IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-000363

BETWEEN	RJ & AM SMALLMON Plaintiff
AND	TRANSPORT SALES LIMITED First Defendant
AND	GRANT ALAN MILLER Second Defendant

Hearing: 22 & 23 March 2010
Further submissions filed 31 May - 22 June 2010

Appearances: J Moss for Plaintiff
P M James for Defendants

Judgment: 30 July 2010

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] Mr and Mrs Smallmon carry on a road transport and earthmoving business in Queensland, Australia. They purchased four trucks to use in their business from a New Zealand company, Transport Sales Limited. Transport Sales Limited is owned by Mr Grant Miller. Mr Miller is also a director of Transport Sales.

[2] The trucks were purchased in New Zealand and shipped to Queensland.

[3] Since the trucks arrived, the Smallmons have experienced a series of problems, the main problem being that the Queensland authorities have refused to register the trucks and will only allow the Smallmons to use them on a limited basis.

The Smallmons say this has caused them loss and they seek to recover damages from Transport Sales and Mr Miller.

[4] The contract did not expressly address the issue of registration or registrability. Accordingly, the key issue is whether and in what circumstances a seller of goods can be liable for breach of an implied term as to fitness for purpose when the alleged lack of fitness arises not from the physical properties of the goods (the trucks are roadworthy) but as the result of non compliance with a regulatory requirement in the buyer's country.

Factual background

[5] The evidence adduced at the hearing regarding the regulatory requirements for trucks in Queensland was somewhat confused and confusing.

[6] However, the salient features appear to be as follows.

[7] Before a vehicle can be driven on the road in Queensland it must be registered, and in order to be registered it must meet a number of requirements. These include a requirement that it must have what are called its "roadworthies". Another requirement relating to vehicles manufactured after a certain date is that they must be fitted with a compliance plate.

[8] "Roadworthies" is the colloquial name for a test undertaken to check whether or not a vehicle complies with the Australian Design Rules (ADRs). The ADRs are national standards. Roadworthies are essentially the equivalent of the New Zealand warrant of fitness.

[9] As for the compliance plate, this is a metal tag attached to the vehicle at the time of manufacture. Essentially, it is a certificate that the vehicle was manufactured to Australian Design Rules. If an owner wants to make modifications to the vehicle, such as adding a tipper, they are required to obtain what is called a modification plate.

[10] The Smallmons have been in the road transport business in Queensland for 20 years.

[11] In April 2006, Mr Smallmon saw a prominent advertisement in the Australian edition of a trade magazine, advertising trucks for sale. The advertisement had been placed by Transport Sales Limited, then known as Transport Sales Canterbury Limited. It showed a photograph of a truck and gave Mr Miller's contact details, stating:

> Late model 8x4 cab & chassis available. Some on Spring some on Airbag. Most have Alloys and Med km. Prices available ex New Zealand or Landed at Brisbane, Melbourne or Sydney. These trucks are good buying!!!!!!!
>
> Dealer inquiry welcome.
>
> Phone Grant and discuss your requirements.

[12] At the time, the Smallmons were looking to upgrade their existing fleet. Mr Smallmon was also aware of another operator in Allora who had imported two trucks from New Zealand and who had told him they were a good deal. This other operator's imported trucks looked "pretty good" to Mr Smallmon, so when he saw the advertisement he thought it would be worth making further enquiries.

[13] He duly contacted Mr Miller in New Zealand.

[14] Then followed two phone conversations, during the course of which Mr Miller confirmed it was his company which had sold the trucks to the Allora operator, and that he had some Volvo FM12 trucks for sale. The photograph in the advertisement was one of the Allora trucks.

[15] The Smallmons then arranged to meet with Mr Miller in New Zealand in August 2006.

[16] Shortly before travelling to New Zealand, the Smallmons received a phone call out of the blue from a Mr Kevin Walsh. Mr Walsh was an ADR compliance engineer. He stated he had heard the Smallmons were looking at some trucks for sale in New Zealand and told them that for compliance purposes it was important to look for three things when inspecting the trucks – the exhaust, the seatbelts and a

stamp on the fuel tank. The conversation ended on the basis that if the Smallmons did decide to buy the trucks, they could just give him a call when they returned home and he would be happy to do the ADRs for them.

[17] In evidence, Mr Miller confirmed it was he who had put Mr Walsh on to the Smallmons.

[18] Mr Walsh did not advise the Smallmons to check to see if compliance plates were fitted. For reasons which will become apparent, the most likely explanation for him saying nothing about compliance plates is that he would have known the plates would be missing but would not have considered it a matter of concern.

[19] The Smallmons duly met with Mr Miller at a truck yard in Auckland. The meeting lasted approximately an hour. There were some 20 to 30 trucks on the lot.

[20] Mrs Smallmon testified that they inspected the trucks to see whether they would comply with the ADRs and in particular whether the trucks complied with the three things mentioned by Mr Walsh. During the course of their inspection, the Smallmons noted black plates screwed on the inside door of the trucks, which they assumed were the compliance plates because they were in the same place where in their experience compliance plates are normally located.

[21] Part of the Smallmons' business involves the cartage of water. As they had anticipated, the inspection also confirmed they would have to make some modifications to the vehicles so as to render them fit for that purpose. The Smallmons thus always knew they were going to have to obtain modification plates.

[22] There was some conflict in the evidence as to exactly what was said during the meeting, in particular whether Mr Miller told the Smallmons the trucks would be ready for use in a few days after arriving in Brisbane, that "everything would be taken care of" and whether he said there would be no import duty payable.

[23] The following was, however, common ground:

- Mr Miller was aware the Smallmons were purchasing the trucks to use in their business, which he knew was based in Queensland and which he knew involved water cartage and landscaping. The Smallmons did not tell him their work sometimes took them into New South Wales.

- The Smallmons told him the reason they wanted to replace their existing fleet was because of the age of the vehicles and the large distances they had travelled.

- They told him they would have to sell their existing trucks to be able to pay for the new ones.

- Mr Miller told them the trucks had been assembled in Australia and exported fully made up to New Zealand and were returned Australian goods.

- Mr Miller stated he had exported trucks to Australia before and had never encountered any problems.

- Mr Miller never gave them any advice on Australian registration requirements and the Smallmons never asked him.

- There was never any discussion of any kind as to what was required in Queensland before the vehicles could be registered.

- Mr Miller told them he could put them in touch with Australian contractors who had brought in the other trucks he had sold to Australians. One was a customs broker, a Mr Tucker, and the other was Mr Walsh who did the ADRs. It is unclear whether Mr Miller actually named the two contractors or just said he would arrange for them to contact the Smallmons.

- At no stage did Mr Miller draw to the Smallmons' attention that the trucks did not have compliance plates.

- Mr Miller never advised the Smallmons they should check out the rules relating to importation and registration.

[24] It was clear from the evidence that the parties were somewhat at cross-purposes over the compliance plates. Mr Miller was aware of the need for compliance plates in a general sense, but not that it was a pre-requisite for registration in Australia. He also knew the trucks he was selling did not have compliance plates and believed the Smallmons must have appreciated that because that was the reason they needed to engage the services of Mr Walsh. The Smallmons thought the trucks did have compliance plates attached and that Mr Walsh's function was to do the modification plates and the roadworthies.

[25] At the conclusion of the meeting, the Smallmons verbally agreed to purchase four trucks for the sum of $72,000 per truck, with a deposit of 10 per cent payable immediately and the balance to be paid before the trucks left New Zealand. Mr Miller was to arrange and pay for the cleaning of the trucks and the shipping.

[26] There was never any written contract.

[27] In some parts of their evidence, the Smallmons contended that as well as the cleaning and shipping, "Grant and his guys" were to arrange for the roadworthies and everything else up to the point of the Smallmons taking the trucks along to get them registered.

[28] By "his [Grant's] guys", the Smallmons explained they meant Mr Walsh who had already telephoned them and Mr Tucker the customs broker.

[29] As the hearing unfolded, however, the Smallmons accepted that Mr Walsh and Mr Miller were in fact their agents, not Mr Miller's agents. They were only "his guys" in the sense he was the one who had recommended them and put them in touch with the Smallmons.

[30] In cross-examination, the Smallmons also accepted it was agreed it was their responsibility to attend to roadworthies and registration once the trucks arrived in Brisbane.

[31] Mr Miller testified that he was not aware of what formalities would be required to get the trucks registered. This was accepted by counsel for the Smallmons who nevertheless argued it was something Mr Miller should have known about or he should have told the Smallmons he did not know. For his part, Mr Miller said he had not made any inquiries about the Australian requirements because under the contract he did not have anything to do with that side of things.

[32] The day after the meeting with Mr Miller at the truck yard, the Smallmons paid the 10 per cent deposit.

[33] They received an invoice for the balance of $259,220 on 31 August 2006, and paid it on 18 September 2006.

[34] In September 2006 the Smallmons were contacted by Mr Tucker, the man Mr Miller had recommended they should engage to take care of the importing requirements. Mr Tucker explained the various matters that his company would undertake, including arranging the quarantine inspection. He also detailed the cost of his services. The Smallmons paid these to his company direct.

[35] During September, the Smallmons also spoke again to Mr Walsh, the ADR compliance engineer, about the modifications they wanted to make to the trucks once they arrived.

[36] The trucks left New Zealand on 29 September 2006.

[37] They arrived in Brisbane on 2 October 2006.

[38] However, that was when the first of the problems at issue started. Instead of being released to the Smallmons, the trucks were quarantined because the Australian authorities considered they were too dirty.

[39] The resulting delay was of considerable concern to the Smallmons due to the fact they had already disposed of some of their existing trucks.

[40] The cost of additional cleaning to the standard required by the Australian Quarantine Service was AU$3993, which Mr Tucker's company paid to get the trucks released. (He later sought reimbursement from the Smallmons, who refused to pay on the grounds they considered it was Mr Miller's liability, not theirs. However, Mr Tucker successfully sued the Smallmons in a small claims court and they were compelled to pay.)

[41] Two of the trucks were eventually released on 16 October 2006 and the remaining two on 19 October 2006.

[42] After collecting the trucks from the port, the Smallmons then had the trucks modified and obtained the roadworthies. This work was undertaken by Mr Walsh.

[43] On 20 October 2006, Mrs Smallmon went to register the first of the trucks at Queensland Transport. However, much to her dismay, she was informed that she was not able to register the truck because it did not have compliance plates attached and because she did not have an authority to import from the National Transport Department.

[44] This was all news to the Smallmons. Their understanding was that they would not need anything other than the modification plates and the roadworthies to get the vehicle registered, an understanding they claim to have received from "Grant and his guys."

[45] In the ensuing weeks, Mrs Smallmon enlisted the support of Mr Tucker and others (including a lawyer) to try and persuade the authorities to register the vehicles, but to no avail. In the end, following the intervention of the Smallmons' local Member of Parliament, Queensland Transport and the National Transport Department eventually agreed to issue the Smallmons with an exemption permit for each of the four trucks.

[46] The permits were issued on 23 November 2006. They allow the Smallmons to use the trucks but on a restricted basis. The permits are for a limited period of time, with an expiry date of 21 September 2011, although indications are they will be renewed for a further five-year period. The permits are not transferrable, which means the trucks cannot be sold. The permits also restrict use of the trucks to Queensland. Previously, five per cent of the Smallmons' business had involved cartage outside of Queensland into New South Wales.

[47] In May 2007, the Smallmons struck another problem. They were selected for auditing by the Australian Customs Service on account of the controversy from the previous year. The result of the audit was a ruling that the Smallmons were required to pay import duty on the trucks in the sum of $AU12,979.83. This was a shock to the Smallmons because they had always understood there was no duty payable.

[48] Much of the evidence at the hearing was devoted to the reasons why the Smallmons had been unable to register the trucks and whether the Australian authorities were right to take the attitude they did regarding registration and the import duty. It was apparent the Smallmons themselves are still confused. Adding to the confusion was the fact that another operator who purchased similar trucks from Mr Miller only a month earlier had 'no difficulty whatsoever' in obtaining registration in Queensland, despite the absence of fitted compliance plates and an authority to import. Similarly, Mr Tucker, who has been involved in the importing of similar trucks on many occasions, said he had never encountered the difficulties experienced by the Smallmons. This prompted the defendants to suggest Mrs Smallmon must have antagonised the officials by being overly aggressive.

[49] The evidence established that Volvo trucks of the type purchased by the Smallmons were originally assembled in Australia. According to Mr Tucker's uncontradicted testimony, all the trucks were manufactured to ADR requirements and compliance plates made for the trucks but never attached. This was because the trucks were intended for export to the New Zealand market and required some minor modifications for that market. Mr Tucker testified that he had seen a box containing all the ADR compliance plates for the Volvo trucks that had been exported to New Zealand and the Pacific. He was confident the compliance plates for the Smallmons'

trucks would be amongst them. The problem was that Volvo for reasons of its own would not release any of the plates.

[50] In the past, other Australian purchasers of imported Volvo trucks have obtained registration by providing the authorities with what is called a ratings letter from Volvo confirming the "build spec" and a letter of compliance from a compliance engineer. The letter of compliance from the engineer certifies that the vehicle complies with all relevant ADRs applicable as at the date of manufacture.

[51] Through Mr Walsh, the Smallmons had obtained a ratings letter from Volvo and a letter of compliance. However, in their case that was held not to be sufficient. There was evidence that, since their case, another importer of Volvo trucks has been told that any vehicles he wants to bring into Australia in the future must have a fitted Australian compliance plate and that he must apply for vehicle import approval prior to shipping.

[52] Mr Tucker, who has been importing trucks and heavy machinery into Australia since 1983, never told the Smallmons they needed an authority to import. But that was because it was his belief that import permits were only required for trucks manufactured outside Australia.

[53] Similarly, Mr Walsh never alerted the Smallmons to the importance of having fitted compliance plates.

[54] According to the evidence, it seems that for whatever reason the Australian authorities must have either changed their previous enforcement policy or are now wrongly applying the relevant regulations. The evidence provided was limited and it was impossible for me to reach a concluded view one way or the other. The Smallmons did not call any expert evidence. Nor did I have the benefit of testimony from any of the Australian authorities. All that can be safely said on the evidence is that the Smallmons' difficulties in obtaining registration were unprecedented, or as Mr Moss called it a "freak occurrence".

[55] There is no doubt the four trucks do in fact comply with Australian Design Rules and comply with all relevant ADRs applicable as at the date of manufacture. The deficiency lies in the absence of the compliance plates and the absence of an authority to import. Of those two deficiencies, it is the absence of a fitted compliance plate that seems to be the major stumbling block. It is a defect that can never be remedied unless perhaps Volvo released the plates. The trucks cannot be re-made.

[56] While, as I have said, Mr Miller knew the trucks did not have a compliance plate, I accept he would not have appreciated the significance of that, given the fact he had sold other vehicles also without compliance plates and those purchasers had never experienced any difficulty.

[57] As regards the import duty, the Smallmons are not the only importers of Volvo Australian-assembled trucks to have been levied retrospectively with import duty. Mr Tucker was adamant the Customs ruling was wrong because it was based on a mis-classification of the trucks and an unsubstantiated assertion by Volvo that it had claimed duty drawback when the assembled trucks were originally exported to New Zealand. The significance of duty drawback having been claimed was that if true it would mean the trucks could not qualify as returned Australian goods. Mr Tucker said the Customs ruling could and should have been challenged through an available appeals process.

The claim by the Smallmons

[58] The Smallmons say that had they known the trucks were not capable of being fully registered, they would never have purchased them. They have lost five per cent of their business due to being unable to go into New South Wales, and say the inability to sell the trucks means they cannot sell their business. They consider the trucks worthless and are seeking recovery of the full purchase price. They also claim to have suffered losses as a result of being unable to use the trucks between 5 October (the date the trucks arrived) and 24 November 2006 (the date the exemption permits commenced). In addition, they claim the costs of the additional cleaning and

the cost of the import duty, as well as losses associated with having to forego sales of some of their old vehicles.

[59] The total claim amounts to AU$341,692.83.

[60] The statement of claim alleges the following causes of action:

As against Transport Sales Limited:

i) Breach of contract.

ii) Breach of the implied term of fitness for purpose under the Sale of Goods Act 1908.

iii) Breach of the United Nations Convention on Contracts for the International Sale of Goods.

iv) Misrepresentation under the Contractual Remedies Act 1979.

v) Misleading and deceptive conduct under s 9 of the Fair Trading Act 1986.

vi) Tortious negligence.

As against Mr Miller in his personal capacity:

vii) Misleading and deceptive conduct under the Fair Trading Act.

viii) Tortious negligence.

[61] There is a considerable degree of overlap between the various causes of action, and indeed to the extent that both the Sale of Goods Act 1908 and the UN Convention are pleaded, the statement of claim is misconceived.

[62] Both Australia and New Zealand have adopted the Convention as part of their law. In New Zealand that was achieved by the enactment of the Sale of Goods Act (United Nations Convention) Act 1994. It came into force on 1 October 1995. Section 5 provides that the UN Convention is to be a code. The effect of s 5 is that when the Convention applies, a party is precluded from suing under the Sale of Goods Act 1908: see *KA (Newmarket) Limited & Ors v Hart & Anor* HC Auckland CP467/SD01, 10 May 2002, Heath J.

[63] There is no question that the Convention applied to the transaction between Transport Sales and the Smallmons. It was a contract for the sale of commercial goods between parties whose respective places of business were in different contracting states and who did not purport to contract out of the Convention: see Articles 1 to 6 of the Convention which set out the necessary pre-requisites.

[64] It follows that the cause of action which relies on an implied term under the Sale of Goods Act 1908 must be struck out.

[65] During the course of submissions, Mr Moss also conceded that having regard to *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA), it was questionable whether Mr Miller owed the Smallmons a duty of care in his personal capacity as a director of Transport Sales. Mr Moss further accepted that in any event because what had happened was a “freak occurrence”, Mr Miller could not be said to have been negligent on the facts even if he did owe a duty of care. I pause here to add that Mr Moss also accepted that Mr Miller could not be said to have been negligent in recommending Messrs Walsh and Tucker. Their competence was not put in issue. If Mr Miller was not negligent on the facts, then Transport Sales cannot be liable in negligence either.

Discussion

What were the terms of the oral contract?

[66] A logical starting point is to ascertain the terms of the contract between Transport Sales and the Smallmons.

[67] The statement of claim pleads that the contract contained the following express terms:

a) Transport Sales agreed to sell to the Smallmons four Volvo FM12 trucks of a specified type, age and kilometre reading.

b) Transport Sales would arrange for the export of the trucks from New Zealand and their importation into Australia via its agents.

c) Prior to the departure of the trucks, Transport Sales would ensure the trucks were cleaned to a standard required by Australian Quarantine and Inspection Services to enable their release immediately after arrival in Australia.

d) The Smallmons would pay a purchase price of $72,000 per truck, as well as the reasonable costs of Transport Sales and its agents incurred in the export from New Zealand into Queensland.

[68] In my view, the evidence does not support the above as a wholly accurate description of the express terms of the agreement reached between the parties.

[69] As I have already mentioned, in cross-examination the Smallmons themselves admitted that Messrs Walsh and Tucker were their agents, not the agents of Transport Sales. The Smallmons also accepted that Transport Sales' obligations under the contract were limited to cleaning and shipping. Transport Sales never agreed to arrange importation and registration. That was the Smallmons' own responsibility.

[70] As regards cleaning, Mr Miller contended that the cleaning was to enable the vehicles to be placed on the boat. It was not a cleaning to enable them to pass Australian quarantine standards. He testified that he was "not aware of Australian quarantine standards and was merely contracting to clean the vehicles sufficient for them to be placed on the vessel for shipment to Brisbane which was part of my contract."

[71] I do not accept that assertion. The cleanliness declaration which he himself signed on behalf of Transport Sales is expressly addressed to the Australian Quarantine Inspection Service. It refers to the four trucks and states:

> CLEANLINESS DECLARATION
>
> TO : AUSTRALIAN QUARANTINE INSPECTION SERVICE
>
> RE : SHIPMENT OF 4 X 2001 VOLVO MODEL FM12, 8X4 CAB/CHASSIS ROAD TRUCKS, VIN #YV5J4DAG41D122390, #YV5J4DAG11D122414, #YV5J4DAG21D122423 & #YV5J4DAG51D122383
>
> SHIPPED ON MV TARONGA V. AF630
> POL AUCKLAND, NZ
> POD BRISBANE, AUSTRALIA
>
> WE HEREBY CERTIFY THAT PRIOR TO EXPORTATION, THE ABOVE TRUCKS WERE STEAM CLEANED AND PRESSURE WASHED. WHERE POSSIBLE, ALL PANELS AND GUARDS WERE REMOVED FOR CLEANING.
>
> TO THE BEST OF OUR KNOWLEDGE, THE TRUCKS ARE FREE OF ANY INFESTATION AND QUARANTINE CONTAMINATION, INCLUDING LIVE INSECTS, SEEDS, SOIL AND ANY OTHER PLANT OR ANIMAL DEBRIS.

[72] Mr Miller failed to discover this document.

[73] There was evidence that the Australian quarantine officials almost invariably required re-cleaning and that some were considered over-zealous. However, in my view, if Mr Miller wanted to pass the risk of this happening onto the Smallmons he needed to have said so expressly. As it was, Transport Sales assumed an obligation to clean the trucks to Australian quarantine standard. On the evidence, I find that the trucks were not cleaned to the requisite standard and that Transport Sales is accordingly liable to pay the additional cleaning costs.

[74] In coming to this conclusion, I have not overlooked the evidence that as at 15 September 2006, Mrs Smallmon had become aware from Mr Tucker that it was most likely the Quarantine officials would require re-cleaning. However, as a matter of law that cannot alter the terms of the contract with Transport Sales which had been concluded in August.

[75] In addition to the express terms, the statement of claim also pleads several implied terms, said to be "implied into the contract as a matter of law by reason of the nature of the contract":

a) Transport Sales warranted that the trucks were fit for the purpose of, and intended use by, the Smallmons in their business;

b) Transport Sales and its duly authorised agents would exercise reasonable care and skill in carrying out the terms of the contract;

c) Transport Sales had requisite knowledge and ability in the area of the export of trucks from New Zealand and the import of trucks into Australia to enable it to import the trucks into Australia in a manner which would allow for the Smallmons' full business use and in a timely manner; and

d) Transport Sales had the requisite knowledge and ability to determine the correct documentation or authorities needed for the import of trucks from New Zealand into Australia for the Smallmons' full business use and in a timely manner.

[76] Of these alleged implied terms, only the first is of any relevance. Such a term is derived from Article 35 of the UN Convention. The other alleged implied terms essentially depend on the wrong assertion that it was Transport Sales' obligation to undertake the importation, which it clearly was not.

Was there a breach of Article 35 of the United Nations Convention?

[77] Article 35 provides:

> (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
>
> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

> (a) are fit for the purposes for which goods of the same description would ordinarily be used;
>
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
>
> (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
>
> (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
>
> (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

[78] There was no express warranty in the contract between Transport Sales and the Smallmons relating to registration.

[79] Nor did the parties ever purport to contract out of Article 35, and accordingly the standards set out at Article 35(2) were implied terms which formed part of the contract.

[80] Article 35(2)(a) requires that the goods be fit for the purposes for which they are ordinarily used.

[81] Trucks are ordinarily used for carting goods on the road. These trucks were mechanically capable of being driven on the road. However, the Smallmons contend that because the trucks were not registrable at the point of sale, and never could be fully registered, they could not be driven and were therefore not fit for the ordinary purpose.

[82] The issue of whether conformity with Article 35(2)(a) can be determined by reference to regulatory requirements prevailing in the buyer's jurisdiction has been

considered in a number of overseas decisions and articles[1]: for example, the 'New Zealand mussels case' (Bundesgerichtshof (German Supreme Court), 8 March 1995, VIII ZR 159/94), the 'Italian Cheese Case' (Court of Appeal, Grenoble, 13 September 1995, 93/4126) and *Medical Marketing v. Internazionale Medico Scientifica* (Federal District Court, Louisiana, 17 May 1999, 99-0380). See also commentary on Article 35(2)(a) in P Schlechtriem & I Schwenzer *Commentary on the UN Convention on the International Sale of Goods* (2nd ed, OUP, 2005) at 418 and P Schlechtriem & P Butler *UN Law on International Sales* (Springer, 2009) at [139].

[83] The following principles can be distilled from these authorities:

i) As a general rule, the seller is not responsible for compliance with the regulatory provisions or standards of the importing country even if he or she knows the destination of the goods unless:

a. The same regulations exist in the seller's country.

b. The buyer drew the seller's attention to the regulatory provisions and relied on the seller's expertise.

c. The seller knew or should have known of the requirements because of special circumstances.

Special circumstances may include:

i. The fact the seller has maintained a branch in the importing country.

ii. The existence of a long-standing connection between the parties.

[1] The two main sources of such decisions are an online digest maintained by the UN Commission on International Trade Law (www.uncitral.org/uncitral/en/case_law/digests/cisg2008.html), and an online database maintained by Pace University in New York (www.cisg.law.pace.edu).

iii. The fact the seller has often exported into the buyer's country.

iv. The fact the seller has promoted its products in the buyer's country.

[84] While one of the leading cases involved a New Zealand product, the decision was actually the decision of a German court. It appears that the present case is the first New Zealand decision to have ever considered the application of Article 35 to a contract made in New Zealand.

[85] Counsel for both parties nevertheless sought to rely on domestic sale of goods law.

[86] However, in my view, recourse to domestic law is prohibited by Article 7.

[87] Article 7 provides:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

[88] The requirement imposed by Article 7(1) namely to have regard "to the international character of the convention and to the need to promote uniformity in application" is generally accepted as establishing what has been called a principle of autonomous interpretation. That means the Convention must be applied and interpreted exclusively on its own terms, having regard to the principles of the Convention and Convention-related decisions in overseas jurisdictions. Recourse to domestic case law is to be avoided:

> In reading and understanding the provisions, concepts and words of the Convention, recourse to the understanding of these words and the like in domestic systems, in particular, the domestic legal system of the reader, must be avoided. This seems to be self-evident but experience shows that

> practitioners and scholars tend to understand words and concepts of the Convention according to their familiar domestic law.
>
> (P Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG* (2005) 36 VUWLR 781 at 789-790)

[89] Counsel rely on Article 7(2) to justify citation of domestic law. However, that only authorises reference to domestic law in order to fill gaps in interpretation.

[90] In my view, this is not a situation of there being a need to fill a gap. The wording of Article 35 is clear, and there is sufficient overseas case law to allow autonomous interpretation of Article 35 without reference to domestic case law.

[91] In applying Article 35, regard must also be had to Article 8 which states:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

[92] Applying the relevant principles to the facts of this case, it was common ground that the registration requirements in Queensland are different to those prevailing in New Zealand. It was also common ground that at no stage did the Smallmons ever raise the issue of registration requirements with Mr Miller. Further, there was no evidence that Mr Miller knew what the registration requirements were in Queensland.

[93] It follows that if the Smallmons are to succeed in establishing a breach of Article 35(2)(a), it must be on the grounds that Mr Miller and Transport Sales ought to have known because of special circumstances.

[94] What is alleged to amount to special circumstances are the facts that Transport Sales advertised in Australia and that Transport Sales had exported trucks previously into Australia. The evidence established that prior to the Smallmon transaction, Transport Sales had exported seven Volvo trucks into Australia.

[95] As the authorities make clear, these are circumstances capable of amounting to special circumstances.

[96] However, in my view, they are outweighed by two other considerations. The first is the terms of the advertisement which stated "landed" at Brisbane. The second is that Mr Miller expressly recommended Australian contractors who would be able to assist the Smallmons with importation and ADR compliance. He was thereby delineating the parties' respective responsibilities, as well as delineating his own field of expertise and knowledge, and in my view in those circumstances it would be wrong to say that Mr Miller or Transport Sales ought to have known.

[97] The same consideration also applies to Article 35(2)(b):

> 2. Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> …
>
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement

[98] The Smallmons made known they wanted to use the trucks in Australia and therefore "use in Australia" could be said to be a particular purpose.

[99] However, in my view, the circumstances show it was unreasonable for the Smallmons to rely on Transport Sales' skill and judgment. The Smallmons were experienced transport operators. They were in a much better position to know the registration requirements of their own country than Mr Miller. The fact the trucks did not have compliance plates was not hidden from them, but was there to be seen. As experienced transport operators, they could be expected to be able to identify a compliance plate. Further, Mr Miller recommended they engage specialist

contractors, which they did. Significantly, Mrs Smallmon agreed with the proposition that the purpose of inspecting the vehicles was to see if they complied with ADRs and that at that stage they were acting on advice from Mr Walsh.

[100] In those circumstances, any reliance placed on Mr Miller's expertise or knowledge or that of his company about the regulatory requirements in Australia would not in my view be reasonable.

[101] For completeness I should record that I would have come to this conclusion regardless of which party bears the burden of proof. There is a conflict in the authorities on the Convention as to whether it is the seller or the buyer.

Misrepresentations

[102] The statement of claim pleads the following pre-contractual misrepresentations as the basis of the claims under the Fair Trading Act and s 6 of the Contractual Remedies Act.

a) The trucks were returned Australian goods and could be imported into Australia for the Smallmons' use and in a timely manner.

b) The trucks would be cleaned prior to their departure from New Zealand to the required standard of Australian Quarantine Inspection Service, such that there would be no delay on arrival in Australia.

c) There would be no problems with importation, compliance and registration of the trucks for the full business use.

[103] Correctly analysed, the alleged statement regarding the cleaning of the trucks is in my view a promissory statement of future intent rather than an actionable misrepresentation. It was an express term of the contract and, as I have found, was a term that was breached.

[104] There was a conflict in the evidence as to whether Mr Miller ever stated that there would be no problems, and that the trucks would be available for use within a few days of landing.

[105] While such statements could be considered statements as to the future, they arguably contain within them an implicit assertion of existing fact – namely that the trucks were in a registrable state.

[106] I am satisfied however on the evidence that Mr Miller never made any statements in the terms pleaded. At the time he had no knowledge of the detail of the modifications the Smallmons were proposing to make, nor how long the modifications would take. In those circumstances I consider it unlikely he would have put a timeframe on it. I am also satisfied he never told the Smallmons there would be no problems.

[107] What the evidence established he did tell the Smallmons was that he had exported trucks to Australia before and that the purchasers had not experienced any problems. Those statements were true. They must have been intended to give the Smallmons confidence, but the risk of there being problems was still theirs.

[108] It is impossible not to have a great deal of sympathy for the Smallmons. However, their bad experience has clearly coloured their account of the discussions with Mr Miller to the point where they asserted that Mr Miller had promised to take care of everything, when patently he had not; and to the point where they asserted that Messrs Walsh and Tucker were Mr Miller's agents, when again patently they were not.

[109] As regards the issue of import duty, Mr Miller denied ever saying that no import duty would be payable. He did, however, admit that he may have described the trucks as returned Australian goods. I consider it most unlikely he would have had occasion to use that phrase unless it was in the context of a discussion about whether import duty was payable.

[110] However, the evidence established that in the past such trucks have been regarded as returned Australian goods and no duty has been levied. The Smallmons have not challenged the correctness of the ruling, and the only expert evidence adduced was to the effect that the ruling was wrong and that import duty was not payable.

[111] In those circumstances, the Smallmons have not discharged the onus of proving that any statement made by Mr Miller about the trucks being returned Australian goods and import duty was false

[112] The fact they also engaged their own expert customs broker would also mean that reliance on any statements made by Mr Miller would not be reasonable, reasonable reliance being a pre-requisite of both claims.

[113] There being no actionable misrepresentations and no reasonable reliance, it follows that the claims under the Fair Trading Act and Contractual Remedies Act must also fail.

Outcome of Hearing

[114] I find that Transport Sales Limited did breach its obligations under the contract relating to the cleaning of the trucks.

[115] The loss suffered by the Smallmons as a result of that breach was the payment of the additional cleaning costs and they are therefore entitled to judgment against Transport Sales in the sum of AU$3993. That does not of course mean I consider the decision of the small claims court in Australia was wrong. It was concerned with liability for the additional cleaning costs as between the Smallmons and Mr Tucker's company, not as between the Smallmons and Transport Sales. Interest on the sum of AU$3993 at the Judicature Act rate is awarded from the date the Smallmons paid the costs to Mr Tucker's company. Leave is reserved to either party to come back to the Court for further directions if they are unable to agree on the amount of the interest.

[116] The Smallmons have also claimed loss of profits due to the trucks being quarantined for cleaning. However, the inability to register the trucks would have prevented the trucks from being used anyway even if they had passed the quarantine inspection. Further, the Smallmons chose to sell their existing trucks despite knowing re-cleaning and thus delay was “most likely”. In my view, any claim for losses due to delay caused by the cleaning is not sustainable.

[117] For the reasons already traversed, all the other claims made by the Smallmons are dismissed.

[118] As regards costs, in the event the parties are unable to reach an agreement on costs and require me to make an award, I direct the defendants are to file submissions first, with submissions from the Smallmons’ counsel within five working days thereafter.

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