21/03; [2003] VSC 281

SUPREME COURT OF VICTORIA

WIEGAND v TSOLAKKIS

Balmford J

28 July, 4 August 2003

CIVIL PROCEEDINGS – CONTRACT FOR SALE OF MOTOR VEHICLE – ROADWORTHY CERTIFICATE GIVEN TO PURCHASER AT TIME OF SALE – BOTH PARTIES BELIEVED AT THE TIME THE VEHICLE TO BE ROADWORTHY – SUBSEQUENT CLAIM BY PURCHASER FOR DAMAGES FOR RECTIFICATION OF THE VEHICLE PLUS OTHER COSTS – FINDING BY MAGISTRATE THAT VEHICLE NOT ROADWORTHY AT TIME OF SALE – FINDING BY MAGISTRATE THAT AN IMPLIED CONDITION OF SALE EXISTED THAT VEHICLE BE ROADWORTHY – ORDER BY MAGISTRATE ON CLAIM – WHETHER MAGISTRATE IN ERROR.

T. bought a vehicle from W. A current roadworthy certificate was given to the purchaser and both parties believed that the vehicle was roadworthy at the time of the sale. Some time later, problems developed with the vehicle and T. took action in the Magistrates' Court to recover the cost of rectification of the vehicle plus insurance thrown away plus the assessor's fee. On the hearing, the magistrate accepted that there was an implied condition in the contract of sale that the vehicle be roadworthy, found the condition breached and made an order for the amount claimed plus costs. Upon appeal—

HELD: Appeal allowed. Order set aside.

1. For a term to be implied into a contract, the following conditions must be met:

(1) the term must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that 'it goes without saying';

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract.

***BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [1977] HCA 40; (1977) 16 ALR 363; (1977) 45 LGRA 62; (1977) 52 ALJR 20; 32 ALT 41; (1977) 180 CLR 266, applied.**

2. In the present case, the circumstances did not match the criteria set out above. The vendor would not have regarded it obvious that he would warrant the accuracy of the roadworthy certificate. In the circumstances, there was no implied term in the contract for sale of the vehicle to the effect that the vehicle be roadworthy. Accordingly, it was not open to the magistrate to hold that there was such an implied term in the agreement.

3. The magistrate's reasons did not explain the basis on which the figures contained in the order were calculated. There was no evidence of the amount of the assessor's fee; no allowance was made for the sum of $210 which had been paid by the vendor to the purchaser in respect of one item of damage which was admitted; and no allowance was made for a number of items in the purchaser's claim which were stated in evidence to be the costs of repairs which were unrelated to the restoration of the vehicle to a roadworthy condition. Accordingly, it was not open to the magistrate to have made the order for the sum claimed.

BALMFORD J:

Introduction

1. This is an appeal on a question of law pursuant to section 109 of the *Magistrates' Court Act* 1989, from a final order of the Magistrates' Court at Heidelberg, whereby it was ordered that the appellant ("the vendor") pay to the respondent ("the purchaser") the amount of $5,578.40 together with $603.50 interest and $6,393 costs.

2. On 13 November 2001 the purchaser bought from the vendor for $12,600 a 1985 model Cherokee Jeep motor vehicle. A roadworthy certificate in respect of the vehicle had been obtained

by the vendor on the previous day. A few days after the sale problems arose with the vehicle, and after some time and further problems, the purchaser initiated proceedings in the Magistrates' Court on 18 March 2002.

3. At the outset of the hearing before the magistrate the purchaser's claim was amended to a claim for damages only, in the sum of $5,578.40, on the basis that this was the cost of rectification of the vehicle plus insurance thrown away plus assessor's fee. Counsel for the purchaser submitted, and the magistrate accepted, that there was an implied condition of the contract of sale that the vehicle be roadworthy. The magistrate found as a fact that the vehicle was not roadworthy, although both parties had thought that it was roadworthy at the time of the sale. As this was a breach of what she had found to be an implied condition of the contract, she ordered that the vendor pay to the purchaser the amount claimed, together with interest and costs as set out at [1] above.

4. On 31 March 2003 Master Wheeler found the following two questions of law to be raised by the appeal:

> 1. It being common ground that at the time of the sale of the vehicle a then-current Certificate of Roadworthiness in respect of the vehicle was given by the Appellant to the Respondent and the Magistrate having held that both parties believed at that time the vehicle to be roadworthy, was it open to the learned Magistrate to hold that there was an implied term in the agreement for the sale of the vehicle that the vehicle be in fact roadworthy?
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> 2. On the whole of the evidence was it open to the Magistrate to find that the Respondent's damages were in the sum of $5578.40?

An implied term?

5. Mr Hanson, for the vendor, submitted that the magistrate was wrong in law in finding that there was an implied condition of the contract that the vehicle be roadworthy. He noted that there was no suggestion that there was any statutory provision implying any such condition. He referred to the judgment of Mason J (with whom Stephen J agreed) in *Codelfa Construction Pty Limited v State Rail Authority of NSW*[1], adopting the passage from *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*[2] where the Privy Council summarised as follows the conditions necessary to ground the implication of a term into a contract:

> (1) [The term] must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that 'it goes without saying';
>
> (4) it must be capable of clear expression;
>
> (5) it must not contradict any express term of the contract.

6. The submission of Mr Hanson was that for a term to be implied all of those conditions must be met, and that was not the case here. He referred to the statement of Mason J in *Codelfa*[3] that "For obvious reasons the courts are slow to imply a term".

7. As to the requirement that the term must be "reasonable and equitable" he submitted that if such a term were implied, there would be, in effect, a contractual obligation on the vendor to warrant the accuracy of the certificate. From the expert evidence called by the parties, it was clear that experts differ as to whether particular items are relevant to roadworthiness, and whether such items, in a particular case, satisfy the tests required for roadworthiness. He submitted that it was not reasonable or equitable to expect a seller of a vehicle, who was not an expert mechanic, to be in a position to warrant such matters.

8. He pointed out that the purchaser had had the opportunity to have the vehicle inspected by an expert before completion of the purchase; he had in fact relied on his own expertise and that of a mechanically skilled friend. He referred to the decision of Eames J in *Intrac (Sales) Pty Ltd v Riverside Plumbing & Gas Fitting Pty Ltd*[4] where his Honour expressed the view that, although

the pleadings rules applied with lesser strictness in the Magistrates' Court than in higher courts, there remained the requirement to spell out the precise representation on which the claim was based. In this case there was no claim of misrepresentation, fraud, deceit or misleading or deceptive conduct made against the vendor; the only claim pleaded was for breach of contract. In all the circumstances, the implication of a term that the vehicle be roadworthy was neither reasonable or equitable.

9. Mr Hanson noted that the magistrate had not dealt with the question as to whether the implication of such a term was necessary to give business efficacy to the contract. In his submission there was no such necessity. The parties had expressly agreed as to the subject matter of the contract, the price, and the delivery of the vehicle with a certificate of roadworthiness, supplied at the time of sale.

10. As to the implication of the term being "so obvious that it 'goes without saying'", that requirement was memorably described by MacKinnon LJ in the English Court of Appeal in *Shirlaw v Southern Foundries (1926) Ltd*[5] in the following terms:

> *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course'.

Whatever the purchaser might have said in that situation, Mr Hanson submitted that it could not be assumed that the vendor would have regarded it as obvious that he accept the additional burden of warranting the accuracy of the certificate of roadworthiness.

11. Mr McDermott, for the purchaser, submitted that *Codelfa* and *BP Westernport* were relevant only to large commercial contracts, and not to a minor and personal transaction such as the sale of a motor vehicle. However, he cited no authority for that proposition, and I would have difficulty in accepting it.

12. He submitted that there was an express condition of the contract between the parties that the vehicle was roadworthy. However, the evidence which he cited for that proposition was the affirmative answer by the vendor to the question "You presented [the roadworthy certificate] to [the purchaser] as proof of the fact that the vehicle was roadworthy?". That answer does not seem to me to go as far as he claimed. Further, I note that there is no suggestion in the affidavit of the vendor in support, or in the magistrate's reasons for her decision, that there was any claim by the purchaser of an express condition in the contract that the vehicle was roadworthy. No answering affidavit was filed, and it must be assumed that the matters deposed to by the vendor were accepted by the purchaser.

13. Mr McDermott expressed the view that the decision of the magistrate turned on questions of fact, rather than law, and the question as to the existence of an implied term was not in issue below. However, that submission is not consistent with the magistrate's reasons for decision; she made findings on disputed questions of fact, but then described the question as to the implication of a term as "the main question remaining", and proceeded to decide that question. Further, the vendor deposes in his unchallenged affidavit in support that the plaintiff claimed at the outset of the hearing that there was such an implied term.

14. Having considered the matter, I accept the submissions of Mr Hanson which I have set out at [5] to [10] above, to the effect that the circumstances do not match the criteria set out in *BP Refinery (Westernport)* and *Codelfa* for the implication of a term into a contract. In particular, I cannot find that the vendor would have regarded it as obvious that, in effect, he would warrant the accuracy of the certificate of roadworthiness. Thus I find that, in all the circumstances of this case, there was no implied term in the contract for sale of the vehicle to the effect that the vehicle be roadworthy. The answer to the first question found by the Master to be raised by the appeal is accordingly No. I should emphasise that I have reached that decision on the material before me relating to this case, and am not intending to propound any general principle applicable to the sale of motor vehicles in the State of Victoria.

Damages

15. The magistrate's reasons for decision do not explain the basis on which the figures contained in the order were calculated. As has been said[6], the principal amount of $5,578.40 which she awarded was the whole of the amount claimed by the purchaser. Mr Hanson did not challenge the calculation of interest or costs. However, he submitted that even if the purchaser was entitled to damages, which was not conceded, there was not evidence before the magistrate on which she could find that the purchaser's damages were of that amount.

16. Specifically, he submitted, there was no evidence of the amount of the assessor's fee; no allowance was made for the sum of $210 which had been paid by the vendor to the purchaser in respect of one item of damage which was admitted; and no allowance was made for a number of items in the purchaser's claim which were stated in evidence to be the costs of repairs which were unrelated to the restoration of the vehicle to a roadworthy condition. The decision of the magistrate was based on her finding that the vendor had not complied with a term of the contract of sale that the vehicle be roadworthy. If that decision was correct, he submitted, the only damages should be the costs directly related to the restoration of the vehicle to that condition.

17. I accept that submission, and find accordingly that the answer to the second question found by the Master to be raised by the appeal is No.

18. I await submissions from counsel as to the form of the orders to be made as a result of those findings and as to costs.

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[1] [1982] HCA 24; 149 CLR 337 at 347; (1982) 41 ALR 367; (1982) 56 ALJR 459.
[2] [1977] HCA 40; (1977) 16 ALR 363; (1977) 45 LGRA 62; (1977) 52 ALJR 20 at 26; 32 ALT 41; (1977) 180 CLR 266.
[3] at 346.
[4] (1997) ATPR 41-572 at 43,942.
[5] [1940] AC 701; [1939] 2 KB 206 at 227; [1940] 2 All ER 445.
[6] see [3] above.

APPEARANCES: For the appellant Wiegand: Mr C Hanson, counsel. W Carew Hardham & Gartlan, solicitors. For the respondent Tsolakkis: Mr G McDermott, counsel. Kenyons Lawyers, solicitors.
