

CITATION: *Roe v Kie Dan Investments Pty Ltd* [2007] NTMC 078

PARTIES: MAUREEN ROE
v
KIE DAN INVESTMENTS PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Small Claims Act

FILE NO(s): 20708010

DELIVERED ON: 16 November 2007 by post

DELIVERED AT: Darwin

HEARING DATE(s): 26 September 2007

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

SMALL CLAIM – DISPUTE ON PAYMENT FOR REPAIRS

REPRESENTATION:

Counsel:

Plaintiff: Mr Forgarty
Defendant: Mr Whately

Solicitors:

Plaintiff: Darwin Community Legal Service
Defendant: Self

Judgment category classification: C
Judgment ID number: [2007] NTMC 078
Number of paragraphs: 16

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

No. 20708010

[2007] NTMC 078

BETWEEN:

MAUREEN ROE
Plaintiff

AND:

KIE DAN INVESTMENTS PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 16 November 2007)

JENNY BLOKLAND CM:

Introduction

1. During the course of this hearing and pursuant to the *Business Names Extract* (Exhibit P2) I made the following order:
 1. To remove Auto Kare Pty Ltd as defendant, dispense with the rules concerning service and insert instead Kie Dan Investments Pty Ltd as the defendant.
 2. As the business name is Auto Kare Automotive Services, the defendant is often referred to as “Auto Kare” throughout the proceedings. This matter involves a claim pursued in the Small Claims jurisdiction for the return of the plaintiff’s vehicle from the defendant, (that carries on a car repair and mechanical business), and an alleged overpayment of \$527.07. The plaintiff claimed that she had made all the proper payments for repairs being carried out on her vehicle by the defendant. She claims she took the vehicle to the defendant for repairs, (initially a radiator hose) and to prepare the car for

registration. The defendant has kept possession of the plaintiff's vehicle claiming it is correctly held subject to a lien. The plaintiff says she gave the vehicle to Alan Searle, described as the former proprietor of the business; after a change in personnel Mr Tininczy took over the management. From March 2005 to May 2006 the plaintiff alleges she made periodic payments usually of \$50 per fortnight. She alleges either receipts were given or a record made on the worksheet. The plaintiff says she was told there was a delay for parts and that she had "paid enough". In August 2006, her son, Bradley Roe decided to go to Auto Kare and there was an altercation. Bradley Roe says half of the engine was in the front of the vehicle, the rest of it was on the back seat and there was rust on the engine indicating it had not been worked on for some time. At another visit in August 2006 the plaintiff says she and her son demanded a "worksheet" indicating only eight hours of work had been done. There was a heated exchange and the plaintiff decided to go to Consumer Affairs and subsequently to Court. The defendant counterclaims \$1,022.93 for repairs already carried out and continues to hold the car. To succeed, the plaintiff must satisfy the court on the balance of probabilities that she has in fact made the payments as alleged by her and denied by the defendant. For the reasons that follow, I am not so satisfied.

Evidence Given on Behalf of the Plaintiff

Maureen Roe

3. Ms Maureen Roe gave evidence in her own case. She said the car concerned was her green Nissan Pulsar sedan – (NT registration 485 178), that she owned for over ten years. She says she put it in for service to get it ready for registration and to have the radiator hose repaired with the defendant on or about March 2005. She said she had taken her vehicle previously to Auto Kare and she had dealt with a person called "Wes" then later "Alan". She said she had always made payments in the past on each pay day. She said

the mechanics would always write the amount she paid on a work sheet. She pointed out invoices 3620 - 1182 indicating instalment payments in 1999, 2000, 2001, (contained in Exhibit P1).

4. In March 2005 she said she made arrangements with “Paul” to pay every fortnight on her pay day and she would give \$50 per pay day to Paul Tininczky. She said she always paid Mr Tininczky when he was at the work bench. She was sometimes accompanied by “Charlie Briston” and there was always someone working with Paul Tininczky when she attended. She said every fortnight she would pay Paul Tininczky \$50 and that she had made two large payments being a \$200 payment when she sold four paintings and a \$500 payment when she received a larger payment from Centrelink. She said she would pay every pension day – that was her pattern of payments. She said she received receipts from Mr Tininczky. She said she paid \$2,350 in total to have her vehicle fixed. She said when she went to Auto Kare with “Bradley” (her son), and opened the car’s bonnet, and the full motor wasn’t there. She saw “Margaret” at the office who brought back “Trevor” (now known as Mr Whatley) who said it didn’t have anything to do with him. She said she was sick of waiting for her car and so were her children; she said there was nothing wrong with the motor and it had all been fixed before. She told the Court that her son Bradley demanded a worksheet and “Margaret” came out with a worksheet. It was not the “Tax Invoice” contained in Exhibit P1. She said she went to Auto Kare with Bradley twice and on the second occasion Bradley spoke to “Trevor”. She stated that Trevor had said he would get it going in two weeks when he saw Paul. She said she had never fallen behind in payments. She had never been in trouble for falling behind payments.
5. In cross-examination it was put to her that she said her car was *green*; she agreed her car was a *white* car. It was suggested to her that each time she paid money she was given a receipt; she said “only four times”. She was asked why she was claiming she had paid \$2,350 when the quote and total

was \$1,822.93. She said she was kept waiting for parts and the defendant had been lying and kept telling her to wait for various parts that were required. She referred to Mr Tininczky as a “bare faced liar”. She agreed that out of thirty receipts she only had four receipts to produce. She said “Paul” always wrote the receipt of money on the job sheet. She said there was no record of the transactions in her bank records as she withdrew the sums she needed, not \$50 specifically each time she paid.

6. Ms Roe tendered a letter from Consumer and Business Affairs (22 December 2006). The letter notes the plaintiff’s claim that she had made four payments totalling \$800 between 1/5/05 and 3/11/05 and was then told she had “already paid enough”; Mrs Roe claimed to have made payments to Auto Kare totalling \$2,400 between March 2005 and May 2006 – she was only able to provide receipts for the four payments mentioned above; that each time she enquired about the progress of her motor vehicle she was advised the trader was awaiting the arrival of spare parts; that Mrs Roe claims she was contacted by the trader on 14 August 2006 and advised the vehicle would be ready the following week – that when she and her son attended there was “only half a motor in the car”. Although it is not evidence in this Court, the Indigenous liaison officer for Consumer and Business Affairs concluded that Mrs Roe’s claim “could not be supported by appropriate receipts, the issue of the total payments remains undetermined”. She was asked in cross-examination about why she would have paid the amount of \$2,400 if she believed she requested that the motor not be replaced or repaired. She said it was because it took so long and she kept making payments. She disagreed that the arrangement was that repairs could not start until a deposit was made. She pointed out some work was already done. She disagreed the cylinder head was already taken off.
7. Before the Court, Ms Roe tendered a list of dates with “\$50” next to that date indicating those were dates that she had paid \$50 to “Paul”. Her evidence was somewhat vague about the status of this record, as it is unclear

whether she meant these were the dates of her Centrelink cheque that she would have by habit made a payment or whether it was a genuine contemporaneous record of each payment. She has marked with a cross each of the payments that she has a receipt for. These receipts total \$800.

Bradley Roe

8. Mr Bradley Roe is the plaintiff's son. He said he went to Auto Kare twice, once to pay \$50 or \$100 on his mother's account and later to find out about her car. He said he went there a number of times in the past and paid bills off for work Auto Kare were doing. He said he had his own car repaired previously and paid the account off. He would pay a deposit, take the car and pay it off. He said in relation to his mother's repairs, when he went to Auto Kare the second time to find out what was happening to his mother's vehicle, half of the motor was not in the vehicle; it was full of dirt; he asked for a job sheet and the lady working there ran next door, grabbed one of the men working there and came back; the man came "flying back" at his mother with "no good manners"; that Mr Roe "stepped in" and said "you speak to my mother one more time". He said the documents showed only eight hours work had been done on the vehicle. He said a family member would take his mother to the defendant's premises.
9. In cross-examination he said his mother initially took the bus to the defendant's and then later he and other members of the family started taking her there. It is noted the plaintiff's version was she would primarily take the bus. He accused Mr Tininczky of "dodging him". He did not accept that work was not going to commence until the deposit was paid. On the gentlest of cross-examinations Mr Roe became extremely agitated and aggressive in the witness box; his demeanour was extremely aggressive and I find it very difficult to accept much of what he told the Court, although I accept he is motivated out of concern for his mother.

Evidence Given on Behalf of the Defendant

Mr Trevor Whatley

10. Mr Trevor Whatley gave evidence that he is the proprietor and director of Auto Kare Automotive. He explained previously his partner “Wes Chin” ran the financial side and he had “particular ways of running the business” that ended in losses. He said the business continued operating after Wes Chin moved on and the new manager was Alan Searle who was previously an apprentice and later tradesman. He said the vehicle in question was originally brought to the 12 Travers Street premises. It was originally brought in for checking over for registration and because it was overheating. He was advised by Alan Searle that the vehicle was severely overheated and considerable work was needed. Mr Whatley advised a deposit would be needed. He said that after examining the vehicle Mrs Roe was advised that the head would need to be removed at an estimated cost of \$1,500 - \$2,000. He said he received the “go ahead” to commence that work and a deposit would need to be taken. In the meantime the business relocated and the Manager appointed was Paul Tininczky. The business moved to 16 Travers Street, Coconut Grove. He told the court it was not as Ms Roe had said, Mr Tininczky did not work on the car throughout.
11. He told the Court the car was relocated with the cylinder head being removed. There was some correspondence between the parties. Mr Whatley said he had never had any type of complaint of a consumer nature after twenty years in business and prided himself in the fairness of his business dealings. He said Bradley Roe attended at the premises when his wife was filling in for Paul Tininczky. She was confronted by Mrs Roe and went to see if Mr Whatley could assist. He said he himself has never been aggressive but on this occasion he may have said things to Bradley Roe but not to his mother. He said after a second visit by Bradley Roe he refused to have any further dealings with him and a staff member called police. It was explained that the costs of what was outlaid on repairs had exceeded the

deposit paid but it had been left in Paul Tininczky's hands to deal with. He denied Bradley Roe's assertion that he was aggressive to Mrs Roe. He said he explained when Paul returned he would have it looked at. He said the reconditioned head was there.

12. The matter ended up with Consumer Affairs and he said he was happy to co-operate and he understood that Consumer Affairs were happy with his explanations of what had happened. He said there was no mention of other payments having been made to him at that time. He said he could not understand that the final bill was for \$1,022.93, he had received \$800 but the plaintiff was saying that she had paid around \$2,300. He thought this was "lacking in credibility". He said Paul Tininczky mainly dealt with the issue. He said he does recall there was a comment made "I just want my car back". He said Mrs Roe had been informed of the cost of repairs to the vehicle. He said nothing was mentioned to him about payments that had been made that were in the system that had not been receipted or acknowledged. He said Consumer Affairs advised to finish the vehicle; this was done and checked by Consumer Affairs and he thought the matter would be finalised. He explained that he had many cars that he did not want to keep on his premises but repairs were not paid. He obviously did not want possession of more cars. He said he had tried to provide information and co-operate through the process with all organisations involved in the dispute.
13. In cross-examination he conceded that there was nothing in writing about the "considerable" deposit needed and nothing in writing to state the terms or general agreement between the parties. He agreed he couldn't completely remember the date when his business changed locations but believed it was in May 2005. He said the records would show the date that the car was brought in but he could not remember. He agreed that some of his records were on the old system but he said he always provided the information when required throughout the process. He said that he had not received any other

monies from the plaintiff than those recorded. He agreed that he had said the estimated quote was \$1,500 - \$2,000 but that in his defence filed \$1,800 was stated; he said he may have contradicted himself but he knows it was going to be no less than \$1,500 and no more than \$2,000. He agreed he had little involvement in the progress of the vehicle. He agreed the business system changed and was better now in terms of record keeping. He agreed the job was finalised after Consumer Affairs was involved. He agreed that when Bradley Roe and the plaintiff attended in August 2006 that his wife gave Bradley Roe a document on the current position of the repairs. He said it was probably not an actual job sheet but would have been a sheet being used by the mechanic. He said it would have been to show the current position. He agreed he dealt very little with the plaintiff's situation. He said after the incident when Bradley Roe attended and was aggressive towards him, he left the matter in the hands of Paul Tininczky.

Paul Tininczky

14. Mr Tininczky agreed he was the manager of the business having taken it over from Mr Searle. He said the cylinder head of the plaintiff's vehicle had been removed and her vehicle was moved to 16 Travers Street when the business was relocated. He was aware that the plaintiff needed to put a deposit on the vehicle; he said he told Mrs Roe that nothing was happening with the vehicle until she had made the deposit. He said some payments were made that were receipted. He said Ms Roe was upset with the procedure. He said Consumer Affairs called and he explained the situation, including showing them receipts. He was not prepared to release the vehicle and have it paid off after completing repairs because of the time Ms Roe had taken already to make payments. He said that Ms Roe just wanted the vehicle fixed and so he obtained a second hand engine and it was fitted with a reconditioned head. He advised the plaintiff her vehicle was ready for collection in August 2006. He said the plaintiff was advised previously that she would have to pay for the repairs carried out prior to collection and she

said she had paid enough. He said Ms Roe had visited the business premises and been aggressive both at the premises and at other times over the phone. In cross-examination he agreed that Ms Roe had been a “good payer” over the years and that previously arrangements for her to pay by instalments had been acceptable. He said he had ordered the engine from south; that otherwise it was going to cost too much. He said the quote was always \$1,500 - \$2,000 and there was never any move away from the quote. He said he was prepared to finish the car when Consumer Affairs were involved as long as he was paid. He denied saying anything like “don’t pay any more money – you have paid enough”.

Consideration of the Issues

15. For the plaintiff to succeed she bears the burden on the balance of probabilities to persuade the Court that she has paid for the repairs as quoted and indeed made an overpayment. Much of her evidence is vague and not supported by the documentation. She may well believe that she had been paying \$50 per Centerlink payment to the defendant and there is no doubt that she paid the \$800 to the defendant, (comprising the payments of \$200, \$500, \$50 and \$50 between September and November of 2005). It is not particularly persuasive evidence when she is unable to provide receipts and her document purporting to list the times she has made other payments is not said to be noted contemporaneously with her actually making those payments. The evidence of her son was similarly non-persuasive and I found him lacking in credibility when he alluded to the aggression of Mr Whatley when his own demeanour in the witness box betrayed significant aggression with no provocation. He also differed in his account from his mother’s account on whether she was always accompanied by family when attending the defendants’ premises. While it is true that these repairs and the arrangements for the quote and ongoing repairs took place during a time that the business moved address, changed office systems and managers and that this had an impact on some of the record keeping, I was impressed with

the sincerity of the defendants' witnesses who have explained their position and what occurred in a clear and straightforward manner. Their explanations of why they required the deposit and that they issue receipts for payments are reasonable and what would be expected in a business of this type. In my view they have little interest if any in attempting to assert that the plaintiff has not paid for repairs if she had paid for them. Where the plaintiff's claim loses credibility is her claim that she paid \$2,400 for a repair that at the most was \$1,800. In my view the balance of probabilities clearly favours the defendant and the plaintiff's claim is dismissed. In my view the defendant has gone to considerable lengths to co-operate with the plaintiff, Consumer Affairs, NAAJA and the Court to explain their position and accommodate the plaintiff. That will mean that there will be no order that the plaintiff's vehicle be returned. In relation to the repairs to the vehicle, clearly in my view the counter claim is made out to the extent of the repairs being \$1,022.93. Storage charges also formed part of the original counter claim but are no longer being pursued and the costs of storage were not calculated in a way that could be accepted by the Court.

16. Orders:

1. The plaintiff's claim is dismissed.
2. Judgment for the defendant on the counter claim in the sum of \$1,022.93.
3. A copy of these reasons and orders to be forwarded to the parties by post as agreed at the conclusion of the hearing.

Dated this 16th day of November 2007.

Jenny Blokland
CHIEF MAGISTRATE