DILLON - LEETCH - Maxwell

101

THE HIGH COURT

1982 No. 2218P

BETWEEN:- THOMAS DILLON-LEETCH Plaintiff

and

MAXWELL MOTORS LIMITED Defendants

Judgment of Mr. Justice Murphy delivered the 20th day of December, 1983.

This is a claim by the plaintiff Mr. Thomas Dillon-Leetch for the rescission of a contract made in the month of May, 1981 for the purchase by him from Maxwell Motors Limited, the defendants of an Alfa Romeo motor car and additionally or alternatively damages for breach thereof.

In May 1981 the plaintiff was the owner of a two year old Lancia motor car which had been seriously damaged in an accident. That vehicle was, at the request of the plaintiff, taken from the scene of the accident to the defendants premises. Arising out of that the plaintiff called to the defendants. He had had no previous dealings with them although his brother had purchased a car there.

On the occasion of his call the plaintiff met with a Mr.

Desmond Smith, the sales representative. The plaintiff made it clear that he did not intend to have the Lancia repaired as he wa completely dissatisfied with that car. He was looking at an Alfa Romeo and expressed the view to Mr. Smith that it was an attractive car but that he would not consider purchasing it because it was an Italian make. Mr. Dillon-Leetch had a series of complaints with the Lancia motor car and apparently he was apprehensive that the other Italian manufactured cars had similar defects. But in fact he was reassured by Mr. Smith that the Alfa Romeo had none of the defects of the Lancia: that there was no problem with rust: no difficulty with the lights or the doors: none of the defects which the plaintiff had with the Lancia: these were completely excluded. It was a better than average car. Mr. Dillon-Leetch explained that he was from Ballyhaunis and travelled a great deal between there and Galway and elsewhere. He was reassured as to the reliability of the Alfa Romeo which he was inspecting.

There is no doubt that this conversation was seriously expressed and seriously intended. The plaintiff expressly stated that he would be holding Mr. Smith to his bargain and when the point came to write a cheque in respect of the purchase money

103

and the plaintiff sought further reassurance from Mr. Smith and was told by him that he, the plaintiff, would have the benefit of the manufacturers guarantee. Mr. Dillon-Leetch stated that he would only sign the cheque on the basis of his reliance on the vendor and not of the manufacturer. To that Mr. Smith stated:-

"I will stand over what I have said to you".

No part of the foregoing account which was given by the plaintiff was disputed or challenged in any way.

It seems to me that this conversation imported into the contract an express term in the contract for sale that the motor vehicle was reliable and suitable to undertake - no doubt subject to reasonable servicing - frequent and substantial journeys. That express term necessarily implies a provision or term to th effect that the vehicle was free from such defects as would rer e: it unreliable or unsuitable for the purpose aforesaid.

Having regard to the business carried on by the defendants and the discussion which admittedly took place between the plaintiff and the defendants representative a condition to the same effect would in any event have been implied in the contract.

In fact the discussions or negotiations took place between Mr. Dillon-Leetch and Mr. Smith over a period of two days or a

any rate on two separate occasions. There is only one area of dispute between the parties in relation to those negotiations or discussions. Mr. Dillon-Leetch maintains that the price of the motor vehicle was £6,500: that this was reduced in the first place by a discount for cash of £500 and that then he was allowed a further sum of £1700 by way of trade-in on his Lancia motor vehicle so that the sum paid by him in cash was £4,300. Mr. Smit whilst unable to state positively the price at which the Alfa Romeo was offered for sale could and did say that the price of th model car was at the relevant date specified by the Society of Irish Motor Industry price list at £5,495. He could also say wit confidence that the Lancia was sold for a sum of £650. It was his belief that in effect a trade-in of approximately £1200 was allowed against the Lancia. It is surprising that this disagreement exists. On the other hand both parties are agreed, as Mr. Dillon-Leetch testified, that the sum to be allowed on the trade-in was tentatively agreed on the first occasion and significantly reduced when the parties next met. It was his clea recollection that the price offered for the Lancia on the first occasion was over £2,000 and reduced on the second occasion to £1,700. Whilst Mr. Smith disputes those figures in the sense

that he finds them inexplicable there is a difficulty in challenging them and certainly he accepts the context in which the debate arose. In fairness to both parties it seems to me that there may have been some misunderstanding - perhaps by Mr. Dillon-Leetch - as to the cash discount of £500 and its relevance to the actual transaction. However in so far as I must prefer one account as against another I am satisfied that on the balance of probabilities that a figure in excess of £2,000 was indeed mentioned on the first occasion and that it was reduced on the second to £1,700. On the other hand the clear reality of the matter is that the motor car which the plaintiff acquired was an Alfa Romeo 1.3L in respect of which the S.I.M.I. quoted a price of £5,495.

The motor car in question was collected on the 28th May, 1981. In early July the right front wheel locked. The plaintiff's son Mark Dillon-Leetch managed to bring the car to a local mechanic Mr. Frane who quickly diagnosed that the brake caliper had seized. To enable the car to be driven Mr. Frane disconnected the caliper. The motor car was subsequently brought back to the defendants for its first service to have a number of items adjusted in particular the hand brake, for it was the hand brake

and not the foot brake which was causing the problem. Subsequent evidence established that in the course of the first service the defective mechanism was lubricated but not otherwise altered.

The next month the plaintiff and his wife were on holidays in Baltimore County Cork. Again the right front wheel seized. On this occasion Mrs. Dillon-Leetch phoned the service manager of the defendant company who in turn made contact with Alfasud and they apparently arranged with an agent in the Cork area to inspec the vehicle. As the plaintiff had interrupted his holiday at that stage the motor vehicle was left in Baltimore until the mechanic called and he again simply disconnected the caliper which was again failing to release the brake pad from the disk.

It then appears that the plaintiff and his son drove this car for a period in excess of two months without having the hand brake reconnected. It was explained that this was due to the pressure of business. In any event it was the 19th November when the car was returned once more to the defendants. There is no doubt but that the matter of the hand brake was drawn to their attention. The plaintiff made it clear that he wanted the matter put right at that stage. The car was to be redelivered to

Mrs Dillon-Leetch at the Hibernian Hotel, Dawson Street, at noon on the 24th November. As it was not so delivered she phoned the defendants and had difficulty in making contact with anybody in authority. She phoned a second time. It was explained to her that there was no driver available to deliver the car to Dawson Street. Mrs Dillon-Leetch took a car out to the defendants premises in Blackrock. It was 3 o'clock before the car was read. She was told by the service manager that it was fixed but when a mechanic went to move it he found it defective and told Mrs Dillon Leetch there was still something wrong with the car.

There then followed a series of telephone calls involving the plaintiff and his wife and Mr. Smith. Mrs Dillon-Leetch was very upset. She had domestic commitments which were seriously upset and she was undoubtedly very much inconvenienced by this incider. A measure of the inconvenience to the plaintiff and his wife may be had from the fact that Mr. Dillon-Leetch advised his wife tha he would arrange a taxi to transport her to Galway. I am satisfie that this is true and represents the course which the plaintiff intended to adopt and would properly have adopted in the very trying circumstances that arose. However as it turned out the

plaintiff and his wife were persuaded to wait and the car was untimately delivered to Mrs Dillon-Leetch at about 6 p.m. on the 24th November. Again it now emerges from the evidence of the service manager that in the first instance they had adjusted a spring in the brake unit and when that did not solve the problem they inserted an additional or "helper" spring on the advice given to them by Alfasud.

On the same day, the 24th November, 1981 the plaintiff wrote to Mr. Desmond Smith. In that letter he set out in considerable detail the history of the transaction and the various misfortunes which occurred and made it clear that he was holding the defendants liable for the damage which he and his family had sustained. Moreover in the final paragraph of his letter he conveyed the following warning:-

> "If the car does not now prove satisfactory I intend to return it to your premises and I will then leave it with you and will require payment of the sum of £6,00 paid in respect of it together with damages for loss, inconvenience and expense incurred since it was delivered to me".

There could be no room for misunderstanding. The unfortunate incident with regard first to the inconvenience caused to

Mrs Dillon-Leetch and secondly the failure to repaid the defective brake must have been fresh in everybody's mind. The receipt of a registered letter from an understandably irate customer could hardly have been overlooked.

What happened next was that the calipers or brake unit did in fact fail once more. On this occasion they were inspected by another mechanic, Mr. Coen, who once more disconnected the unit to enable the car to be driven. It was in those circumstances that the plaintiff phoned Mr. Smith. According to Mr. Dillon-Leetch he told Mr. Smith that he Mr. Smith should arrange to call to Ballyhaunis to take the car away. It was the plaintiff's evidence that Mr. Smith was concerned and said that in effect that it was unreasonable: that he was unable to get a car and a spare driver to go down to the West to collect the car. Faced with that Mr. Dillon-Leetch relented and agreed to bring the car to Dublin where, he told Mr. Smith, he would leave it outside the Hibernian Hotel from where Mr Smith could collect it and do what he liked with it. In relation to this evidence Mr Smith says he has no recollection of that phone call and certainly no recollection of it being suggested that arrangements should be

made to collect the car in County Mayo. In fact the car was subsequently collected by the defendants from the Hibernian Hote so they must have received some communication. However apart from that small measure of corroborative evidence I accept the plaintiff as a witness of the truth and I am satisfied that he did phone Mr. Smith immediately after the vehicle broke down on this occasion and I have indeed no difficulty in accepting that he told Mr. Smith then, that the motor car could be taken away by the defendants.

The actual date on which the car was collected by the defendants appears to have been the 3rd December, 1981. It may have been available to them on an earlier date - I believe it wa In any event they carried out certain repairs thereto. They replaced the caliper unit in each of the front wheels at a cost the order of £400. In fact the evidence given by the plaintiff - and uncontradicted - was to the effect that this work would cost in the order of £600 and I assume the discrepancy is due to the fact that the defendants were carrying out the work at cost price

The defendants did not reply to the letter from the plainti of the 24th November. They did not record any comment in relatic

to the subsequent phone call and more particularly they did not communicate with the plaintiff to say that the motor car had been repaired. Instead on the 12th December, 1981 the plaintiff once more phoned the defendants. In relation to this telephone call there is no doubt that Mr Dillon-Leetch enquired at some stage whether the car had been repaired and was told that it had then been repaired. To that the defendants attach significance as any question with regard to repairs would indicate an interest on the part of the plaintiff in the vehicle. I am satisfied, however, that this reference formed part of a wider discussion. In particular I am satisfied that the plaintiff asked Mr. Smith what proposals the defendants had to compensate him for the inconvenience which he had undoubtedly endured. It is common c s that Mr. Smith indicated that he would not have the authority t deal with the matter and that as it was late on a Friday evenin he would discuss the matter with his directors and phone back the plaintiff early in the following week. In relation to that suggestion Mr Dillon-Leetch specifically, I am satisfied, asked Mr Smith to obtain the defendants proposals under three separate headings so that the entire matter could be considered by him,

namely,

(1) on the basis of the defendants keeping the motor car and repaying the plaintiff the purchase price together with expenses.

(2) The defendants supplying to the plaintiff a different motor car not being an Alfa Romeo.

(3) The plaintiff keeping the Alfa Romeo together with compensation.

Mr. Smith has no recollection of these proposals and whilst I am satisfied that they were made I recognise that Mr Smith may at the time, or subsequently, have focused his attention on the proposition that the plaintiff would or might in some circumstances keep the car.

Unhappily this chapter of unhappy incidents was not yet over Mr Smith did not contact Mr Dillon-Leetch nor, as far as the evidence goes, were the directors of the defendant company involved. Instead nothing was done. Mr Smith explained that he overlooked the matter which had arisen effectively after hours on a Friday evening: the Christmas vacation subsequently intervened: the motor car was moved to another area and in the result the

entire transaction escaped his attention. The next step, therefor was a further letter from Mr Dillon-Leetch dated the 17th Februa.y 1982 complaining of the failure to return his telephone call and demanding repayment of the purchase price of the vehicle with damages. This was followed by proceedings instituted on the 24th February, 1982 and it was September, 1982 before the comments of the defendants were provided in a letter from their solicitors Messrs Hooper and Company dated the 27th September, 1982 and later of course by way of defence which was dated the 1st November 1982 to the statement of claim which had been delivered some month earlier.

In their letter of the 27th September, 1982 the solicitors on behalf of the defendants did offer to make an ex gratia payment to the plaintiff of an unspecified sum and indicated that the vehicle was awaiting collection by the plaintiff. This offer was not acceptable to the plaintiff.

On these facts counsel on behalf of the defendants conceded that his clients had been guilty of a breach of either an express or implied term of the contract for the sale of the motor car. However, it was argued on behalf of the defendants that the onl.

remedy of the plaintiff sounded in damages and that the sum to be awarded should be limited to an appropriate but modest amount to compensate the plaintiff for the expense and inconvenience flowin from the defects in the vehicle which did in fact exist. The plaintiff claimed that he was entitled to rescind the contract an in the alternative claimed, in a provision inserted by way of amendment in his reply, that the defendants had, by retaining possession of the motor car accepted the plaintiff's rejection thereof.

Ordinarily, the collection of the vehicle from the vendor an the use of it by the plaintiff over a period of some five months would be construed as amounting to an acceptance as a result of which the original condition as to fitness would "sink to the level of a warranty" for which damages would be the only remedy. Against this it was argued on behalf of the plaintiff that the Sale of Goods and Supply of Services Act 1980 in providing that the implied condition of merchantable quality required (among other things) that the goods sold should be "as durable as it is reasonable to expect" having regard to the circumstances mentione in the Act necessarily involved the postponement of the stage at

which acceptance became effective and with it the transition fro condition to warranty. Again it was recognised that the equitab remedy of rescission is not available to a plaintiff unless the parties can be restored substantially to the position in which th had been before the wrong-doing. As the motor car which the plaintiff traded in with the defendants was subsequently sold clearly the plaintiff cannot be restored to his original positor

Somewhat late in the case - indeed in replying to the defendants - it was argued on behalf of the plaintiff that a righ to reject the goods arose under section 21 of the 1980 Act. I am not satisfied that the plaintiff had expressly or otherwise invok that section by complying with the provisions contained therein.

The reality of this case is that contrary to the assurance given by the defendants the motor car in question was defective and unreliable. The problem with regard to the brakes immobilise the car on four occasions and the effort to remedy the defect defeated the engineering skill of the defendants - with the assistance of the manufacturers - on three occasions. Indeed the cost of the repairs ultimately carried out may have been in the order of 10% of the cost of the vehicle itself. In these

circumstances it is not really open to the defendants to dispute the seriousness of the defects which existed in the car which the sold to the plaintiff.

In those circumstances the plaintiff had - quite independent of the 1980 Act or indeed the 1893 Act - a remedy in law. At the very least he was entitled to recover damages from the defendants It seems to me that one method of measuring those damages would have been for the plaintiff to have sold the motor car for the best price available and to have sued the defendants for the difference between the sale price and the cost of a suitable replacement together with other costs and expenses. I do not think it unreasonable to assume that the defendants themselves would have been in a better position to pay the maximum price for the car so as to make whatever alterations or adjustments as woul be appropriate to enable it to be resold to a consumer at the best price possible. Certainly the conduct of the plaintiff woul be open to criticism if he did not afford the defendants an opportunity of taking back the vehicle and making an appropriate financial adjustment.

In fact this is what in substance was done. In the letter o

the 24th November 1981, which I have already quoted, the plaintiff made it clear as to the course which he intended to adopt. In the subsequent telephone conversation of the 27th November the plaintiff, according to the account which he gave and which I accept as being true, informed the defendants that they were to collect the car - by way of compromise outside the Hibernian Hotel - and to refund him his investment. It seems to me that by collecting the motor car in that way the defendants - not unwisely - accepted the offer of the plaintiff. The only doubt which is cast upon this interpretation of the transaction between the parties is first the plaintiff's phone call of the 18th December and the discussion which undoubtedly included a reference to the repairs to the vehicle. I am satisfied, however, that this conversation did not and could not have properly have been interpreted as a waiver by the plaintiff of his rights under the agreement already implemented. He was merely indicating a willingness to consider an alternative arrangement if suitable proposals were put to him. No such proposals emerged and accordingly the agreement by the defendants to accept the return of the vehicle and pay appropriate compensation subsists.

Secondly it was argued that the failure of the plaintiff to deliver the registration book relating to the vehicle to the defendants was inconsistent with the case made by the plaintiff. In the circumstances of the case I do not attach any such significance to the plaintiffs failure to post on or otherwise deliver to the defendants the registration book.

At the end of the day the fact remains that the defendants took back a motor car on terms which had been explained to Mr Smith on the telephone and which were no more and no less than those which the plaintiff had expressly stated in unequivocal terms in a registered letter which he had sent to the company three days earlier. It is in those circumstances that I am force to conclude that the defendants must be treated as having accepted the proposal made by the plaintiff and that the assessment of damages falls to be dealt with on that basis.

On that view it follows that the plaintiff is entitled to th cost price of the vehicle, that is to say, £5495.00 - against tha some allowance must be made to the defendants for the fact that the plaintiff had the use of the motor car - for what it was wort - for a period of some five months. I think that this allowance might properly be assessed in a sum of £500.00. However, the

plaintiff is entitled in addition to a sum of money to compensate him for the not inconsiderable inconvenience which he suffered. It seems to me that a fair figure would be the like sum of £500. In the result, therefore, I would assess the damages payable by the defendant to the plaintiff in the sum of £5,495.00 and give judgment for that amount.