

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

C.P. 146/98

BETWEEN: TUULIMA LAITI of Lalomanu,
Aleipata, Public Servant:

Plaintiff

A N D: APIA TRADERS LIMITED a duly
incorporated company having its
registered office at Apia, Samoa:

Defendant

Counsel: A Pereira for plaintiff
R Drake for defendant

Hearing: 5 August 1998

Judgment: 18 August 1998

ADDENDUM TO JUDGMENT OF SAPOLU, CJ

On 18th August 1998, this Court held that the second-hand freezer which was the subject of a contract of sale between the plaintiff as buyer and the defendant as seller was not reasonably fit for its purpose ~~of~~ ^{of} merchantable quality. Therefore the sale was in breach of sections ⁵14(a) and (b) of the Sale of Goods Act 1975.

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The Court, however, then asked counsel for both parties to present written legal submissions on the appropriate form of relief. I have now received those submissions and the first question which calls for decision is whether in the circumstances of this case the plaintiff

still has the right to reject the freezer or whether he has lost the right to do so. In essence, counsel for the plaintiff is saying that the plaintiff is entitled to reject the freezer because it is not reasonably fit for its purpose or of merchantable quality. Counsel for the defendant, on the other hand, has submitted that the plaintiff has lost any right of rejection he might have had and must now sue for damages only. She referred to the relevant provisions of the Sale of Goods Act 1975 in support of her submission. I turn to those provisions now.

Section 12(3) of the Act provides :

“Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there is a term of the contract express or implied to that effect”.

It is clear from section 12(3) that there are two situations where a buyer would lose the right to reject goods for breach of condition. The first is where the contract of sale is not severable and the buyer has accepted the goods or part thereof. The second situation is where the goods are specific and the property in them has passed to the buyer. In both situations the breach of condition would be treated as a breach of warranty.

Counsel for the defendant submitted that the plaintiff as buyer, has lost any right he might have had of rejecting the second-hand freezer because he has accepted the freezer and, alternatively, the freezer is specific goods and the property in it had already passed to the plaintiff. I will now turn first to the question of acceptance and here I refer to section 35 of the Act which provides :

“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods, without intimating to the seller that he has rejected them”.

Counsel for the defendant submitted that the plaintiff in this case had continued to retain and use the freezer after the lapse of a reasonable time without intimating to the defendant, as seller, that he has rejected it. Therefore, in terms of section 35 the plaintiff must be deemed to have accepted the freezer. It follows that the plaintiff in terms of section 12(3) of the Act has lost any right of rejection of the freezer and treating the contract of sale as repudiated.

After careful consideration, I am of the view that the submission by counsel for the defendant should be accepted. The plaintiff had purchased and used the freezer for about 7½ months. After the first period of 2 to 3 months the freezer sustained a defect after working well for that period. The plaintiff did not reject the freezer then. It was repaired and restored to good working condition. The plaintiff used the freezer again until about 4½ months later when it again failed to cool anything. In my view that was more than a lapse of a reasonable time without the plaintiff intimating to the defendant that he has rejected the freezer. In terms of section 35 the plaintiff must, therefore, be deemed to have accepted the freezer. It follows that under section 12(3) he has lost any right to reject.

I think it can also be argued that the plaintiff by keeping the freezer and using it as his own to cool his goods for a period of about 7 months, is tantamount to doing an act in relation to the freezer which is inconsistent with the defendant's ownership of it in terms of section 35.

On that basis the plaintiff can also be deemed to have accepted the freezer under section 35 and, therefore, has lost any right to reject it.

Accordingly, the breaches of the implied conditions as to reasonable fitness for purpose and as to merchantable quality must be treated as breaches of warranty by reason of section 12(3). The remedy for a breach of warranty is provided in section 52 of the Act which, as far as relevant, provides :

“(1) Where there is a breach of warranty by the seller, or where the buyer elects or is “compelled to treat any breach of a condition on the part of the seller as a breach of “warranty, the buyer is not by reason only of such breach of warranty entitled to reject “the goods; but he may -

“ (a)

“ (b) maintain an action against the seller for damages for the breach of
“ warranty.

“(2) The measure of damages for breach of warranty is the estimated loss directly and “naturally resulting, in the ordinary course of events, from the breach of warranty”.

In essence, what section 52(1)(b) is saying is that where a breach of condition on the part of a seller is treated as a breach of warranty, the proper action to take is one for damages against the seller for breach of warranty.

The other issue raised by counsel for the defendant in support of her submission that the plaintiff has lost any right of rejection he might have had is that the sale of the freezer was a sale of specific goods and the property in the freezer had passed to the plaintiff. The expression “specific goods” is defined in section 2(1) of the Act to mean goods identified and agreed on at the time a contract of sale is made. The freezer was clearly identified and agreed

on at the time the contract of sale was entered into between the plaintiff and the defendant.

The sale was therefore one for specific goods.

Section 19 rule 1 then provides :

“Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both, is postponed”.

This particular provision was not the subject of submissions by counsel on either side but it appears that counsel for the defendant had it in mind when making her submissions. On its face, it is clear from section 19 rule 1 that if a contract of sale of specific goods is unconditional and the goods were in a deliverable state, the property passes to the buyer at the time the contract is made. Here the freezer is specific goods and it was in a deliverable state at the time of the sale which was unconditional. So prima facie, the property in the freezer had passed from the defendant to the plaintiff at the time of the sale. I say prima facie the property had passed because there is dispute in other jurisdictions whether that is in fact so. The reason given in those other jurisdictions is that if property in an unconditional sale of specific goods in a deliverable state is to pass at the time a contract is made, it would mean that in terms of section 12(3) of the Act the buyer would lose any right to reject the goods at the very time the contract of sale is made. So there will be no opportunity to reject once the contract is made. As that issue was not addressed in this case, I would not express any conclusive view on the applicability of section 19 rule 1 to this case. I would only say that prima facie a combined reading of sections 12(3) and 19 does not appear to give any assistance to the plaintiff's case.

Counsel for the plaintiff has also asked the Court again to rescind the contract of sale between the plaintiff and the defendant, on the ground of innocent misrepresentation. The first difficulty is that there is no evidence of any misrepresentation. The other difficulty is the question of whether a right of rescission would lie after acceptance of the goods by the buyer. In terms of sections 12(3) and 35 of the Act, the right of rejection would be lost when the goods have been accepted by the buyer under a contract of sale. It was not raised whether any right that might exist to rescind a contract of sale would also be lost after acceptance of the goods by a buyer. I would leave that question open for another case.

Counsel for the plaintiff then submitted in the alternative that a decree of specific performance should be issued against the defendant under section 51 of the Act to supply the plaintiff with a second-hand freezer which is reasonably fit for its purpose and is of merchantable quality as per their contract of sale of 19 August 1996. I am also not able to accept this submission for the plaintiff for two reasons. The first reason is that the circumstances contemplated by section 51 in which specific performance may be ordered do not apply to the facts of this case. Section 51 speaks of the availability of specific performance in an action for breach of contract to deliver specific or ascertained goods. There is no such action in this case because the freezer is specific goods and the plaintiff had taken delivery of it. No submission was also directed to the question whether specific performance may lie in circumstances which fall outside of section 51. The second reason why I am not able to accept the submission for the plaintiff is this. Specific performance is normally ordered against a party to a contract to carry out his obligations under the contract according to the terms of the contract. However, what the plaintiff is asking for is that the Court orders the return of the freezer to the defendant as seller, and then the Court to issue specific

performance against the defendant to supply to the plaintiff a freezer that is reasonably fit and is of merchantable quality. That would seem to be asking the Court to order the defendant, by way of specific performance, to comply with the statutory implied conditions provided in section 14(a) and (b) of the Sale of Goods Act 1975. It is not asking the Court to order the defendant to carry out any contractual obligation under the contract of sale with the plaintiff in accordance with the terms of that contract. I do not think that what the plaintiff is asking for can be achieved by a decree of specific performance.

I have come to the view that in the circumstances of this case, the plaintiff's remedy should be an action for damages for breach of warranty in terms of section 52. I accept the submission for the defendant that the damages to be awarded in this connexion should be the costs of repairs. That is between \$360 and \$450. I would award \$410 to the plaintiff under this head of damages.

As to the claim for consequential loss which arises from the failure of the freezer to cool anything in March or April 1997, the plaintiff claims \$100 for the freezer goods that were damaged as a result of the freezer failing to cool anything and \$54 for transporting the freezer to Grevel Air Conditioning and Refrigeration Service. Counsel for the defendant has agreed to an award of \$100 for damaged freezer goods but not to any award for transport costs because of the absence of any evidence. While there is no direct evidence as to transport costs that were incurred, I am satisfied that for the freezer to be at Grevel Air Conditioning and Refrigeration Service for repairs, it must have been transported from the plaintiff's place at Lalomanu. I would award \$45 for costs of transport. For consequential loss I would therefore award a total of \$145.

As to the claims for general and exemplary damages. There is no evidence to sustain the claim for general damages, and in the circumstances of this case where the plaintiff had lost his right to reject the freezer an award of exemplary damages will not be appropriate. I therefore disallow both claims for general and exemplary damages.

I have also decided that this is not a case for an award of interest.

I have also given careful consideration to the question of costs. It is clear that even though the plaintiff had succeeded on the question of liability, the defendant has succeeded substantially on the question of appropriate relief. I am also conscious that many of the issues raised in this case are novel issues insofar as the law of Samoa is concerned. I have therefore decided not to make an order as to costs.

In all then, judgment is given for the plaintiff in the total sum of \$555.

T.M. Sapala.....
CHIEF JUSTICE