

CITATION: OVERMAN v PERSHOUSE [2009] NTMC 062

PARTIES: JUDITH ANN OVERMAN

v

JOHN WAYNE PERSHOUSE

TITLE OF COURT: LOCAL COURT

JURISDICTION: SMALL CLAIMS

FILE NO(s): 20835586

DELIVERED ON: 2 DECEMBER 2009

DELIVERED AT: DARWIN

HEARING DATE(s): 20 OCTOBER 2009

JUDGMENT OF: ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

CONTRACT – Breach of contract – incorporation of oral representations into terms of the contact

CONTACT – Actionable misrepresentation – remedy of rescission

REPRESENTATION:

Counsel:

Plaintiff: NA

Defendant: NA

Solicitors:

Plaintiff: Self Represented

Defendant: Self Represented

Judgment category classification: B

Judgment ID number: [2009] NTMC 062

Number of paragraphs: 56

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

No. 20835586

BETWEEN:

JUDITH ANN OVERMAN
Plaintiff

AND:

JOHN WAYNE PERSHOUSE
Defendant

REASONS FOR JUDGMENT

(Delivered 2 December 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. The plaintiff's claim against the defendant concerns the sale and purchase of a motor vehicle, namely a Mitsubishi Delica ("the vehicle"), in December 2005. The plaintiff seeks the return of the purchase price of the vehicle (\$8150), insurance costs (\$854), costs of an Automobile Association of the Northern Territory ("AANT") inspection (\$172), mechanic's costs (\$296) and court fees.
2. The particulars, as set out in the plaintiff's statement of claim, are as follows:
 - (a) In December 2005 she purchased the vehicle from the defendant after he was to have the vehicle fixed and have it roadworthy for her.
 - (b) Within days of receiving the vehicle diesel fuel and oil was leaking from the vehicle.

- (c) The plaintiff's mechanic advised her to have an independent inspection of the vehicle.
- (d) In January 2006 the AANT inspected the vehicle and it failed a roadworthy inspection.
- (e) During 2006 the plaintiff's mechanic worked on the vehicle to repair leaks unsuccessfully.
- (f) In April 2006 the plaintiff sent a letter of demand to the defendant asking him to take back the vehicle and to return her money. He refused.

3. In response, the defendant's defence states:

- (a) In November 2005 the vehicle was inspected by two licensed inspectors, one of whom was an inspector at the motor vehicle registry.
- (b) The plaintiff returned the vehicle with a list of faults which included a faulty door lock and surface rust on the roof. Those items were fixed.
- (c) In mid December 2005 the plaintiff expressed her happiness in the vehicle to the defendant's wife.
- (d) The Defendant denies the plaintiff is entitled to the purchase price or any other damages.

4. The matter was heard on 20 October 2009. Ms Overman appeared for the plaintiff. Ms Pershouse appeared, with leave, on behalf of the defendant. The defendant had previously had a heart attack in the Court precinct following a pre-hearing conference and was not medically fit to appear. Two witnesses were called by the plaintiff on summons, namely Mr Jason Stapleton and Mr Wayne Harris. All witnesses gave evidence on oath.

The Plaintiff's Evidence

5. In December 2005 the plaintiff was self employed as a cleaner and she ran her own business. She needed a reliable work vehicle as the vehicle she had at the time was not reliable. She spoke to her mechanic, Jason Stapleton of the mechanical repair business JSM, in late 2005, and asked if he knew anyone who was selling a van. Mr Stapleton referred the plaintiff to the defendant.
6. On or about 2 December 2005 the plaintiff attended the defendant's business premises. The defendant is the proprietor of a mechanical repairs business called OZNorth. The plaintiff had a conversation with the defendant in relation to her needs concerning a new van. She stressed the need to have a reliable vehicle for her business. She went into the defendant's yard and looked at a van which she had been told was for sale. The plaintiff noticed that there was machinery in the van, which looked like the engine. The plaintiff's mechanic, Mr Stapleton, also attended and inspected the van, however the motor was not running at that time.
7. The plaintiff was told by the defendant that he was leaving town for about 3 months on holiday and that if she wanted the vehicle she would have to make a decision immediately to secure it. The plaintiff was told that the vehicle was worth \$12,000 but the defendant would sell it to her for \$8,000. Mr Stapleton assured the plaintiff that the defendant could be trusted and that he had dealt with him before.
8. Negotiations ensued and the following terms were agreed: that the seats were to be removed from the van; that the engine would be refitted to the vehicle; that the engine would be made running, the vehicle would be made safe and put in a roadworthy condition, purchase price was \$8,150, comprising a \$4,000 deposit and \$4,150 at a later date on delivery. There was no written contract. The plaintiff wrote a cheque for \$4,000 on that day.

9. The plaintiff returned to the defendant's premises on 9 December 2005 to collect the vehicle and pay the balance of the purchase price. She was told it was not ready and for her to come back on the next day. She paid the balance of the purchase price. The vehicle was subsequently delivered to the plaintiff's home the following day, which was a Saturday. When delivered it had number plates, a compliance sticker and was registered.
10. On about 10 December 2005 the plaintiff inspected the vehicle. She looked through it, the sun roof did not work, there were some issues with the interior detailing, there was rust on the top of the roof.
11. On about 12 December 2005 the plaintiff returned the vehicle to the defendant to get certain issues rectified (ie. rust and other items).
12. On 21 December 2005 the defendant picked up the vehicle. On the way home the plaintiff stopped for fuel. Upon fuelling she smelled diesel fumes about the vehicle. On or about the same date she showed the vehicle to a friend, who made adverse comments about the engine, referring to possible problems with it. However, the plaintiff ignored such comments.
13. On 24 December 2005 the plaintiff noticed there was a large wet area under the van and a strong smell of diesel about the van. The plaintiff called her mechanic, Mr Stapleton, and spoke to him about the leak that had appeared. The plaintiff understood that the defendant had already left town. Mr Stapleton was due to go on holidays but arranged to look at the vehicle on his return on about 16 January 2006. Mr Stapleton advised the plaintiff to get an independent inspection of the vehicle.
14. The plaintiff went on holiday and returned on 1 January 2006 to find a massive diesel and oil leak in her parking bay underneath the vehicle. She booked the vehicle in to get an inspection with the AANT on 6 January 2006.

15. The vehicle was inspected by AANT on 6 January 2006, a number of items were identified such as oil leaks, diesel leaks and a number of other items which made the vehicle unroadworthy.
16. The plaintiff waited until Mr Stapleton got back from holidays and took the AANT report and vehicle to him to look at. Mr Stapleton went to talk to the mechanic who had done the roadworthy inspection, Mr Harris. Over the course of time Mr Stapleton attempted to fix the leaks but could not. There were a large number of issues, the plaintiff was told the engine needed serious work, it needed a new engine. During that time the defendant was still away, and some attempt at communication was made through the defendant's daughter.
17. The vehicle was in and out of the workshop for three months (March, April and May 2006). The defendant had returned from holiday but the plaintiff had left Mr Stapleton to make contact with them. The plaintiff continued using her old vehicle for three months. The plaintiff subsequently bought another vehicle from the side of the road in May 2006.
18. The vehicle had effectively remained at the plaintiff's premises since its purchase, except when it was being repaired. The vehicle was last inspected by the plaintiff's new mechanic, Mr Lee Buckmaster of Northern Mobile Mechanics, in March 2007. Mr Buckmaster found a number of items wrong with the vehicle.
19. The plaintiff tendered a bundle of documents (Exhibit P1) including: the bill of sale for the vehicle, copies of cheques for the purchase of the vehicle, the AANT inspection report, JSM job card, complaint made to Consumer Affairs in April 2006, letter of demand dated 1 April 2006, letter of reply dated 28 April 2006, statutory declaration of Overman dated 26 April 2009, statutory declaration of L Buckmaster dated 18 October 2009, correspondence between Consumer Affairs and the plaintiff, a Repco Report on the vehicle dated 21 July 2009, statutory declaration of Michael

Besil dated 29 September 2009 and the statutory declaration of Jewel Bennett dated 18 October 2009.

Evidence of Jason Stanley Stapleton

20. Mr Stapleton was the plaintiff's motor mechanic at the relevant times in 2005 and 2006. It was his evidence that he had contacted the defendant in 2005 and discussed the plaintiff's needs in relation to purchasing a van for her business. It was he who put the plaintiff into contact with the defendant.
21. Mr Stapleton confirmed that he had inspected the vehicle before the plaintiff had purchased it. He recalled that, at the time he inspected it, the vehicle had its timing belt off, the radiator off and there was some work being done to it. He recalls saying to the plaintiff that he needed to get it running to give a proper opinion, but from what he could tell it seemed ok. In evidence he stated that he would have preferred to take the vehicle for a test drive before the plaintiff paid her deposit.
22. He received a phone call on Christmas Eve 2005 from the plaintiff, and recalls being told that there was something under the van in the nature of oil or fuel. He could not recall suggesting to the plaintiff that she get an independent inspection carried out.
23. On 13 January 2005 he inspected the vehicle, and he spoke to Mr Wayne Harris, the mechanic who conducted the registration inspection on the vehicle. He confirmed there was a diesel leak on the top of the fuel pump. Further, there appeared to be an oil leak coming from the rocket gasket cover. He tried to get in contact with the defendant and left a message with his daughter.
24. In relation to repairs to the vehicle, Mr Stapleton recalls taking the diesel pump off to replace the gasket, removing the seats, washing everything down and telling the plaintiff to come back in a few days. There was no

specific agreement as to who was going to pay for the repairs, it was Mr Stapleton's view that he would sort out the issue of payment at the end of the day. It was more important to him that everyone was happy at the end of the day.

25. Mr Stapleton was pretty sure that he fixed the leak to the diesel pump. However, oil leaks continued and the vehicle began blowing black smoke. Eventually extensive oil leaks developed. Mr Stapleton suggested that the plaintiff should see the defendant. He was concerned that the engine needed to be removed and it needed new gaskets.
26. Mr Stapleton's last dealing with the vehicle was in about mid 2006 after about 3 or 4 months of dealing with it on and off.
27. Mr Stapleton was unsure about certain dates and events and his evidence was not as clear as he would have liked. He indicated that he had undergone medical treatment in the last few years which had affected his memory.

Evidence of Wayne Stephen Harris

28. Mr Harris was the motor mechanic who conducted the roadworthy inspections of the vehicle in early December 2005. Mr Harris runs his own mechanical repair business and is a member of the Board of the Transport Accident Commission.
29. Mr Harris remembered the vehicle because it was an unusual make and model. He was shown a copy of his roadworthy inspection certificate and confirmed that it was true and correct. The certificate, dated 5 and 6 December 2005, indicated that the vehicle failed its roadworthy inspection on 5 December 2005, but was subsequently passed on 6 December 2005.

30. The items which were identified as needing attention included replacement of pedal rubber, fresh oil on the rocker cover, steering rack dust covers, leaking diesel dripping on ground at pump and requires VIN check.
31. It was Mr Harris' evidence that in relation to roadworthy inspections, as in this case, he would identify a number of issues to be rectified, the owner would then go off and attend to them and then represent the vehicle. If the issues had been rectified the vehicle would be passed. A roadworthy inspection would take 15-20 minutes, vehicles would be looked over not dismantled. It was Mr Harris' evidence that over 50% of vehicles would be failed due to oil leaks. In relation to the requirement to get a VIN check, Mr Harris explained that a VIN check was carried out by an inspector at the Motor Vehicle Registry who would open the engine bay to identify the vehicle identification number. Mr Harris was adamant that if an inspector carried out a Vin check and noticed oil or fuel leaks, a vehicle would be immediately declared unroadworthy. In cross examination, Mr Harris denied any suggestion that he had been asked to avoid compliance with the vehicle. It was Mr Harris' evidence that he had passed the vehicle for roadworthy because, upon inspection, the defects which he had previously identified were no longer apparent, and all other aspects of the vehicle rendered it roadworthy.

The Defendant's Evidence

32. Mrs Pershouse gave evidence on behalf of the defendant. It was her evidence that she was present at all material times relating to discussions or dealings with the vehicle. It was her evidence that she ran all of the administrative aspects of her husband's business and would often follow him to meetings with a note book, taking notes of what was required.
33. In November and December 2005 the defendant did not have a car dealer's licence. On occasion the defendant would sell cars, on behalf of

customers, for no charge other than the promise to give any repair work needed on such vehicles to OZNorth.

34. In relation to the plaintiff's vehicle, it was the defendant's private vehicle which the defendant and Mrs Pershouse had bought in 2005. They had intended to fix up the vehicle to use as their own but had since bought a newer model and therefore had no need for the vehicle.
35. On or about 2 December 2005 the defendant received a telephone call from Jason Stapleton who indicated that he had a lady customer looking to buy a van. The plaintiff came to the defendant's business premises, where the vehicle was located, to inspect the vehicle. She was told that it needed work, that it needed a new windscreen, brakes and other works, but could be ready by 9 December 2005. A price was agreed of \$8,000 plus 6 months registration. However, the plaintiff was told that the defendant and his wife were going away on holiday soon and that a deposit payment would be required to ensure that repairs were done and registration gained. The defendant was not willing to begin work on the vehicle without a deposit being paid.
36. The defendant took the vehicle into his workshop that day and started the necessary work, including installing new brakes and wheel bearings. Following the repairs Mrs Pershouse drove the vehicle to C & H Autoline at 11 Mile to have it inspected for its registration. Mr Harris, the registration inspector, failed it and told Mrs Pershouse to go away and get it fixed. The vehicle was returned to the defendant who attended to the various items including replacing the top gasket on the fuel pump and retightening bolts on the tappet cover which had been leaking oil. The vehicle was then taken for a further test drive, returned to the workshop and no further oil leaks were detected. The vehicle was returned to Mr Harris for a further inspection on 6 December 2005, in what was described as a "fanatical inspection". The vehicle passed inspection.

37. On the following day, 7 December 2005, the vehicle was taken by Mrs Pershouse to the Motor Vehicle Registry at Goyder Road for its VIN inspection. That inspection involved the inspector lifting the passenger seat up, as the engine was located under the seat, leaning forward into the engine bay with a torch and inspecting the VIN plate on the engine. The inspector did not notice any oil or leaking diesel. Following the inspection, the registration fee was paid on behalf of the plaintiff and the vehicle was driven back to the workshop.
38. The next day the plaintiff came into the workshop to collect the vehicle. She wanted the seats removed. She was told to come back the following day. However the following day was a Saturday and it was arranged for the vehicle to be delivered to her home.
39. The following working day, the plaintiff brought the vehicle back with a few minor problems. She complained the back door latch was not working, it was tested and found to be OK. She complained that there was rust on the roof. The defendant arranged for a panel beater to pick the vehicle up and for the roof to be repainted at a cost to the defendant of \$600.
40. The vehicle was returned to the plaintiff on 14 December 2005. Nothing further was heard until 23 December 2005, the day before the defendant went on holiday. On 23 December 2005 at the Commonwealth Bank in Casuarina, the defendant and Mrs Pershouse met the plaintiff, who openly expressed her happiness with the vehicle. The defendant and his wife subsequently left on holiday.
41. Nothing further was heard until the defendant's daughter contacted the defendant in mid February 2006. The defendant was told that his daughter had been visited by Mr Wayne Harris who was unhappy about issues relating to a car. The defendant told his daughter to ring Wayne Harris and tell him he would see him on his return.

42. When the defendant returned he telephoned Mr Harris, who told him that he had had a visit from Jason Stapleton. The defendant then contacted Jason Stapleton who had indicated that the plaintiff was not happy with her vehicle and wanted her money back. The defendant told Mr Stapleton that if the plaintiff was not happy with her vehicle then she should bring it in and he would sell it on her behalf.
43. Nothing further was heard until April 2006 when the plaintiff sent her letter of demand.

Decision

44. The plaintiff's specific cause of action is not pleaded, as is common with small claims proceedings, but it is assumed that she seeks damages for breach of contract or alternatively rescission of the contract due to misrepresentation. Although not pleaded specifically it is evident that it was the plaintiff's case that representations made to her in the course of negotiations regarding the mechanical reliability of the vehicle became either terms of the contract or actionable misrepresentations.

Breach of Contract

45. It is the plaintiff's case that the defendant breached the contract. In order to succeed the plaintiff needs to prove that statements made concerning the mechanical soundness of the vehicle became terms of the contract. To do so she points to evidence of the negotiations which took place prior to the sale of the vehicle and the importance she placed on having a reliable vehicle, as indicative of the fact that there was such a term of the contract.
46. It was the defendant's case that there was no such breach and that prior to the purchase of the vehicle the defendant was told that it had been sitting idle for some time and may have some teething problems. It was the defendant's case that he had done all within his power to ensure that the vehicle was in good repair and in a roadworthy condition. It was the

defendant's case that the plaintiff was told that any work done by OZNorth would be covered by a warranty, but an unconditional warranty was not provided on the vehicle. It was the defendant's case that he had rectified further problems identified by the plaintiff, after purchase, at his own cost.

47. On the basis of the evidence I am reasonably satisfied that discussions took place on 2 December 2005 between the plaintiff and defendant to the effect that the plaintiff was looking for a new van for her business and that it needed to be reliable. I am reasonably satisfied that in the course of such discussions the plaintiff was told that the vehicle would be put back together, necessary repairs would be done and it would be sold to her in a roadworthy state. The question is whether, as a result of such negotiations, it became a term of the contract that the plaintiff would be sold a mechanically sound vehicle (as opposed to a roadworthy one).
48. The law in relation to whether statements made in the course of negotiations become contractual terms requires an examination of the intention of the parties. The test is an objective one and is assisted by looking to a number of factors to determine whether such statements have become terms. Those factors include: how close in time to the completed contract the statement was made, whether there was a reduction into writing, did one of the parties have special knowledge or skill upon which the other was entitled to rely and the importance of the statement in the minds of the parties (see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 61-62). It is the latter two factors which are relevant to this matter.
49. Although the vehicle was being sold privately by the defendant, and he was not a car dealer, he was the proprietor of a mechanical repair business. It was the defendant who was going to repair the vehicle and make it roadworthy. I find that the defendant possessed relevant special knowledge and skill in relation to statements made concerning the mechanical nature

of the vehicle. In the circumstances, had the plaintiff dealt with the defendant alone, that would have been sufficient evidence of unequal degrees of knowledge for any statement to have likely become a contractual term. However, the plaintiff had been acting through her mechanic Mr Stapleton, he had attended the defendant's premises with her and he had actually inspected the vehicle. The plaintiff had the opportunity to seek Mr Stapleton's advice and assistance in relation to the purchase of the vehicle. It cannot be said that the degrees of knowledge of the parties were unequal (cf. *Dick Bentley Productions Ltd v Harold Smith Motors* [1965] 2 All ER 65 and *Oscar Chess Ltd v Williams* [1957] 1 All ER 525).

50. It is also apparent from the evidence that the statements which were made, in relation to the vehicle, were critical in the plaintiff's decision. The plaintiff wanted a reliable work vehicle and told the defendant so. However, it was the defendant's evidence, which I accept, that the plaintiff was also told that the vehicle had been outside for a while and may have teething problems. The plaintiff was given ample opportunity to inspect the vehicle, both initially and after it had minor repairs attended to. Thus the importance of any statements made, which affected the mind of the plaintiff, must be taken in the context of a full opportunity to test the veracity of such statements.
51. I am therefore not satisfied that any relevant statements made during the course of negotiations, regarding the future mechanical soundness of the vehicle (other than being sold in a roadworthy state) became terms of the contract. Certainly statements warranting specific work done on the vehicle would have been enforceable (ie. replacement of the windscreen, fixing brakes and other items). However, there was no general warranty relating to the condition of the vehicle.

Misrepresentation

52. The second part of the plaintiff's claim, as I understand it, relates to misrepresentation. Misrepresentations are actionable notwithstanding a failure to show that such misrepresentations are contractual terms. In order to do so the plaintiff must show that there was a false statement, it was one of fact, addressed to the party to be misled and intended to induce and did induce.
53. On the basis of the evidence there was no evidence of fraudulent or negligent misrepresentation. Any misrepresentation must therefore be innocent misrepresentation.
54. I am not reasonably satisfied on the evidence that the plaintiff has made out sufficient grounds for actionable misrepresentation. Misrepresentation is a technical aspect of the law and requires clear and cogent evidence. In my view the plaintiff has fallen short of that requirement. However, if I am wrong, it would appear the only remedy for innocent misrepresentation is rescission.
55. Rescission is effectively an equitable remedy. In order to consider whether rescission is possible it is necessary to consider whether the parties could be placed back in substantially the same positions as they were prior to entering into the contract. I am not satisfied that rescission is possible in this case. The vehicle has been sitting idle for the better part of 4 years, it has not apparently been maintained and would appear to be in a state of decay. It was inspected in 2007 by a mechanic who found significant issues with the cooling system including corrosion, problems not obviously apparent on purchase or in the AANT inspection of January 2006. A further inspection was carried out in 2009 which found other issues including with cylinder compression and the motor, which were not evident on purchase or the AANT inspection of January 2006. I am not satisfied given the deterioration of the vehicle that it would be equitable to order

rescission. That is not to say that rescission may not have been possible if the plaintiff had sought such an order from the Court at an earlier date (say mid 2006). The plaintiff indicated she wanted her money back in April 2006. However the plaintiff has waited three years, almost to the end of the limitation period, to commence legal proceedings and assert her rights. During that time the vehicle had deteriorated significantly. Furthermore, the plaintiff had her own mechanic examine, restart and run the vehicle in 2007. There was an allegation, which is supported by the evidence, that damage may have been caused in attempting to run the vehicle in 2007. Such acts are somewhat inconsistent with an election to rescind the contract. Furthermore, the plaintiff had ample opportunity to inspect the vehicle prior to completion of the contract and transfer of title to her. She had engaged a mechanic for that specific purpose. The fact that she did not do so, but instead, as she stated, put trust in her mechanic and the defendant, is unfortunate but it does not give rise to any enforceable right.

56. The plaintiff's claim is therefore dismissed.

Dated this 2nd day of December 2009

CRAIG SMYTH
ACTING JUDICIAL REGISTRAR