IN THE GRAND COURT OF THE CAYMAN ISLANDS

LEGAL AID NO. 40 OF 1998
CAUSE NO: 155 OF 1998

13-08-98

BETWEEN:

TRACY PEARCE PLAINTIFF

-AND-

(1) MERLIN SEYMOUR and (2) CURTIS SEYMOUR
T/A MERLIN'S AUTO SALES DEFENDANTS

Appearances:

J. Walton for the plaintiff

S. McField for the defendants

13 August 1998

REASONS FOR DECISION

Murphy J:

This is an assessment of damages pursuant to the default interlocutory judgment of Douglas J dated 13 July 1998

Default Judgment

At the outset of the hearing before me, defence counsel indicated an intention to apply to set aside the default judgment. He apparently had only raised this with plaintiff's counsel this morning, and no material had been served. There was no material in the court file relating to such an application.

This is an action for damages arising out of the sale of an automobile. On 5 May 1998 Graham J ordered the first defendant to file a list of documents.

On 4 June 1998 Douglas J ordered that the defendants file an affidavit within 14 days disclosing whether they had certain documents in their possession. The defendants did not comply, though that order was apparently made on consent.

On 2 July 1998 Douglas J made an "unless" order for the filing of such an affidavit within seven days.

Plaintiff's counsel took steps for default judgment to be signed by Douglas J on 13 July 1998 pursuant to the terms of his earlier "unless" order. That is how the assessment came on before me.

I heard submissions as to whether I should entertain a defence application to set aside the default judgment, either today or at some other time. (Technically, as far as I am aware, no such application had been set down in accordance with the Rules.)

Defence counsel took the position that had not the court file been "closed improperly" to facilitate the signing of default judgment, an affidavit (the subject matter of the orders of Douglas J) would have been filed 10 July 1998, and that would have been in compliance with the order of Douglas J dated 2 July 1998, given the time provisions of Order 3 Rule 2. That may well be technically correct, and plaintiff's counsel essentially conceded the timing point. But that is not my real concern.

The defence has been skating on thin ice in this regard, and has failed to comply with the orders of this Court, including one apparently made on consent. The defence knew of the signing of default judgment 13 July 1998 (and probably knew default judgment was imminent as early as 10 July 1998), yet the defence brought no application to set the default judgment aside till it purported to try to do so today. This is unacceptable delay, particularly in view of the interlocutory history. The jurisprudence applicable to the setting aside of default judgments is applicable notwithstanding that a judgment may have been irregularly obtained: Odgers on High Court Pleading and Practice 23rd ed. at 76.

On the basis of delay alone, in the exercise of my discretion, I was not prepared to entertain an application to set aside the default judgment today or to adjourn for the purpose. To do otherwise would be to make a mockery of this Court's processes and to countenance what to me are plainly delaying tactics. While that disposes of the default judgment issue, I say in passing that the affidavit material the defence proposed to file on an application to set the default judgment aside (which defence counsel provided to me today), contained absolutely nothing either explaining the delay in applying or establishing a meritorious defence (much less a "real prospect of success": The Saudi Eagle [1986] 2 Lloyds Rep 221 CA). Clearly the application, if I had allowed it to be made, would have been doomed to failure in any case, absent these essential requisites.

Assessment of Damages

I record that when I indicated that I would proceed to assess damages, defence counsel chose to withdraw from the proceedings notwithstanding my express invitation to him to cross-examine the plaintiff's witnesses and to make submissions if he wished to do so.

I accept for purposes of this assessment that liability as pleaded has been established. In brief summary, the plaintiff bought a 1990 Toyota automobile from the defendants on 14 July 1997 for $3,500. It soon became apparent to the plaintiff that there were serious mechanical flaws. The one that manifested itself most obviously to the lay person was that the automobile would not steer properly to the left. A sharp left turn would "pull the steering wheel out of my hands," the plaintiff testified, and the tires would "drag."

The plaintiff relies upon the s.15 Sale of Goods Law conditions, as well as a misrepresentation that the automobile was in a roadworthy condition.

The plaintiff's expert, Robert Holton, is an automobile damage evaluator and assessor of 30 years experience who now provides his services primarily to insurance

companies. He has had a long career as a mechanic and appraiser. He was taken in chief through his report, and I also questioned him extensively.

I accept his conclusions, after his examination of the automobile, that it had been seriously damaged in a prior accident and that the structural damage had merely been masked (by persons unknown) and not repaired properly. There were serious deficiencies in the structural integrity and alignment of the chassis. In Holton's opinion the automobile was not roadworthy and the parts and labour (at prevailing local prices) required to make it so would amount to $3660.69, a total exceeding the purchase price.

The plaintiff takes the not unreasonable view that it is not worth trying to repair the automobile and she has not done so. She would not in good conscience try to resell it now knowing its true condition.

On the evidence I conclude that the vehicle is not only not roadworthy, but worthless.

I assess the damages at the amount of the purchase price, $3500, either as damage naturally resulting from the breach pursuant to s.53 of the Sale of Goods Law, or as a total failure of consideration within the meaning of s.54.

Accordingly, pursuant to the provisions of Order 37 I certify the damages at $3,500.00 to which will be added simple interest at the prescribed rate from 14 July 1997. Plaintiff's costs of today to be fixed at $500.00.

13 August 1998

J D Murphy, J.