told him to take it back but they were unable to get in touch with the defendant and that they had been ignored. In re examination Mr Forschinger was asked what he was told when the vehicle was taken to Preventative Maintenance and he said he was told that the motor could go at any time, he said he was told it would cost \$5,000 to fix.

Evidence given on behalf of the Defendant

10. Mr Merrill gave evidence for the defendant. He said that Mr Forschinger attended the car lot on the Sunday and took the vehicle for a test drive. At

that time Mr Forschinger's only concern was that it needed an oil change. He told the Court Mr Forschinger came back the next morning and looked over the vehicle. Mr Merrill then drove him to Westpac Bank at Winnellie where he paid cash. He said that the sale included a six month warranty and six months registration. He said he didn't hear anything from Mr Forschinger in regard to him taking the vehicle to Preventative Maintenance and that he did not get a copy of that report until 25 September. He said it was similar to what happened with the AANT result. He said in relation to the cylinder compression he had a look when the vehicle was returned and most of the readings were not correct. He said most of the oil leak was from the oil spilling from the filter. He said the defendant had a look over the vehicle and Mr Merrill indicated that some of the items could be addressed and the defendant replaced the brake fluid hose, the back wheel cylinders, adjusted the brakes, sealed a transfer case oil leak and topped up the diff oil. Before the Court is Exhibit 6 which Mr Merrill says is a list of things that were done to the vehicle. He said the diff wasn't leaking, he replaced the rocket cover gasket, replaced the top radiator hose, tightened the exhaust manifold, topped up the coolant and greased the tail shaft.

11. Mr Merrill said he had the car for two days and ran it for an hour during the two days and could not get a single oil leak. He said it passed MVR inspection on 23 October and the defendant was paying the six months registration. He said he faxed a copy of an offer to Darwin Community Legal Services on 11 October and he was presuming the plaintiff was bringing the vehicle back to take him up on his offer. He said he had no communication with the plaintiff that indicated the plaintiff would like to rescind the contract. He said Mr Forschinger went into the defendant's premises on 13 October and that the person that Mr Forschinger dealt with is no longer working for the defendant and no longer lives in Darwin.
12. Mr Merrill said he wanted to stress that the plaintiff knew he was buying a vehicle that was 21 years old, had done 426,000 klms and that by going to

another caryard he came to the view he had paid too much. He said he sold three similar vehicles in a month. Mr Merrill was questioned about whether he had in fact sent any faxes to the Darwin Community Legal Service. Mr Merrill agreed he did not have a record of faxes sent. He was also cross-examined over the appropriate price for the vehicle and rejected that the “red book” is the way that motor vehicles are priced.

13. In relation to the AANT report (Exhibit P2) Mr Merrill said he did not believe they were serious defects, they were minor oil leaks and that Mr Forschinger continued to drive it for another four weeks and nothing happened. In relation to the repairs that Mr Merrill says were undertaken, he was questioned about what date the repairs took place. He said it must have been before 25 September and before 4 October when the list of repairs was faxed. He said he didn't do any repairs on the vehicle after the vehicle was returned. He said the repairs were done before 4 October and after 25 September which was when he received the AANT report. He said Mr Forschinger returned the vehicle nine days later. In between the return of the vehicle and when the car was taken to Motor Vehicle Registry no more repairs were done.

Summary of the Documents before the Court

14. I have referred to the AANT report (Exhibit P2), the Preventative Maintenance Report (Exhibit P1); the list of items fixed by the defendant (Exhibit 6). Before the Court is also the purchaser's copy of the contract (Exhibit P3) and a letter tendered by the defendant dated 11 October 2006 (Exhibit 7). Also before the Court are a bundle of the relevant documents (Exhibit 5), being the total of the DCLS correspondence. Documents are important in this case not only because of their content but they assist in establishing what the timelines were for each step. That becomes important in the assessment of whether or not the purported recision was made in accordance with the *Consumer Affairs and Fair Trading Act*.

15. It is clear from the letter of the plaintiff's solicitor dated 25 September 2006 that the defendant was notified of the results of the test carried out by Preventative Maintenance and by AANT. Those results were attached to that correspondence. There was some acknowledgment in that letter that the plaintiff was aware that some minor repairs had been conducted by the defendant.
16. From the letter of the Darwin Community Legal Service (DCLS) solicitors dated 3 October it is noted there was no response to the letter of 25 September (or, as noted in the letter of 3 October 2006 as "26 September 2006"). The letter of 3 October 2006 notes that details of repairs have not been forwarded. Clearly the defendant was advised in that letter that the plaintiff had been advised to consider rescinding the purchase contract within seven days of 3 October 2006.
17. The letter of 6 October 2006 from the defendant to the plaintiff's solicitor received by them on 9 October 2006 notes:

"A further four days later he [Mr Forschinger] sought a more comprehensive report from AANT. That report found only minor issues mainly small oil leaks. I have subsequently addressed all items on the report. AANT also carried out an electronic compression check of the motor (very accurate) and found that all cylinders had good compression and were within five percent of each other".

Further the letter reads:

"The AANT report confirms that the motor is in very good condition for its age (20 years) and kilometres travelled (426,000).

With regard to my obligations and responsibilities under the *Consumer Affairs and Fair Trading Act 1992* I believe this matter is now resolved and I have no intention of refunding the purchase prices you have suggested".

18. On 10 October 2006 the solicitor for the plaintiff faxed a further letter to the defendant stating:

“I refer to your letter of 6 October 2006 and note that you have not provided us with the details of the repairs that you say you have completed on the above mentioned vehicle since the date it was purchased by Mr Forschinger. We again request the details of any repairs completed by you since the date of sale”.

In that letter the solicitor for the plaintiff challenges the observation that there were only minor problems with the vehicle. The plaintiff’s solicitor requests the defendant to indicate in writing by close of business the following day whether the serious defects identified have been repaired. In that letter the content of the DCLS advice is set out. It included the fact that DCLS had advised Mr Forschinger of his option of rescinding the purchase contract after 11 October 2006 by returning the vehicle to the defendant.

19. The next correspondence is a letter from the defendant dated 11 October 2006 received by DCLS on 13 October 2006. That letter states that all of the matters identified have been addressed. That letter indicates that Mr Merrill is prepared to take the vehicle personally to Motor Vehicle Registry for testing. By letter faxed on 23 October 2006 DCLS advised the defendant that Mr Forschinger returned the vehicle on 12 October 2006 and “rescinded the purchase contract”. The letter of 26 October 2006 from the defendant to DCLS encloses a copy of the roadworthy certificate indicating that the vehicle was roadworthy. The date of the inspection is 23 October 2006.

Consideration of the Issues

20. In these sorts of matters, although the oral evidence is of course important, honest witnesses may well have different recollections of events and in my view the documents and correspondence are more reliable. Having said that, there are some matters that reflect adversely on the credibility of the Defendant’s case. First, for the defendant to describe the AANT report as finding only “minor issues” is to completely disregard the significance of the AANT’s report. I place significant weight on the AANT report and there has been no evidence called that would controvert anything in the AANT’s

report. I place little weight on the Preventative Maintenance report, save that it would have been enough to warrant further enquiries by the plaintiff. In those circumstances in my view the attitude taken by the defendant after having those matters drawn to its attention compromises the Defendant's case.

21. There is a further issue of some concern as it is clear that timing is important in this case. The defendant claims to have faxed a list of repairs it was undertaking to the DCLS on 4 October 2007. The DCLS has argued that it has only ever received correspondence by post from the defendant. The DCLS correspondence that is before the Court contains no faxes from the defendant – they are all date-stamped letters. The fax produced by the defendant as Exhibit 6 apparently as proof of conducting repairs is not addressed to DCLS or the plaintiff, there is no document before the Court that proves it was sent by fax. Similarly, there is no document before the Court indicating the letter of the defendant dated 11 October 2006 was faxed to DCLS or the plaintiff. On balance, I readily prefer the plaintiff's documents in terms of a true representation of the correspondence and its timing between the parties. The defendant is unable to produce the records of the crucial faxes it claims to have sent to the plaintiff's solicitor.
22. Clearly there is an implied condition that the car is of merchantable quality (s 64 *Consumer Affairs and Fair Trading Act*). Although Mr Forschinger had the opportunity to inspect the car and took it for a test drive, the serious defects as identified by the AANT report would not have been revealed by his examination and test driving of the vehicle. It was not until he drove the vehicle after purchase that he realised something wasn't right. He then had the vehicle tested to identify the problems. Generally speaking merchantable quality means the goods are fit for their purpose: *Aswan Engineering Establishment Co. v Lupdine Ltd* [1987] 1 ALL ER 135, having regard to price and other relevant circumstances. In *Anthony v Esanda Ltd* (1980) 30 ALR 627, Murphy J stated that before "the goods can be

characterised as unmerchantable, it must be shown that, as goods of a particular description or character, they are defective, although proof or unfitness for some particular and obvious purpose may establish that they are defective”.

23. Even having regard to age and mileage, which are relevant, the unchallenged AANT report establishes serious defects that allow the car to be characterised as not of merchantable quality. I reject the assertion by the defendant company that the plaintiff has merely found out that there are other opinions about price indicating he paid too much and that is why he sought to rescind the contract. It is clear to me the plaintiff was happy with the price, but not with the level of defects after having paid the price.
24. In terms of the facts of the rescission, the defendant has been unable to call “Chris” as he has apparently left Darwin. I am left only with the evidence of the plaintiff on that matter and accept his evidence about the return of the vehicle. The question is whether the purported rescission complies with s 67 *Consumer Affairs and Fair Trading Act*.

67. Rescission of contract for breach of implied condition

- (1) Where –
 - (a) a person supplies goods to a consumer in the course of a business; and
 - (b) there is a breach of a condition that is, by virtue of a provision of this Division, implied in the contract for the supply of the goods,the consumer is, subject to this section, entitled to rescind the contract by –
 - (c) causing to be served on the supplier a notice in writing signed by the consumer giving particulars of the breach; or
 - (d) causing the goods to be returned to the supplier and giving to the supplier, either orally or in writing, particulars of the breach.
- (2) Where a consumer purports to rescind a contract for the supply of goods by virtue of this section, the purported rescission does not have any effect if –

- (a) the notice is not served, or the goods are not returned, within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods;
 - (b) in the case of a rescission effected by service of a notice, after the delivery of the goods to the consumer but before the notice is served –
 - (i) the goods were disposed of by the consumer, were lost, or were destroyed otherwise than by reason of a defect in the goods;
 - (ii) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
 - (iii) the goods were damaged by abnormal use; or
 - (c) in the case of a rescission effected by return of the goods, while the goods were in the possession of the consumer –
 - (i) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
 - (ii) the goods were damaged by abnormal use.
- (3) Where a contract for the supply of goods has been rescinded in accordance with this section –
- (a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to, the supplier – the property in the goods re-vests in the supplier upon the service of the notice or the return of the goods; and
 - (b) the consumer may recover from the supplier, as a debt due and payable, the amount or value of any consideration paid or provided by the consumer for the goods.
- (4) The right of rescission conferred by this section is in addition to, and not in derogation of, any other right or remedy under this Act or any other law.

25. In my view the plaintiff's actions do comply with the section. First, as a preliminary matter I confirm that in my view the examination and test drive of the vehicle would not have revealed the serious defects that later came to light. Secondly, particulars of the breach of the condition of merchantable

quality were brought to the Defendant Company's attention in writing and in detail by DCLS at least by 25 September 2006. The letter and attachments are very clear. Further, given there was no response on repairs being conducted, a further letter reiterating the plaintiff's advice was sent on 3 October 2006. The correspondence from the defendant of 6 October 2006 still does not provide details of repairs, noting that the AANT Report found "minor issues only". Further notification was provided to the defendant on 10 October 2006. In those circumstances, given the context of the correspondence, the plaintiff returned the car within a reasonable time as required by s 67 2(a) *Consumer Affairs and Fair Trading Act*. If the defendant did fix the vehicle before 12 October 2006, that was never communicated to the plaintiff. The notification that the vehicle was inspected by MVR on 23 October 2006 and passed is hardly sufficient in these circumstances.

26. I note that during these proceedings the plaintiff reduced his claim by \$300 to take account of the cost of the warranty paid for by the defendant.

Orders

1. Judgment for the plaintiff in the sum of \$9,700.
2. I direct these reasons be forwarded to the parties by post as indicated in the proceedings before the Court.

Dated this 8th day of August 2007.

Jenny Blokland
CHIEF MAGISTRATE