37/75

SUPREME COURT OF VICTORIA

ASSOCIATED SECURITIES FINANCE LTD v ELLIS & ANOR

Crockett J

3 October 1975

CIVIL PROCEEDINGS – MISREPRESENTATION – RIGHT TO RESCIND – KNOWLEDGE OF RIGHT TO RESCIND BEFORE POSSIBILITY OF AFFIRMING AGREEMENT.

E. agreed to purchase a motor car by Hire Purchase agreement relying on a representation that the vehicle was mechanically sound and would give trouble-free motoring. The car later revealed considerable defects, including a faulty alternator and a detached piston. The only defect that, on the evidence, could be shown to be present at the time of the representation was that the engine block had been set too close to the radiator as a result of previous repairs — this caused the fan to slice the radiator when braking. Because E. continued to use the car after learning of this defect, the Magistrate held that he had affirmed the contract and waived his rights — as such he had lost his right to rescind. E. later returned the vehicle to Assoc. Securities where after auction *etc*, a claim was made against him for an adjustment balance under the HP agreement.

HELD: Remitted to the Magistrates' Court for further hearing and determination.
1. The evidence that was accepted by the Magistrate conclusively required a finding of a right to rescind following the radiator incident, on the ground that the car was not in a roadworthy or good mechanical condition, and that acts relied upon as affirmation could not be treated as such because there was no evidence to show that when they were performed the applicant had an awareness of his right to rescind. Further, that when he did receive that knowledge, he engaged in no acts that could constitute, or could be treated as acts of affirmation. Indeed, he had by that stage returned the car to the complainant company.

2. The evidence compelled a finding of an effective rescission in equity upon the establishment of an innocent misrepresentation unless there was to be found in the evidence conduct by the applicant of such a character as in the circumstances would have precluded him from asserting that he had not affirmed the contract. This must be conduct which was adverse to the complainant. His conduct in repairing the vehicle and then continuing to drive it could not plainly be so characterised as conduct which would be adverse to the complainant preventing rescission.

3. Therefore the only conclusion correctly open in law to be made by the Magistrate was that rescission of the contract had occurred, thus relieving the applicant of liability pursuant to the agreement so that the complainant's case failed.

CROCKETT J: ... Dealing with this submission, I look first at the representations relied upon by the applicant. Those consisting of the statements that the car 'would cause no trouble' and 'would give trouble-free motoring' are promises as to what the future might hold with relation to the applicant's use of the car, should he buy it.

They amount thus to no more than a belief. A belief is a state of mind, and of course can be treated as a fact for the purpose of showing that such fact was a representation inducing entry into an agreement. However, there is no evidence to show that such a belief held at the time of making the statement was not honestly held. *Ex hypothesi*, any misrepresentation constituted by a falsely stated state of mind would have to be a fraudulent misrepresentation and fraud was expressly disclaimed in the present case.

Thus the representation sought to be relied upon must be that the car was a good and roadworthy car and was mechanically sound. To show that that representation was false, the applicant would have to establish that at the time of the making of the representation, and not simply at some later stage, the car was not in fact mechanically sound, or roadworthy. There is no evidence to show that at the time of the making of the representation the faulty alternator possessed the defects that caused its breakdown. Similarly there is no evidence to show that the piston defect was present in the car at the time of the making of the representation. It must be

remembered that the car was not a new car. If it had been, possibly the inference to be irresistibly drawn from the occurrence of such defects only about three months after the acquisition of the car was that the particular components in question must have been faulty at the time the representation was made and the car acquired. However, with a car which had done nearly 80,000 miles, as this car admittedly had, such an inference was not one which the Magistrate was bound to draw. In my view it was open to him to reach the conclusion that he did, that with respect to those particular defects, there was no evidence to show that they afforded demonstration of the falsity of the representation made concerning the roadworthiness of the vehicle.

It was suggested by counsel for the applicant that the offer of the three-month warranty as to road-worthiness should be used for the purpose of interpreting the representation as meaning that the car would remain free of defects for three months. Even if this were a permissible method of construing the effect of the misrepresentation, which I very much doubt, the fact is that the piston trouble occurred after the effluxion of a period of three months from the entry into the agreement.

I think therefore that the Magistrate was correct in confining attention to the defectiveness of the car with relation to the vulnerability of the radiator to damage from the fan.

The maker of the representation was, of course, not the complainant, However, by virtue of s6(1) of the *Hire Purchase Act* 1959, a representation made to a prospective hirer by a dealer in connection with, or in the course of negotiations leading to, the entry into a hire purchase agreement, shall confer on the hirer as against the owner, i.e. the hire purchase company, the same right to rescind the agreement as the hirer would have had if representation had been made by an agent of the hire purchase company.

The defect discovered with relation to the abnormal juxtaposition of the radiator to the fan was a defect which undoubtedly established the falsity of the representation concerning the good mechanical condition of the vehicle. That defect in the car was plainly shown by the evidence to have been present when the representation was made and a finding to such an effect is implicit in the reasons expressed by the learned Magistrate.

The real question then is whether the Magistrate was correct in reaching the conclusion that after the falsity of the representation in that respect came to the knowledge of the applicant he affirmed the contract, or, whether in reliance upon such representation he rescinded it.

The Order Nisi to review the Magistrate's order was granted, so far as material, upon the ground first that the Magistrate was bound to find that the defendant was entitled to rescind. As I understand the evidence, which has been demonstrated to me was accepted by the Magistrate, and the conclusions he drew from it, the Magistrate did in fact determine that there was vested in the applicant an entitlement to rescind.

Next, it was said that the Magistrate was bound to find that the defendant in fact rescinded the agreement at the time and by reason of his return of the vehicle to the complainant company. Finally it was said that the Magistrate was wrong in finding a waiver by the applicant of his right to rescind and his having affirmed the agreement.

The evidence plainly discloses that after the radiator mishap the applicant engaged in acts which could be treated as acts of affirmation. These were having the radiator repaired and continuing thereafter to drive the car daily and use it as though it were still his own for a period which appears to have been approximately one month,

The Magistrate has equally clearly so treated such acts as acts of affirmation and has concluded that in consequence the subsequent return of the vehicle could not be used as an act of disaffirmance, the right to rescind having been then lost.

However, faced as the applicant was after the radiator mishap, with a right to elect either to rescind or to affirm, his exercise of that election to be effective for the purpose of amounting to an affirmation of the contract must be made with a knowledge of his right to rescind. Moreover, as it is the complainant which, upon having had proved against it the existence of a false representation

giving a right to rescind, is asserting the loss of that right by affirmation, it is the complainant which carried the burden of establishing not only acts of affirmation but that such acts were performed with knowledge at the relevant time on the part of the applicant that he had in law a right to rescind the agreement.

Although these principles of law were apparently discussed with him, regrettably the Magistrate has made no reference to this aspect of the matter. The principles to which I have referred are to be found in a number of cases. It is sufficient, I think, for me to do no more than to refer to *Coastal Estates Pty Ltd v Melevende* [1965] VicRp 60; [1965] VR 433 – a decision of the Full Court.

There is some evidence which bears upon this issue. The applicant himself said in evidence that he was very upset as a result of the radiator mishap and consulted the St Kilda Legal Aid Service where, he said, a Mr Hunz told him, 'I should cease payments on the car'. The applicant says that he did then cease such payments but having heard nothing further over a period of four weeks, he again consulted the same office only to be told that he had no legal rights and should resume payments to the complainant. In cross-examination on this matter by the solicitor for the complainant, the applicant said that until he had seen his present solicitors, he never regarded himself as having any rights against the complainant company, and the applicant's wife said that at the Legal Aid Service (where apparently she attended with her husband) there was no discussion at the time of the first visit concerning the return of the car.

In that state of the case the least I would have thought would be required to be done would be to remit the matter to the Magistrate in order to have him make a specific finding as to whether in the time between the happening of the radiator mishap and, the return of the vehicle, which was undoubtedly evidence of a purported rescission of the agreement, the applicant did have an awareness of his right to rescind the contract. However, I have been urged to take the view that on the evidence as it stands, the only conclusion that would be open to the learned Magistrate would be that the complainant has not discharged its burden of establishing knowledge or awareness by the applicant of his right to rescind at the time he engaged in the acts which have been relied upon as acts of affirmation. With some hesitation I have concluded that I should take such a view.

The only evidence that suggests knowledge of rights is a statement by a lawyer not to make additional payments. This, in my opinion, falls too far short of acquainting the applicant with what is involved in the concept of rescission, involving as it does the return of the car and the making of such pecuniary adjustments as are necessary to achieve restitution on both sides, in addition to a release from the necessity to meet further periodic payments. Particularly, when that evidence is taken in conjunction with the other passages to which I have referred, does it seem to me that it falls too far short of enabling a court to reach an affirmative finding of an awareness of his rights at the material time when the burden of establishing possession of such knowledge rests, as it does, upon the complainant.

The result is that I have reached the conclusion that the evidence that was accepted by the Magistrate conclusively requires a finding of a right to rescind following the radiator incident, on the ground that the car was not in a roadworthy or good mechanical condition, and that acts relied upon as affirmation cannot be treated as such because there is no evidence to show that when they were performed the applicant had an awareness of his right to rescind. Further, that when he did receive that knowledge, he engaged in no acts that could constitute, or could be treated as acts of affirmation. Indeed, he had by that stage returned the car to the complainant company.

The result is that the evidence compels a finding of an effective rescission in equity upon the establishment of an innocent misrepresentation unless there is to be found in the evidence conduct by the applicant of such a character as in the circumstances would preclude him from asserting that he had not affirmed the contract. This must be conduct which is adverse to the complainant. His conduct in repairing the vehicle and then continuing to drive it cannot plainly, in my view, be so characterised as conduct which would be adverse to the complainant preventing rescission. Despite an unawareness of his rights, conduct would be adverse conduct where the car was badly damaged by some act of the applicant himself, or had been disposed of by a sale. It seems to me, therefore, that the only conclusion correctly open in law to be made by the Magistrate

was that rescission of the contract had occurred, thus relieving the applicant of liability pursuant to the agreement so that the complainant's case must fail.

It would be necessary, however, for a determination to be made as to what is proper to be done by way of restitution following upon rescission of the contract in addition to the return of the vehicle which has already occurred. For this purpose, it seems to me that it is necessary that the matter he remitted for further consideration by the Magistrate and a receipt of evidence; if necessary, by him from whatever party or parties may wish to lead evidence on this matter.
