Neutral Citation Number: [2007] IEHC 103

THE HIGH COURT

[1999 No. 9684 P]

BETWEEN

PATRICK G FLYNN

PLAINTIFF

AND
DERMOT KELLY LIMITED AND
NEW HOLLAND FINANCE (IRELAND) LIMITED

DEFENDANTS

Judgment of Mr. Justice O'Neill delivered on the 16th day of March 2007

1. The plaintiff is a farmer and lives near Enfield, Co. Meath. The first named defendant is a seller of farm equipment and the second named defendant is a finance and leasing company. On or about the 8th of April 1998, the plaintiff sought to acquire from the first named defendant a tractor model "New Holland M 115" with a registration number 98 MH 2837. The first named defendant was the party from whom the plaintiff sought to make this acquisition. The method of completion of the transaction was by way of a leasing agreement made between the plaintiff and the second named defendant, whereby the tractor was sold by the first named defendant to the second named defendant and leased by them to the plaintiff. The lease was for a period of six months at the monthly rent of IR £3,504.13. The lease was to run from 8th April 1998, until 8th October 2002.

2. On 8th June 1998, the plaintiff was assisting a friend of his, Mr. Dixon an agricultural contractor, to cut silage on the farm of Mr. Hiney. They were using three tractors, the plaintiff's New Holland and two Fiat tractors owned by Mr. Dixon. The two Fiats were a Fiat 980 and a Fiat 1580. They were respectively fifteen and eighteen years old. The three tractors were each pulling a trailer, used to draw the cut silage to a silage pit.

3. The work went on late into the evening and finished at around about 11.00 pm. After that the plaintiff and Mr. Dixon helped Mr. Hiney to cover his silage pit. When this was done at about 11.30 the three tractors were parked beside each other with their trailers attached in a field close to the silage pit. The plaintiff and Mr. Dixon left to go home.

4. Early next morning the plaintiff was phoned and given very bad news concerning his tractor. He rushed to the scene to discover that his tractor and those of Mr. Dixon had been totally destroyed by fire.

5. In due course these proceedings were issued by the plaintiff claiming from both defendants damages in respect of the loss of the tractor.

6. In this respect the quantum of special damages was agreed between the parties in the sum of €42,387.34.

7. In the trial the core issue was the cause of the fire.

8. The plaintiff through his witnesses and in particular his engineer Mr. Slack contended that the cause of the fire was an electrical fault in the area of a control panel to the right of the driver's seat resulting in the commencement of a "resistive" type of combustion which ignited into a fire within the closed locked cab of the plaintiff's tractor and from there spread to the fuel tanks and then up to the engine compartment and thereon, to engulf and consume the entire tractor. A moderate wind blowing diagonally across the three tractors from the plaintiff's tractor over to the Fiat 1580 ensured the spread of the fire to the two Fiats causing their total destruction as well.

9. Arising from this evidence the plaintiff contends that the cause of the fire as so proved meant that the New Holland tractor contained an inherent defect in its electrical system which rendered the tractor dangerously defective and unfit for its intended purpose and not of merchantable quality.

10. For the defendants evidence was given by Dr. Woods, an engineer, to the effect that the remains of the three tractors did not furnish any evidence which indicate any specific cause or seat of the fire. In particular he differed from Mr. Slack's opinion that the fire was caused by an electrical fault at or near the control panel on the right side of the driver seat. Specifically he said that the presence of globules at the end of copper wires in this area and evidence of high temperature damage to two connectors did not indicate "resistive" heating in these cables leading to combustion but was, rather the result of the fire itself, rather than its cause. Whilst Dr. Woods's evidence was to the effect that there was no evidence of the cause of the fire he was of the opinion that the other Fiat tractors were a much more likely or probable source of the fire having regard to the age and probable worn and brittle condition of the wiring in these two tractors. Dr. Woods did not advance any opinion to the effect that the fire was started maliciously although that explanation was pursued vigorously by Mr. Keane S.C. in cross examination of Mr. Slack.

11. A specific theory advanced by Mr. Keane S.C. was that the fire was started by a rag doused with an accelerant being placed behind a wheel up against the outside of the mudguard adjacent to the plate where the control panel referred to by Mr. Slack was located and hence if the fire did start there it could have been caused maliciously in this way. Dr. Woods agreed that this was a possible explanation of the fire.

12. A second theory pursued by Mr. Keane was that a miscreant, finding that the doors of the two Fiat tractors were not locked started the fire by igniting materials such as a rag or rags doused with an accelerant in the cabs of one or other of them. Both Dr. Woods and Mr. Stack acknowledged that this was a possibility.

13. Another theory advanced on behalf of the defendants was that even if the fire had started in the cab of the New Holland tractor, that because the cab was locked the fire would have self extinguished due to oxygen starvation because of the fact that the vents in the cab were at roof level and rising smoke from the fire would have prevented the entry of air thus causing the fire to self extinguish.

14. Evidence relating to the question of whether the fire was malicious was given by Detective Garda Farrelly. He attended at the scene on the morning of the fire and took samples which he sent to the Garda Technical Bureau for analysis.

15. The results of these tests as reported to him and his knowledge of the area caused Garda Farrelly to be satisfied that the fire was not started maliciously.

16. I am satisfied that the evidence does not support the conclusion that the fire was malicious. The theories advanced by Mr. Keane in this regard are not supported by evidence and in my view are unconvincing. I am inclined to the view that the fire was in all probability not started maliciously.

17. Mr. Slack gave evidence of finding debris on the floor of the cab of the plaintiff's tractor and of examining the layers of that debris. He said that in this debris he found plastics at the bottom and glass on top, and this, he said indicated that plastics in the cab burned first before the windows of the cab broke causing glass to fall to the floor of the cab. This meant that the fire occurred within the cab rather than coming from outside. If the fire had come back from outside, the glass would have broken first resulting in the glass being found at the bottom of the debris rather than at the top as was the case.

18. This evidence of Mr. Slack was not contradicted by Dr. Woods. I accept Mr. Slack's evidence in this regard. The consequence of this finding are decisive for the resolution of the issue of how the fire started. The undisputed evidence was that the cab of the plaintiff's tractor was locked. Thus I conclude that the fire was not started maliciously inside the cab of the Holland tractor. If the fire started within the cab of the plaintiff's tractor and was not started maliciously, having regard to the age of the tractor in my view it is highly probable the fire was started by an electrical fault in the cab. Mr. Slack's explanation of how this happened seems to me to be convincing, particularly in the light of the fact that Dr. Woods agrees that the two connectors showed evidence of exposure to higher temperatures than affected other connectors. I have come to the conclusion that it is probable that the fire did start in the manner described by Mr. Slack.

19. I am satisfied that the fire spread from the plaintiff's tractor to the other two driven to a significant extent by winds coming across the plaintiff's tractor and blowing diagonally in the direction of the two Fiats. The scorching of the grass on the right side of the Fiat 1580 tends to support the view that the fire was moved in that direction by the wind. So also does the extensive damage to the trailer behind the Fiat 980.

20. In the light of the finding that the fire did start in the cab of the plaintiff's tractor it would seem to me to be highly improbable that there would be a second seat of the fire and hence the theory that the fire should have self extinguished cannot be valid. Sufficient air must have been available for the fire to develop, be it from leaks from the underside of the tractor or from the vents in the roof to have enabled the fire to develop to the extent of breaking the glass in the cab, at which stage ample oxygen would have been available.

21. I am therefore satisfied that the fire was caused by an electrical fault in the cab of the New Holland tractor. It remains to decide whether the defendants have a liability for the damage so caused.

22. It was conceded that the plaintiff was not a "consumer" as defined in s. 2 of the Consumer Credit Act 1995, because the plaintiff purchased the tractor in the course of his business as a farmer.

23. It was submitted by Mr. Keane S.C. for the defendants that because the plaintiff was not a "consumer" he could not then be a "hirer" as defined in s. 2 of this Act, and if he was not a "hirer" then the agreement entered into by the plaintiff with the second named defendant was not a "consumer hire agreement" as defined in s. 2 of the Act and hence the plaintiff was not entitled to the benefit of the implied undertakings as to quality or fitness as contained in s. 76 of this Act.

24. It was further submitted by Mr. Keane S.C. that as there was no contract for the sale of goods as between the plaintiff and either of the defendants, because the only contract entered into was between the plaintiff and the second named defendant and that was simply a leasing agreement, the implied conditions and warranties as to quality and fitness contained in the Sale of Goods and Supply of Services Act, 1980 did not apply.

25. It was further submitted that the plaintiff had not given any evidence as to express warranties given to him by the first named defendant when he was acquiring the tractor, and therefore, even if the court found that the fire had been caused by an electrical fault in the tractor as contended for by the plaintiff, there was no breach of contract on the part of the first named defendant and as the agreement between the plaintiff and the second named defendant was a leasing agreement to which the Consumer Credit Act, 1995 did not apply, and as the agreement entered into between the plaintiff and the second named defendant for the lease of the tractor contained a clause at clause 8 which excluded any liability on the part of the second named defendant in respect of any liability in contract or tort, in respect of any defect in the tractor, be it a latent or apparent defect, no liability could attach to the second named defendant either.

26. Hence it was submitted that the plaintiff had failed to prove any breach of contract against either defendant.

27. For the plaintiff it was submitted that apart from the agreement between the plaintiff and the second named defendant there was a collateral agreement between the plaintiff and the first named defendant, whereby in consideration of the plaintiff entering into the leasing agreement with the second named defendant, the first named defendant agreed to sell the tractor to the second named defendant which was then leased to the plaintiff. It was submitted that as the agreement was for the supply of a new tractor it was necessarily to be implied that that agreement contained a condition that the tractor was of merchantable quality and fit for its intended purpose, and did not have dangerous defects.

28. In addition it was submitted that the implied condition contained in s. 13 of the Sale of Goods and Supply of Services Act, 1980 applied, and that the fire was caused by a defect in the tractor namely an electrical fault which rendered the tractor both dangerous and not of an merchantable quality.

29. It was further submitted that the occurrence of this defect in the tractor, having regard to the very young age of the tractor and the danger which it posed to the user of the tractor was a fundamental breach of the agreement between the plaintiff and the defendants.

30. The following statutory provisions are relevant to the issues to be decided.

The Consumer Credit Act, 1995.

"Section 2

"Consumer" means a natural person acting outside his trade, business or profession;

"consumer-hire agreement" means an agreement of more than three months duration for the bailment of goods to a

hirer under which the property in the goods remains with the owner;…

"hirer" means a consumer who takes, intends to take or has taken goods from an owner under a hire-purchase agreement or a consumer-hire agreement in return for periodical payments;"

The Sale of Goods and Supply of Services Act, 1980

"Section 13

(1) In this section "motor vehicle" means a vehicle intended or adapted for propulsion by mechanical means, including—

(a) a bicycle or tricycle with an attachment for propelling it by mechanical power, and

(b) a vehicle the means of propulsion of which is electrical or partly electrical and partly mechanical.

(2) Without prejudice to any other condition or warranty, in every contract for the sale of a motor vehicle (except a contract in which the buyer is a person whose business it is to deal in motor vehicles) there is an implied condition that at the time of delivery of the vehicle under the contract it is free from any defect which would render it a danger to the public, including persons travelling in the vehicle…."

31. I am satisfied that Mr. Keane is correct in his submission that the agreement entered into between the plaintiff and the second named defendant for the leasing of this tractor was not a "consumer hire agreement" as defined in the Act of 1995 because the plaintiff was not a "consumer" and therefore he could not be a "hirer" as defined in s. 2 of that Act. That being so, the plaintiff was not entitled to the benefit of the implied undertaking as to quality and fitness contained in s. 76 of that Act.

32. The contract between the plaintiff and the second named defendant was for the lease of this tractor and hence in my view it was not a contract for the sale of goods and hence the implied conditions as to quality and fitness contained in s. 13 of the Sale of Goods and Supply of Services Act, 1980 did not apply either.

33. There was no evidence of any warranties or representations on the part of the second named defendant as to the quality or fitness of this tractor and therefore it would seem to me that the plaintiff has failed to make out a case for breach of contract against the second named defendant. That being so it is not necessary to consider whether or not the exclusion clause in s. 8 of the agreement was effective to exclude any such liability.

34. The position of the first named defendant is somewhat different. The entire basis of the transaction is that the plaintiff went to the first named defendant to acquire a new tractor. Having selected the one he wished to acquire he then, for the purposes of this acquisition, entered into the leasing arrangement with the second named defendant.

35. In my view a necessary and unavoidable part of this transaction was the agreement of the first named defendant to sell the tractor to the second named defendant. This would not have happened or could not have happened without the agreement of the plaintiff to enter into the leasing agreement with the second named defendant.

36. I am satisfied that the commercial reality of this transaction dictates the existence of a collateral contract between the plaintiff and the first named defendant whereby the first named defendant agreed to sell the tractor to the second named defendant in consideration of the plaintiff entering into the leasing agreement with the second named defendant.

37. I am also satisfied that as this was a contract for the supply of new tractor, necessarily, there was implied into that contract between the plaintiff and the first named defendant a condition that the contract was of merchantable quality and free from defects which would render it dangerous or unfit for its intended purpose.

38. The existence of the defect in the electrical system of this tractor, was in my view, having regard to the age of the tractor a fundamental breach of that implied condition as to quality.

39. That being so I have come to the conclusion that the first named defendant was in breach of his collateral contract with the plaintiff, and is liable to the plaintiff in damages. These damages have been agreed in the sum of €42,387.34 and there will be judgment in favour of the plaintiff against the first named defendant for that sum.