

## THE HIGH COURT

[2001 No. 11420 P]

BETWEEN

PATRICK KANE

PLAINTIFF

AND  
**MASSEY FERGUSON (IRELAND) LIMITED**  
**THOMAS FLYNN AND SONS LIMITED AND**  
**AGRI CREDIT LIMITED**

DEFENDANTS

**Judgment delivered by Ms. Justice Irvine on the 20th day of December 2007**

1. The plaintiff in these proceedings is an experienced farmer and part time mechanic who resides at Gaulmoylestown, Mullingar. The first named defendant is a limited liability company involved in the manufacture of Massey Ferguson agricultural vehicles. The second named defendant is a limited liability company and is a dealer in agricultural equipment and is also an authorised agent on behalf of Massey Ferguson Limited. The third named defendant is a finance house that purchased the tractor the subject matter of this claim from the second named defendant and thereafter supplied the said vehicle to the plaintiff on foot of a lease agreement signed by the plaintiff on 18th January, 1998.

2. In December 1997 the plaintiff decided to acquire a new tractor from the second named defendant Company. According to the second named defendant, the plaintiff was anxious to take out on trial a demonstration model 6170 Massey Ferguson tractor which they had on their premises in December 1997. According to the defendants, Mr. Kane took this tractor out for a number of days to try it out and having expressed himself satisfied with its performance indicated his willingness to purchase the same subject to a number of modifications being carried out to meet his requirements. In particular the plaintiff wanted a larger set of wheels put on the tractor and further wanted agreement that the vehicle would not be registered until 1998. Consequently, the defendants carried out a service check on the vehicle and delivered it to the plaintiff in the middle of January 1998. The lease agreement signed by Mr. Kane is dated 18th January, 1998 and the invoice of the second named defendant dated 31st January, 1998.

3. The essence of the agreement entered into between the plaintiff and the second named defendant appears to have been that in consideration of the second named defendant accepting a trade in of the plaintiff's used Massey Ferguson tractor which it valued at £14,640 that the plaintiff would enter into a leasing agreement with the third named defendant in relation to the demonstration model 6170 Massey Ferguson tractor aforementioned subject to the terms and conditions set out in that leasing agreement dated 18th January, 1998. Hence, there was a collateral agreement between the plaintiff and the second named defendant whereby the second named defendant agreed to sell the demonstration model tractor to the third named defendant in consideration of the plaintiff entering into a leasing agreement with the third named defendant and also delivering up to the said second named defendant his own tractor which they had valued at £14,640. The balance of the purchase money was financed through the said lease agreement.

4. By plenary summons dated 12th July, 2001 the plaintiff instituted proceedings seeking (*inter alia*) damages for breach of contract, negligence, misrepresentation and rescission of the agreement just referred to on the basis that the tractor which was supplied to him was not fit for the purpose for which he had purchased the same. The plaintiff in his statement of claim pleaded that the tractor had multitudinous defects which required intervention on the part of the second named defendant and that in particular the loss of power of the vehicle whilst pulling a load or travelling uphill was such as to render the vehicle unsuitable for his needs. At that time the particulars of special damages referred to in the statement of claim identified a potential claim for loss of use of the vehicle in region of £10,000.

5. The first and second named defendants delivered a defence to the within proceedings on 28th February, 2002 wherein they denied any breach of contract, negligence, misrepresentation or breach of warranty and further contended that if the plaintiff had suffered any loss the same was due to his own default. The first and second named defendants particularly relied upon an assertion that any fault found with the tractor was a result of the failure on the part of the plaintiff to maintain and service the tractor or alternatively was due to either the plaintiff's failure to change the oil filter or the use by him of contaminated fuel.

6. The third named defendant in its amended defence pleaded a full defence to the plaintiff's claim and has also submitted that the plaintiff did not deal as a "consumer" within the meaning of the Sale of Goods Act, 1980 so as to entitle him to maintain any valid cause of action against such defendant. The said defendant also denied that the plaintiff was entitled to the benefit of the terms of the Consumer Credit Act, 1995 which once again does not benefit any person unless they fall within the definition of a "consumer" within the meaning of s. 2 thereof.

7. In addition to the usual notices for particulars and replies thereto, interrogatories and a notice to admit facts were delivered. In the notice to admit facts the plaintiff admitted he was a farmer and part time mechanic and that he purchased his tractor in the course of his business as a farmer and so as to enable him to carry out his business as a farmer.

8. Prior to the institution of the within proceedings by the plaintiff, correspondence setting out the respective positions of the plaintiff and first and second named defendants was exchanged. Much of the dealings as between the parties are referred to in a detailed letter sent by the second named defendant to the plaintiff's solicitors on 29th June, 2000. This letter was in response to a series of letters from the plaintiff's solicitors where he firstly, by letter dated 3rd April, 2000 sought the replacement of what he described as a defective engine or alternatively a new replacement tractor. In a subsequent letter dated 23rd June, 2000 a replacement tractor with an undertaking to compensate the plaintiff for all losses incurred was sought.

9. The second named defendant's response to these demands as per their letter of 29th June, 2000 contained an assertion that the plaintiff's full two year warranty had been voided due to his failure to have his tractor serviced with an approved Massey Ferguson dealer at the frequency of one service for every 250 hours of use.

10. The court has carefully perused the contractual documents in this case. Indeed, the only written contract is the lease agreement entered into as between the plaintiff and the third named defendant. The agreement as between the plaintiff and the second named defendant is a collateral contract and is one which is not in writing. The only two documents evidencing the terms of that collateral agreement are the Invoice bearing No. 190005 addressed to the plaintiff and the Installation and Registration Certificate dated 20th January, 1998. This latter document contains an acknowledgement by the plaintiff that he had been instructed in the operation and routine servicing of the vehicle with the only mention of a warranty being that confined to the possibility of an additional third year warranty on terms set out in the warranty manual.

11. In the foregoing circumstances the court discounts any assertion made by the first and/or second named defendants that the plaintiff contractually bound himself to have his tractor serviced by an approved Massey Ferguson dealer at the intervals contended for by these defendants.

12. Notwithstanding the position adopted in the correspondence to the effect that the plaintiff's warranty was invalidated by his own behaviour, the second named defendant nonetheless carried out a number of repairs to the vehicle, including:

(a) Recalibration of the injectors in 1999 having, according to the second named defendant's letter of 29th June, 2000 "diagnosed a problem with the injectors" which they associated with client's reported lack of power.

(b) Replacement of an apparently "juddery clutch" in November 1999 and recalibration of the tractor pump which, according to the second named defendant's letter of 29th June, 2000 was "in fact producing more than it should have been."

(c) In February, 2000 the second named defendant changed the fuel injectors even though it was their perception at the time that the problem with the injectors was as a result of lack of maintenance and the use of contaminated fuel.

(d) In March, 2000 a new injector pump to the value of £1,500 was fitted at no charge to the plaintiff and the tractor returned to the plaintiff with the second named defendant believing that the tractor was in good working order and fully conforming to its expected horsepower.

13. At all stages in the course of the evidence the plaintiff maintained that he complained about the level of power available from this particular tractor from March 1998 onwards and he disputed the contention of the second named defendant that his problems in relation to the power output from this vehicle did not start until February 1999.

14. There is really only one issue in this particular case and that is whether or not the vehicle supplied to the plaintiff was as suggested by his counsel in his opening of his client's case, a "Monday tractor" which simply failed to perform in accordance with its specifications or alternatively whether the vehicle, in accordance with the evidence the first and second named defendants at all times operated to the manufacturer's specifications but did lose power a year after it was purchased due to either a lack of servicing and/or the use by Mr. Kane of contaminated fuel and/or a failure to change the oil filter.

15. Unfortunately, in this particular case, there is very little objective evidence which can be relied upon by the court to gainsay whether this tractor was of merchantable quality as is contended for by the defendants.

16. In terms of the power available from the Massey Ferguson tractor the subject matter of these proceedings the court has had the benefit of the evidence of Mr. Kane and other witnesses regarding the power produced by this vehicle under a variety of circumstances. Mr. Kane is a farmer of many years experience and I am quite satisfied that having owned a significant amount of heavy machinery over the years including a number of tractors that he would be well aware of whether or not his tractor was performing to the manufacturer's specifications. Mr. Kane was adamant in his evidence that when driving this tractor uphill or attaching a load that the vehicle lost power to the point that it became unfit for the purposes for which he purchased it. He states that he would expect to do 750 hours work per year with his tractor but advised the court that having purchased the vehicle on 31st January, 1998 he had only recorded 947 hours work as of May 2000.

17. In addition to the evidence of Mr. Kane regarding the performance of the tractor I have also heard evidence from Mr. Paul Harrington of John Kane Limited, Automotive Engineers and Assessors. He road tested this vehicle in May 2000 and found that the tractor lost considerable power particularly once the tractor was faced with any incline. He reported the tractor losing 1,200 revs from its expected 2,300 rpm on such an incline. The court further heard evidence regarding the performance of the tractor from a Mr. Owens who has a substantial concrete and farm machinery business. Mr. Owens described his business as having approximately 100 vehicles at any one time and how one of his 90hp tractors would have left the plaintiff's 100hp engine "for dead".

18. In addition to the aforementioned evidence the court also received evidence via Mr. Harrington regarding a Dyna test carried out on the tractor at the garage of D & E McHughes on 29th May, 2000 and also a similar test carried out at the request of the defendants in March 2001. Mr. Harrington has asked me to accept the findings of the Dyna test prepared on the plaintiff's behalf which showed a significant reduction in the torque reserve of the engine. On the other hand I am advised by the defendant's experts, including Mr. Williams, who was the inventor of the Dyna test, to conclude that the plaintiff's test results cannot be relied upon. Mr. Williams in his evidence took me through the test carried out on behalf of the first and second named defendants on 1st March 2001. He advised me that the test conditions are as specified in the document produced to the court save that one input figure i.e. that of the rated speed of the vehicle which was entered by the operator, should have read 1,100rpm rather than 1,055rpm. Re-running the calculations with this amended input he stated would produce a torque reserve result of approximately 26% which would be well within the manufacturer's specifications and he advised me that this figure should replace the 10.9% figure in the printed report.

19. Mr. Williams also advised the court that looking at the Dyna test results carried out at the D & E McHughes Garage on behalf of the plaintiff that the documentation establishes that the engine was never run at maximum power during the test and this is why the torque backup ratio was reported as being as low as 6.8%.

20. The court is effectively asked to elect between the Dyna test results of 1st March, 2001 when amended in the manner suggested by Mr. Williams and the evidence given to the court by three individuals, experienced in agricultural machinery, that this particular vehicle did not perform as it ought to have performed. The defendant's test results are less than satisfactory having regard to the evidence of Mr. Williams that one incorrect input figure has led to a false recorded torque reserve of 10.9% rather than 26% which he states would have been produced had the correct "rated speed" been entered by the operator. Further, Mr. Flynn who carried out this test on behalf of the defendants had no specific recollection of the same and consequently the admissibility of these results, even if they were accurate, should not strictly speaking be permitted. It is also somewhat disarming that the first and second named defendants, in the face of this test results, which certainly suggested that the vehicle was operating far below an acceptable level, advised the plaintiff in a letter of 29th June, 2000 at para. 6 that the tractor came "well within the manufacturer specifications for power". The test result, on the face of the print out, certainly did not suggest that this was so.

21. Mr. Flynn, on behalf of the first and second named defendants gave detailed evidence to the court as to his dealings with the plaintiff regarding this tractor from the date of its purchase. Mr. Flynn was adamant that he received no complaint regarding this tractor until February 1999 notwithstanding the fact that he saw the plaintiff on many occasions regarding other agricultural machinery matters. Mr. Flynn indicated that he had sold very many tractors belonging to this particular series and that none of the other tractors had the same problems with power as that experienced by Mr. Kane with his tractor. From this fact the court was

asked to determine that it was Mr. Kane's failure to use clean fuel and adequately maintain this tractor that led to its lack of power. On the other hand Mr. Flynn maintained that at all times when the vehicle was checked it was not lacking in power and consistently performed to the manufacturer's specifications.

22. Mr. Flynn's evidence regarding the performance of the tractor when tested by his garage seemed to be at variance with the correspondence wherein the plaintiff solicitors were advised as to the extent of the repairs carried out on the vehicle, the amount of labour involved in such work and the cost of the parts replaced.

23. Mr. Flynn gave evidence that he did absolutely everything possible to appease Mr. Kane including giving him a replacement tractor whilst he was investigating the alleged lack of power in the tractor concerned and that all repairs and replacement parts were carried out for free. Mr. Flynn also indicated to the court that he exerted great pressure on Messrs Massey Ferguson to offer the plaintiff a new engine and he said that he had great difficulty convincing Massey Ferguson to offer a new engine given that he could not provide them with any evidence that the original engine was defective. However, eventually Mr. Flynn found himself in a position of being able to offer the plaintiff a new engine or alternatively a trade in against a newer demonstration model Massey Ferguson tractor which had more power than the one he had purchased, had air conditioning and bigger wheels subject to an additional payment of £6,000 plus VAT.

24. At the end of the day the court has to conclude:-

(a) Whether or not the tractor sold to the plaintiff in January 1998 did under perform so as to fail to perform to the specifications expected of that model of tractor.

(b) If it did so under perform at any period following its purchase whether or not the same was defective from the start or whether the lack of power was as a result of a failure to service the vehicle on the part of the plaintiff, his use of contaminated diesel and/or a failure to change the oil filters.

25. Insofar as the first issue is concerned the court prefers the evidence of the plaintiff, Mr. Owens and Mr. Harrington to the effect that the vehicle did not perform as expected for the specifications of this particular model. The court finds the defendant's assertions that this particular vehicle at all times performed in accordance with the manufacturers representation to be in too much conflict with the extent of the repairs, labour and investigations carried out by them upon this tractor in the two years subsequent to its sale.

26. In relation to the second issue the court finds the defendant's assertion regarding the failure on the part of the plaintiff to service the tractor, his alleged use of contaminated fuel and/or his alleged failure to change his oil filter to be wholly unsatisfactory and prefers the plaintiff's evidence and that of Mr. Harrington in relation to the same.

27. On the assumption that the tractor was serviced, albeit not by a Massey Ferguson dealer, the only other explanation for the tractor's failure to perform is that Mr. Kane brought about his own misfortune by using contaminated fuel in this tractor and/or failed to change the oil filters. The court does not believe that this assertion, as a matter of probability can be accepted. Firstly, the defendants had every opportunity to obtain for the court evidence that the fuel being used by Mr. Kane in this vehicle was contaminated. The letter from the second named defendant dated 29th June, 2000 refers twice to suspicions that contaminated fuel was being used. Yet no satisfactory evidence of this fact was produced to the court. No sample was taken from the fuel tanks on the Plaintiff's premises. Neither was an adequate sample taken for the purpose of testing on any of the many occasions when the tractor was in the second named Defendant's garage for investigation or repair.

28. The main evidence adduced in support of the defendant's assertion that the plaintiff used contaminated fuel was a photograph of a tank which is rusty and was taken at the plaintiff's premises many years after the events in issue in these proceedings. Notwithstanding the fact that the second named defendant was suspicious that the plaintiff's tank had developed an internal rust problem which was causing problems for Mr. Kane's tractor they, the second named defendants, continued to supply and deliver diesel to these tanks without any complaint or written warning knowing full well that this supply was being used for the tractor which was giving trouble. Further, the plaintiff apparently rented a tractor from Mr. Owens which he used for in excess of 300 hours and this vehicle should, if Mr. Flynn's assertion was correct, have similarly failed to perform by reason of the use of contaminated fuel. Indeed, any vehicle being used by Mr. Kane should have encountered difficulties if the diesel supply was contaminated by rust as is alleged by the second named defendant.

29. The court must also wonder why the vehicle traded in by Mr. Kane against the purchase of the tractor, the subject matter of these proceedings was not similarly damaged by contaminated fuel. Further, if it was the second named defendant's *bona fide* belief that all of the plaintiff's problems with this tractor were as a result of contaminated fuel, furnishing Mr. Kane with a new engine or indeed a new tractor was not going to resolve Mr. Kane's difficulties and hence one wonders why such offers would have been made by the defendants.

30. In addition to a foregoing the court noted the evidence of Mr. Harrington who stated that as far as he was concerned the fuel was not contaminated and that he did not find any fault with the oil filters on the tractor and that he had checked the same at the time of his inspection.

31. It seems inconceivable to this court that having been made aware of the suggestion in Mr. Flynn's letter that contaminated fuel might have been the cause of the lack of power to the machine that Mr. Kane would have ignored this assertion and deliberately put contaminated diesel into his vehicles. Mr. Kane had invested significant funds in the purchase of this new Massey Ferguson tractor and it seems wholly unlikely to the court that he would have continued to use contaminated fuel if this fact was brought to his attention.

32. In all of the foregoing circumstances the court accepts that there was an ongoing problem with the plaintiff's tractor from early 1998 which required him to bring the tractor back to the second named defendant for regular repair. The court accepts that this lack of power was not brought about by a lack of servicing and the court accepts the plaintiff's evidence and that of Mr. Owens that he serviced this tractor albeit perhaps not rigidly following upon each 250 hours of use. The court is further satisfied that the plaintiff did not use contaminated diesel in this tractor's engine.

33. The court therefore concludes that the second named defendant supplied to the plaintiff a vehicle which was not fit for the purpose for which he leased the same from the third named defendant. The court concludes that the tractor was not of merchantable quality by reason of some defect in its manufacture and does not ascribe the loss of power in this vehicle to any inappropriate intervention on the part of the second named defendant whom the court commends for its efforts to appease Mr. Kane, having regard to the circumstances in which he found himself. However, this does not impact upon the liability of the second named defendant on

foot of the implied warranties that it gave the plaintiff at the time he entered into his leasing agreement with the third named defendant. Consequently, the court must find liability jointly and severally as against the first and second named defendants.

34. Insofar as the third named defendant is concerned, the court does not propose to restate the law in relation to the Sale of Goods Act, 1980 and the Consumer Credit Act, 1995 in relation to "consumers" who are defined in both Acts so as to exclude certain categories of persons including those who enter into contractual relationships in the course of their business from certain statutory rights. The position in relation to the law in this issue is, in the opinion of this court, correctly stated by O'Neill J. in *Patrick G. Flynn v. Dermot Kelly Limited and New Holland Finance (Ireland) Limited* [2007] IEHC 103. This court concludes that the agreement between the plaintiff and the third named defendant for the leasing of this Massey Ferguson tractor was not a "consumer hire agreement" within the meaning of the Consumer Credit Act, 1995 as the plaintiff was hiring the goods for business use. This fact is further confirmed by the plaintiff in the terms and conditions which are attached to the lease agreement dated 18th January, 1998. For these reasons the Court holds that the Plaintiff has no claim against the Third named defendant.

#### **Damages**

35. In the course of the trial, evidence was led to the effect that the plaintiff had failed to make a number of payments on foot of the lease agreement entered into with the third named defendant. This being so, the court the Court needs to be appraised of the rights, if any, being asserted by the Third named Defendant regarding ownership of the tractor and /or the extent of any liability they contend remains outstanding by the Plaintiff as a condition precedent to his entitlement to ownership thereof. The Court is therefore not in a position at present to deal with the issue of damages and will need to hear all parties regarding these matters. For the purposes of dealing with the issue of damages, the court will also require evidence as to:-

1. The location of the tractor, the subject matter of the agreement and its current value.
2. The present day cost of the most similar model of Massey Ferguson tractor to that the subject matter of this claim.

36. Consequently, the court will deal with the issue of quantum at a time to be agreed between the parties who should, if at all possible, to avoid further unnecessary costs endeavour to reach agreement on the above matters with fairly immediate effect.

37. The Court will deal with the Costs of all parties after the issue of Damages has been disposed of.