
CANADA / JUDGMENT

Willowbrook Motors Ltd. v. Coast Cylinder Dispatch Ltd.

2014 BCSC 2129

COURT

Supreme Court of British Columbia

DECIDED

28 October 2014

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2014 BCSC 2129 Willowbrook Motors Ltd. v. Coast Cylinder Dispatch Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Willowbrook Motors Ltd. v. Coast Cylinder Dispatch Ltd.,

2014 BCSC 2129

Date: 20141028

Docket: S161068

Registry: New Westminster

Between:

Willowbrook Motors Ltd.

Appellant

And

Coast Cylinder Dispatch Ltd.

Respondent

Before: The Honourable Mr. Justice G.C. Weatherill

On appeal from:

An order of the Provincial Court of British Columbia (Small Claims Court)

dated March 25, 2014

Coast Cylinder Dispatch Ltd. v. Willowbrook Motors Ltd.

Surrey Registry File No. Sur-P-C-72057

Oral Reasons for Judgment

In Chambers

Counsel for the Appellant:

L.C. Morrison

Counsel for the Respondent:

C.L. Corriveau

Place and Date of Trial/Hearing:

New Westminster, B.C.

October 28, 2014

Place and Date of Judgment:

New Westminster, B.C.

October 28, 2014

- [1] THE COURT: This is an appeal from the oral judgment of the Honourable Judge Brownstone of the Provincial Court of British Columbia pronounced on March 25, 2014, after a trial in Small Claims Court. The appellant asserts that the learned trial judge erred:
- (a) by awarding vehicle lease payments that had been made by the respondent to the appellant as damages for loss of use and;
 - (b) by not requiring the respondent to disclose to the appellant and to the court the terms of its settlement with Chrysler Canada Inc. ("Chrysler"), the manufacturer of the vehicle, and by not setting off the amount of the Chrysler settlement against the damages that were ordered.

Background

- [2] On February 4, 2011, the respondent leased with an option to purchase a new Dodge 3500 pickup truck from the appellant. The respondent intended to use the vehicle for business operations and business purposes. The terms of the lease were set out in a written lease agreement (the "Lease"). The lease term was for four years. The respondent made a down payment of \$6,145.75 and agreed to make monthly payments of \$759.75.
- [3] Clause 20 of the Lease provides:

Warranty

The Lessee covenants and agrees that the Lessor has made no representation or warranty with respect to the suitability or durability of any such Equipment for the purposes and uses of the Lessee, or any other representations or warranty express or implied with respect thereto.

- [4] The vehicle was covered by a manufacturer's warranty provided by Chrysler ("Vehicle Warranty") for five years or 160,000 kilometres, whichever first occurred.
- [5] The vehicle's engine failed after approximately one month of use by the respondent. It was repaired. However, after approximately one more year of use by the respondent, the vehicle's engine failed again. The respondent attempted to resolve the issues it had with the vehicle with both Chrysler and the appellant but to no avail.
- [6] On June 4, 2012, the respondent commenced an action against both the appellant and Chrysler in the Provincial Court of British Columbia - Small Claims Court in Surrey, B.C. (Surrey Registry Action No. Sur-P-C-72057), alleging that the appellant and Chrysler had breached the vehicle warranty and the Lease by failing to repair the vehicle thereby causing the respondent to suffer loss and damages, namely:
 - (a) the down payment, taxes, and fees paid at the outset of the Lease;
 - (b) the cost of the Lease and insurance since the engine failure in February of 2012; and
 - (c) towing charges.
- [7] The respondent also claimed an order "that the [Lease] has been rescinded or, alternatively, an order that the vehicle be repaired along with an order refunding the lease payments made since the engine failed."
- [8] In the further alternative, the respondent sought damages in the amount equal to the projected cost of the engine repair as well as the cost of the lease payments and insurance for the loss of use period.
- [9] At no time did the respondent formally take the position that the Lease had been repudiated and that the repudiation had been accepted by it as putting an end to the Lease. In fact, the respondent continued to make all payments under the Lease even though the vehicle was not being used by it.
- [10] On March 24, 2014, the day before the trial of the action, the respondent settled its claim against Chrysler. The trial of the respondent's claim against the appellant for damages for loss of use proceeded the following day. No evidence was presented as to the cause of the engine failure. The trial judge stated:
 - [8] Suffice it to say there is no real explanation for what caused the vehicle to fail within a year. It just appears that it was perhaps a faulty engine, but I do not know Chrysler's position as they were not part of this.

- [11] The trial judge found that the vehicle was not "reasonably durable" because it failed within one year and there was no evidence of unreasonable driving or excess mileage.
- [12] The trial judge found that there was an implied term pursuant to s. 18 of the Sale of Goods Act, R.S.B.C. 1996, c. 410 ("SGA") that the vehicle would be fit for the respondent's purposes and that the appellant had breached that implied term. The trial judge held that Clause 20 of the Lease was insufficiently clear and unambiguous to exclude the implied warranty provisions of the SGA.
- [13] The evidence of the respondent at trial was that the estimated cost of repair of the vehicle was between \$10,000 and \$18,000. As at the time of the trial, the vehicle had not been repaired and had been unused since the vehicle failure over two years earlier. The trial judge found that the respondent was entitled to damages in the amount of \$19,287 comprised of the monthly lease payments made by the respondent under the Lease during the 25 months preceding trial that it was unable to use the vehicle totalling \$18,993.75, and towing costs of \$293.54. The trial judge also awarded \$196 for costs.
- [14] The trial judge did not require disclosure of the terms of the settlement with Chrysler and no credit was given in respect of any settlement payment made to the respondent by Chrysler.

Standard of Review

- [15] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, the Supreme Court of Canada articulated the standard of review of a trial court's findings of fact as follows:
10. The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"* [1976], 2 S.C.R. 802 at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12 at para. 42 [and] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57.
- [16] The Supreme Court cited numerous policy reasons for adopting this standard and said:
18. The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony viva voce, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.
- [17] Section 12 of the Small Claims Act, R.S.B.C. 1996, c. 430 ("SCA") provides as follows regarding the hearing of an appeal:

[The] appeal to the Supreme Court under this Act

- (a) may be brought to review the order under appeal on questions of fact and on questions of law, and

(b) must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial.

[18] The appellant in this appeal has the onus of demonstrating that the learned trial judge made a palpable and overriding error.

Discussion

[19] It is well accepted that an innocent party to a contract has two alternatives when the other party repudiates. The innocent party may accept the repudiation as putting an end to the contract and sue for damages, or the innocent may affirm the contract and sue for damages: *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434, at para. 24; *Homestar Industrial Properties Ltd. v. Philips* (1992), 72 B.C.L.R. (2d) 69 (C.A.), at para. 13.

[20] Although the respondent pled that it was entitled to "an order that the contract has been rescinded", it is plain that it was not entitled to such an order and, in my view, the trial judge was correct in refusing it. That is because the respondent did not exercise its option of accepting the repudiation as putting an end to the Lease. Instead, the respondent affirmed the Lease by continuing to keep possession of the vehicle and continuing to make all payment obligations under it.

[21] Unless and until the innocent party accepts the repudiation, the contract continues in existence as "an unaccepted repudiation is a thing writ in water and of no value to anybody. It confers no legal rights of any sort or kind": *Howard v. Pickford Tool Company*, [1951] 1 K.B. 417 at 421 (C.A.), cited with approval most recently by our court in *Dosanjh v. Liang*, 2014 BCSC 162, at para. 51.

Did the trial judge err in awarding the lease payments as damages?

[22] After finding that the appellant had breached the implied warranty set out in s. 18 of the SGA, the trial judge stated:

[21] The next issue is what is the appropriate remedy? Section 56 [of the Small Claims Act] allows the lessee to sue for damages for the breach of warranty. It says that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events on the breach of warrant. So that is the question in this case; what are the damages that are flowing?

[23] In coming to her conclusion regarding the measure of damages that were flowing, the trial judge stated:

[22] While Ms. Corriveau has urged me to find that the contract is repudiated, the wording of the Sale of Goods Act provides for damages for its breach. So the estimated loss from the breach of warranty is that the claimant was paying for a vehicle for two years that it did not have use of. It has not actually repaired the vehicle and I understand it will have to, but I am concerned about double recovery. I understand that the settlement with Chrysler was a

confidential one and I am not going to require you to disclose it, but I think that what is fair in this case is to find that there have been 25 months of payments, starting in March 2012 and continuing through to and including March 2014, for a vehicle which could not be used. So 25 months of payment at \$759.75 a month, according to my calculations, comes to \$18,993.75.

- [24] Section 52(2) of the SCA is a codification of the common law regarding damages for breach of contract that the innocent party is entitled to be put in the position it would have been in had the contract breach not occurred: *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440, at para. 29.
- [25] The only evidence of loss or potential loss presented to the trial judge was that the cost to repair the vehicle's engine was estimated at between \$10,000 or \$18,000. Counsel for the respondent submits that the damages award as assessed by the trial judge was "in the ballpark."
- [26] However, at trial, the respondent presented no evidence that it suffered any loss as a consequence of its inability to use the vehicle. A claim for damages for loss of use requires some proof that a plaintiff has suffered in some way as a result of it being deprived of the use of his or her property: *Rana Enterprises Ltd. v. Wheeler*, [1992] B.C.J. No. 497, at para. 18.
- [27] Counsel for the respondent has pointed out that in the *Rana* decision at para. 10, reference is made to an earlier decision of *Sharma v. Andrews*, an unreported decision likely of this court, October 12, 1989, New Westminster Registry. In that case, Mr. Justice Selbie stated:

This plaintiff was paying money for the use of [his] car on a lease basis. The use of the vehicle was taken from him by the actions of the defendant. [What better measure of his loss --] What better measure of his loss is there than the monies he was forced to continue paying without benefit of use and without gaining any advantage an advantage, I would suggest, that he would have got if he had been buying the car and was simply continuing the payments. I do not think the car payments would have been a measure of damages but in my view lease or rent payments would be.

- [28] With the greatest of respect to Mr. Justice Selbie, I see no distinction between payments made by a purchaser of a car and payments made by a lessor of a car in respect of a loss-of-use claim.
- [29] In my view, it was incumbent upon the respondent to present some evidence at trial that it suffered in some way as a result of the vehicle not being operational, for example, was it required to replace the vehicle with another vehicle? If so, the reasonable cost of the replacement vehicle would have been recoverable. Or was it required to use other vehicles in its existing fleet, to pay overtime to employees because deliveries or other services to the respondent's customers could not be accomplished during the regular workday in the absence of the inoperable vehicle and/or that it incurred increased costs in respect of the

operation of the other vehicles such as depreciation or additional maintenance costs? If so, the additional costs may well have been recoverable. Instead, in this case, the trial judge simply assessed damages for loss of use as equivalent to the lease payments that the respondent made after the engine failure.

- [30] There was no evidence presented at trial that the lease payments made after the vehicle became inoperable related in any way, shape, or form to a loss suffered by the respondent because it was unable to use the vehicle. To the contrary, the lease payments were the precise payments the respondent would have made under the very Lease that the trial judge found had not been repudiated and continued in effect. In other words, by making the lease payments, the respondent was in the same position it would have been in if the engine had not failed. It was not in any worse position because it made the lease payments.
- [31] It is trite law that the onus is upon a plaintiff to prove its claim at trial on the balance of probabilities. If it fails to do so, the claim must be dismissed. Here, the respondent's claim at trial was that it suffered damages for loss of use of the vehicle. It was obliged to show that it suffered a loss by not having the use of the vehicle. However, it did not provide the trial judge with any basis upon which a reasonable assessment of damages for loss of use could be made.
- [32] Since the respondent did not provide any evidence of loss in respect of its inability to use the vehicle, it was not open to the trial judge to award any damages for loss of use, let alone an assessment based upon an outlay that the respondent was obliged to make regardless of the breach. In my view, it was a palpable and overriding error for the trial judge to have done so.

Should the terms of Chrysler Settlement have been disclosed?

- [33] Given my finding on the first issue under appeal, there is no need for me to deal with whether or not the terms of the Chrysler settlement should have been disclosed.

Conclusion

- [34] The appeal is allowed and the judgment below is set aside.
- [35] The funds paid into court by the appellant for security for costs will be paid out to the appellant forthwith.
- [36] The appellant is entitled to its costs of this appeal.

____ "G.C. Weatherill J." ____

G.C. Weatherill J.

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