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

JUDGMENT OF SAPOLU, CJ

This case is about a contract of sale of goods. As such, the provisions of the Sale of Goods Act 1975 apply to this case. Under the contract, the plaintiff is the buyer and the defendant is the seller.

On 19 August 1996 the plaintiff went to the defendant's store to buy a freezer, the defendant being a company carrying on business as a dealer in second-hand appliances including second-hand freezers. The plaintiff then selected a second-hand freezer he wanted to buy and an employee of the defendant switched on the freezer for five minutes to see if it

was working well. It was. The plaintiff then paid $1,295 for the price of the freezer and was given a receipt for that amount. On the receipt was written a warranty for three months. This was explained by both counsel to mean that any faults to the freezer which arose within three months from the date of sale would be the responsibility of the defendant as the seller.

Counsel for the defendant submitted that the freezer was sold as "second-hand with repairs". I do not accept that the freezer was sold under such a description. I accept the plaintiff's evidence that he went to the plaintiff's store to buy a second-hand freezer. This particular freezer was switched on for 5 minutes and it worked well. So he bought it. There was no mention that the sale was "second-hand with repairs".

When the plaintiff took the freezer to his home at Lalomanu, Aleipata, he switched it on and it was still working well. Foodstuffs like chicken, turkey tails and fish were kept in the freezer which was kept switched on 24 hours a day. Then in late October or early November 1996 the freezer failed to cool anything. This was within the three months period covered by the warranty. So the plaintiff brought the freezer to the defendant which took it to Grevel Air Conditioning and Refrigeration Service to be fixed.

Now the employee of Grevel Air Conditioning and Refrigeration Service who attended to repairing the freezer was called by the plaintiff to testify. He has had about eight years experience in refrigeration work. He said that he found no freon, or coolant gas, in the coolant gas container and piping system of the freezer. That was the reason why the freezer was not cooling anything. He found a leak in an outside pipe which must have caused the freon or coolant gas, to come out thus resulting in the failure of the freezer to cool anything. The leak was welded and the air that was inside the piping system of the freezer was vacuumed out and

new freon was pumped into the freezer. In a week's time, the freezer was again in good working condition and the plaintiff took it back to his home. He did not have to pay for the repairs as the fault to the freezer occurred within the warranty period.

In his evidence, the same employee of Grevel Air Conditioning and Refrigeration Service also said that given the nature and condition of the leak that he found, he was of the opinion that the leak must have occurred a week before the freezer stopped cooling anything. He based his opinion on the appearance and the small size of the leak that he found. He said that if it had been a major leak, all the freon would have come out quicker and the freezer would have stopped cooling anything within a day. He also testified that this leak could have been caused from the freezer being dropped or someone interfering with its pipes. I must point out here that the plaintiff made no mention in his evidence that the freezer dropped or that anyone interfered with the pipes of the freezer. His evidence was that the freezer suddenly stopped cooling anything. The employee of Grevel Air Conditioning and Refrigeration Service was called by counsel for the plaintiff after the plaintiff had testified. After some consideration of this aspect of the evidence, I have decided to take the evidence from Grevel's employee.

After the freezer was repaired and taken back to his home by the plaintiff, it again worked well in cooling foodstuffs. Then in late March or early April 1997 the freezer again stopped cooling anything. The plaintiff then took it back to the defendant and then to Grevel Air Conditioning and Refrigeration Service. The same employee who had fixed this freezer in 1996 attended to the freezer again in April 1997. He told the plaintiff that the fault was with the interior pipes and that repiping was necessary. That means the replacement of the rusted pipes with new pipes. He testified that the fault had arisen through rust as this is a second-

hand freezer and this rusting process must have occurred over a period of 5 years. He gave the cost for doing that repiping as between $360 to $450.

The plaintiff was not willing to pay that amount. He wants to rescind the sale and for the price he paid for the freezer to be refunded to him by the defendant. He is also suing for items of damages.

The evidence for the defendant was given by its accountant Frank Moors. He testified that the defendant company deals in second-hand appliances and the second-hand freezer in this case was imported by the defendant from New Zealand. He also testified that this second-hand freezer was about 12 years old at the time of the sale and had a life expectancy of 2 to 3 years. There is no evidence that any of this information was made known by the defendant to the plaintiff at the time of the sale. What appears to have happened was that the plaintiff simply had a look at the freezer and then it was switched on for five minutes. The plaintiff was satisfied with the working condition of the freezer and he paid the price of $1,295. Mr Moors further testified that the cost in 1996 of a new freezer of the same kind would be $2,500 to $2,600. He had also offered some money to the plaintiff to pay for his expenses when the freezer was brought in again in 1997 to be fixed but the plaintiff refused to accept it.

Now the plaintiff has brought this claim under section 15(a) and (b) of the Sale of Goods Act 1975. Section 15(a) as far as relevant provides :

> "Where the buyer, expressly or by implication, makes known to the seller the "particular purpose for which the goods are required, so as to show that the buyer "relies on the seller's skill or judgment, and the goods are of a description which it is

"in the course of the seller's business to supply (whether he is the manufacturer or "not), there is an implied condition that the goods shall be reasonably fit for such "purpose".

Section 15(b), as far as relevant, then provides :

"Where goods are bought by description from a seller who deals in goods of that "description (whether he is the manufacturer or not), there is an implied condition that "the goods shall be of merchantable quality".

The two principal issues which are in dispute between counsel in this case are : (a) whether the second-hand freezer was reasonably fit for its purpose as required by section 15(a), and (b) whether the second-hand freezer was of merchantable quality as required by section 15(b).

Counsel for the plaintiff submitted that the sale of the freezer was in breach of both the implied conditions as to reasonable fitness for purpose and as to merchantable quality. He further submitted that the contract of sale must therefore be rescinded and the price paid by the plaintiff should be refunded to him. Counsel for the defendant on the other hand opposed the submissions for the plaintiff and emphasised that the freezer in this case is a second-hand freezer and was sold by the defendant to the plaintiff under that description. The question of whether there has been a breach of any of the implied conditions in issue in this case must therefore be approached bearing in mind that we are here dealing with a second-hand and not with a new freezer. Counsel for the defendant then cited the well-known case in this area of second-hand sales of *Bartlett v Sidney Marcus Ltd [1965] 2 All ER 753*. In that case the plaintiff bought a second-hand car from the defendant, a second-hand car dealer. The defendant's salesman told the plaintiff that the clutch of the car was defective. It was then agreed between the plaintiff and the defendant that the plaintiff would buy the car at a reduced

price but he would be responsible for the repairs to be done to the clutch. The plaintiff then took the car and drove it around for four weeks when it was discovered that the defect to the clutch was far more serious than expected. The clutch was very much worn out. So the plaintiff sued the defendant for breach of the implied conditions as to fitness and as to merchantable quality.

Lord Denning MR in discussing the implied conditions as to fitness and merchantability under section 14(1) and (2) of the UK legislation said at p.755 :

> **"[On] a sale of a secondhand car, it is merchantable if it is in usable condition, "even though not perfect. This is very similar to the position under s.14(1). A "secondhand car is 'reasonably fit for the purpose' if it is in a roadworthy "condition, fit to be driven along the road in safety, even though not as perfect "as a new car.**
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> "Applying those tests here, the car was far from perfect. It required a good deal of "work to be done on it; but so do many secondhand cars. A buyer should realise that, "when he buys a secondhand car, defects may appear sooner or later; and, in the "absence of an express warranty, he has no redress. Even when he buys from a dealer "the most that he can require is that it should be reasonably fit for the purpose of "being driven along the road. This car came up to that requirement. The plaintiff "drove the car away himself. It seemed to be running smoothly. He drove it for four "weeks before he put it into the garage to have the clutch repaired. Then more work "was necessary than he anticipated; but that does not mean that, at the time of the sale, "it was not fit for use as a car. I do not think that, on the judge's findings, there was "any evidence of a breach of the implied conditions". (italics mine)

The next case which involved the sale of a second-hand car was ***Crowther v Shannon Motor Co. [1975] 1 All ER 139.*** The plaintiff in that case bought a second-hand jaguar car from the defendant which was a dealer in second-hand cars. He had the car for three weeks when it came to a full stop. The engine had seized up and was in an extremely bad condition that it had to be scrapped and replaced with a reconditioned engine. The evidence of the former owner, who had sold the car to the defendant dealer, was that when he sold the car to

the defendant the engine was "clapped out" and was not fit to be used on the road. In the lower Court it was held that on the facts there was a breach of the implied condition as to reasonable fitness for purpose. On appeal to the Court of Appeal, Lord Denning MR distinguished the case of ***Bartlett v Sidney Marcus Ltd [1965] 2 All ER 753*** on the facts and dismissed the appeal. At pp 140-141 His Lordship said :

> "Counsel for the dealers, who put the case very cogently before us, submitted that a car "which had covered 2,534 miles must have been reasonably fit for the purpose of "driving along the road. He drew attention to a case some years ago in this Court, "***Bartlett v Sidney Marcus Ltd [1965] 2 All ER 753***. We emphasised then that a "buyer, when he buys a secondhand car, should realise that defects may appear sooner "or later. In that particular case a defect did appear in the clutch. It was more "expensive to repair than had been anticipated. It was held by this Court that the fact "that the defect was more expensive than had been anticipated did not mean that there "had been any breach of the implied condition. But that seems to me to be entirely "distinguishable from the present case. In that case it was a minor repair costing 45 "pounds after 300 miles. Here we have a very different case. On the dealer's own "evidence, a buyer could reasonably expect to get 100,000 miles life out of a jaguar "engine. Here the jaguar had only done 80,000 miles. Yet it was in such a bad "condition that it was 'clapped out' and after some 2,300 miles it failed altogether. "That is very different from a minor repair. The dealers themselves said that if they "had known that the engine would blow up after 2,000 miles, they would not have sold "it. The reason obviously was because it would not have been reasonably fit for the "purpose".

Further on, Lord Denning MR said :

> "Some criticism was made of a phrase used by the judge. He said : 'What does fit for "the purpose' mean? He answered : 'To go as a car for a reasonable time'. I am not "quite sure that that is entirely accurate. The relevant time is the time of sale. But "there is no doubt what the judge meant. If the car does not go for a reasonable time "but the engine breaks up within a short time, that is evidence which goes to show it "was not reasonably fit for the purpose at the time it was sold. On the evidence in this "case, the engine was liable to go at any time. It was 'nearing the point of failure', "said the expert, Mr Wise. The time interval was merely 'staving off the inevitable'. "That shows that at the time of the sale it was not reasonably fit for the purpose of "being driven on the road. I think the judge on the evidence was quite entitled to find "there was a breach of s.14(1) of the 1893 Act and I would therefore dismiss the "appeal".

I have cited in some detail from these cases to show that the questions whether or not particular goods are reasonably fit for their purpose or of merchantable quality are essentially questions of fact and degree.

In the cases of ***Rogers v Paris (Scarborough) Ltd [1987] QB 933***; ***Business Appliances Specialists Ltd v Nationwide Credit Corporation Ltd [1988] RTR 332***; and ***Shine v General Guarantee Corporation Ltd [1988] 1 All ER 911***; the English Courts, however, adopted a different approach to the question of merchantability based on the wording of the provisions of the new Sale of Goods Act 1979. The cases of ***Bartlett v Sidney Marcus Ltd [1965] 2 All ER 753*** and ***Crowther v Shannon Motor Co. [1975] 1 All ER 139*** were, of course, decided under the 1893 Act.

The English position as of 1990 under the Sale of Goods Act 1979 is, perhaps, best summarised in ***Sale of Goods*** (1990) 8th edn by P.S. Atiyah where the learned author says at p.174 :

> "[Although] second-hand goods have to be merchantable, no less than new goods, it is "clear that nobody can expect second-hand goods at a lower price to be as good as new "goods at a higher price. Under the original law, and before the 1973 statutory "definition was enacted, the question arose occassionally with motor vehicles, and "there was a tendency then to hold that the requirement of merchantability, as it "applied to second-hand vehicles, meant that the vehicle must at least be safe and "roadworthy. But in ***Business Appliances Specialists Ltd v Nationwide Credit "Corporation Ltd [1988] RTR 332*** the Court of Appeal rejected this approach. The "requirements of merchantability extends to other matters besides safety and "roadworthiness. They stressed that the statutory definition of merchantability applies "also to the case of second-hand goods. Indeed, the test to be applied is precisely the "same as the test to be applied for new vehicles, as discussed in ***Rogers v Paris "(Scarborough) Ltd [1987] QB 933. The question always is : are the goods as fit for "their purpose as it is reasonable to expect? But, of course, it is also abundantly "clear that what it is reasonable to expect will differ according to the price, and "having regard to the fact that the goods are second-hand***". (italics mine)

The relevant provisions of our Sale of Goods Act 1975 are similar to the provisions of the Sale of Goods Act 1893 (UK) but are somewhat different from the provisions of the Sale of Goods Act 1979 (UK). Any difference in the two approaches by the English Courts to the interpretation of the 1893 Act and the 1979 Act are not, in my opinion, material for present purpose. Both approaches provide useful guidance to the interpretation of the relevant provisions of our own Act and we are free to choose the most appropriate from each of the two approaches if we decide to do so.

It is also to be noted that what we are dealing with in this case is the sale of a second-hand freezer whereas some of the English authorities I have referred to relate to the sale of second-hand cars. However, I am of the view that the discussion in those authorities relating to the implied conditions as to reasonable fitness for purpose and merchantable quality in respect of second-hand cars is relevant to this case of a second-hand freezer.

Turning back now to the facts of this case, the freezer was sold as a second-hand freezer on 19 August 1996. Before the plaintiff took the freezer from the defendant's premises, the freezer was switched on for five minutes and it was in good working condition. When the plaintiff took the freezer to his home, it was switched on 24 hours a day. Foodstuffs consisting mainly of chicken, turkey tails and fish were stored inside the freezer. The freezer was working well. Then at the end of October or the beginning of November 1996 the freezer suddenly stopped cooling anything. The employee of Grevel Air Conditioning and Refrigeration Service who repaired the freezer said that the fault with the freezer at that time was a small leak in one of the outside pipes which allowed the freon, or coolant gas, to come out from the piping system, and thus caused the freezer to stop cooling anything. He said that in his opinion that leak must have occurred one week before the freezer stopped cooling

anything. He also said that in his opinion the leak would have been caused by the freezer dropping or someone interfering with the pipes. Those opinions were based on the witness's examination of the leak. He also said if the leak was a major one, all the freon or coolant gas would have come out within a day and the freezer would have ceased to perform its function within a day. After the fault was repaired, the plaintiff took the freezer back. The defendant was responsible for the costs of those repairs because the fault occurred within the 3 months warranty period. Thus the plaintiff did not pay for those repairs. Up to the end of March or beginning of April 1997 the freezer was again working well.

On that evidence alone, I do not think there can be any justified complaint that the freezer was not reasonably fit for its purpose or not of merchantable quality. The defect which was discovered to the freezer in late October on early November in 1996 cannot, therefore, be the subject of a complaint that the freezer was not reasonably fit for its purpose or not of merchantable quality at the time of the sale when the plaintiff took delivery of the freezer.

The real issue in this case relates to the fact that the freezer again stopped cooling anything at the end of March or the beginning of April in 1997. The defect at that time was that the interior pipes had so rusted that it resulted in a leak which allowed the freon to come out. According to the employee of Grevel Air Conditioning and Refrigeration Service who had attended to the repairs to this freezer in 1996, the rust must have started some five years before the leak occurred. So the rust was existing and was at an advanced stage by the time of the sale in August 1996. He estimated the costs of repairs to be between $360.00 and $450.00. The nature of the needed repairs was repiping which means the replacement of the rusted pipes with new pipes. The leak occurred about 7½ months after the sale. The price that was paid for the freezer was half or slightly more than half the price of a new freezer of

the same kind at that time. The freezer was also 12 years old at the time of the sale and its life expectancy was 2 to 3 years. Except for the short time when the faults occurred in 1996, it was in good working condition when used by the plaintiff and was switched on 24 hours a day to cool foodstuffs.

On that evidence, the first question is whether the second-hand freezer was reasonably fit for its purpose. The second question is whether it was of merhantable quality. After some careful consideration, I have come to the view that this freezer was not reasonably fit for its purpose at the time of the sale when the plaintiff took delivery of it. Neither was it of merchantable quality.

It is, of course, true that this is a sale of a second-hand freezer. As such, the freezer is not expected to be in as good a condition as a new freezer. Some defects and some ordinary wear and tear are to be expected. While bearing those considerations in mind, the authorities show that the question whether second-hand goods are reasonably fit for their purpose or of mechantable quality is essentially a question of fact and a matter of degree. The price of the freezer is also a relevant consideration.

This freezer was 12 years old at the time of the sale. It was sold for $1,295.00 which was about half the price of a new freezer. Its life expectancy was 2 to 3 years. On those facts, the price of this freezer was on the high side. The defect was rust in the interior pipes which resulted in a leak allowing the freon to come out causing the freezer to stop cooling anything. The rusting process was in an advanced stage by the time of the sale. The estimated costs of repairs was between $360.00 and $450.00. Given the price of the freezer was $1,295.00,

these costs of repairs would be about one third of the price. On those facts, this is a major and not a minor repair of an essential functional part of the freezer.

It was emphasized on the defendant's behalf that the life expectancy of the freezer was 2 to 3 years. If what that statement was intended to convey was that this freezer was to last for 2 to 3 years, then this freezer certainly stopped functioning as a freezer after about 7½ months. That is well below 2 to 3 years which was its life expectancy. The defect was also a hidden one which was existing at the time of the sale. It was only a matter of time before it was bound to surface through the occurrence of a leak which allowed the freon to come out. The plaintiff was entitled to receive value for the price he paid. I do not think he did.

In these circumstances, I am of the view that even though this was a sale of a second-hand freezer, the freezer was not reasonably fit for its purpose or of mechantable quality. I, therefore, hold that there has been a breach of the relevant implied conditions in section 14(a) and (b) of the Sale of Goods Act 1975.

I turn now to the relief sought, namely, rescission and damages. Counsel for the plaintiff asked the Court to rescind the contract of sale of the freezer. The difficulty is that rescission is an equitable remedy which normally applies in relation to a contract of sale where there has been an innocent or fraudulent misrepresentation. There is no evidence in this case of any misrepresentation. I am, therefore, of the view that rescission is not available.

The appropriate form of relief in this case was not addressed by counsel at the hearing. Rescission is not available. I would defer giving a final judgment on the question of relief.

Counsel are to file submissions in writing within 7 days on what should be the appropriate form of relief in this case.

TFM Sapolu
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CHIEF JUSTICE

Solicitors:
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