10th. December, 1951

Judges :

His Honour Sir George Borg, Kt., M.B.E., LL.D., *Chief Justice*.

His Honour Dr. L. A. Camilleri, LL.D.

His Honour Dr. A. J. Montanaro Gauci, LL.D.

Thomas Colgnhoun *versus* Robert Butler

"Actio Redhibitoria" — Latent Defect — Art. 1481 of the Civil Code.

The "actio redhibitoria", in regard to movables, is barred by the lapse of one month as from the day of the delivery of the thing sold.

But when it was not possible for the buyer to discover the latent defect in the thing, the said period of limitation shall run only from the day on which it was possible for him to discover such defect.

In this case, the Appellate Court disagreed with the Court of First Instance as to the time when it was possible for plaintiff to detect the latent defect in a car he had purchased from defendant, and reversed the judgment of the First Court accordingly.

This is an action brought forward by plaintiff before the Commercial Court, wherein plaintiff, after prefacing in the writ-of-summons that, on the 9th. November, 1950, he had acquired from defendant a Jaguar Saloon car no. 7285 in consideration of a used S.S. Saloon no. 925 and a cash difference of £290, whereof £180 was payable cash down and the balance in instalments; that on the 18th. November, 1950, plaintiff discovered that the car Jaguar Saloon had a latent defect, that is, a fine crack in the rear axle casing, which caused the

oil in the rear axle to ooze out; that, had plaintiff been aware of this defect, he would not have bought the car; and that he could not have become aware of the said defect before the 18th. November, 1950, when it was discovered by a mechanic; plaintiff prayed that, after a judicial declaration to the effect that the car had a latent defect, defendant be condemned to refund to plaintiff the sum of £180 already paid to him, and to return to him the S.S. Saloon no. 925 or its value in £120, and to withdraw from plaintiff the Jaguar car. no. 7285. With costs;

In his statement of defence on page 5 of the record, defendant stated that the writ-of-summons was defective, in so far as plaintiff had not asked for a rescission of the sale. Moreover, plaintiff knew of the defect alleged by him on the 11th. or 12th. November, 1950; and further that, if such defect really exists, it did not exist at the time of the sale; and in any case, it is not such as to give rise to the action exercised by plaintiff;

Omissis;

By judgment of the 26th. June, 1951, the Commercial Court dismissed plaintiff's claims, on the grounds that;

Undoubtedly, it would have been more correct for plaintiff to include in his claim a demand for the rescission of the sale; but the Court is not of opinion that the summons should be annulled on that score, as the rescission of the sale is implied in the demand contained in the summons for the refund of the purchase price, the return of the S.S. Saloon car, and the withdrawal of the Jaguar. Even in days when local formalities were very much more stilted and rigorous, our Courts have been fairly liberal in upholding the form of the claim "per impliciter" (vide Appeal Court, "Leonard vs. Casella", 26. 2. 1873);

Plaintiff is exercising the so called "actio redibitoria" mentioned in section 1477 of the Civil Code, Chap. 23 Rev. Edit. In terms of law, in fact, the seller is not bound for "apparent" defects which the buyer might have discovered for himself (section 1475), but he is answerable, unless he has contracted out of his liability, for latent defects (sect. 1476). The action, however, is exercisable, within the

term of one month from the day of the delivery of the thing sold, or, alternately, from the day on which it was possible for the buyer to discover the defect (sect. 1481). This period of time cannot be enlarged (vide "Brown vs. Gelfo", 6th. February, 1936—Comm. Court, Ganado J.);

The points, therefore, to be examined, in this case, are the following :—

1. Did the defect in question—if there be any defect—exist at the time of the sale?

2. Was it apparent or latent?

3. If latent, when was it possible for plaintiff to discover it?

It appears there is no real disagreement between the parties that actually (apart from other questions) there is, in point of fact, a crack of a little over one inch in length in the rear part of the differential bulb, or "banjo", as it is commonly called..... Now, the Court is inclined to accept the version that the defect existed at the time of the sale.....;

Coming to the second point, an important guiding principle was laid down "in subjecta materia" by the Court of Appeal in "Spiteri Debono vs. Darmanin", 20th. April, 1931, a principle which was subsequently quoted with approval by Mr. Justice Edgar Ganado, sitting in this Court, in "Chetcuti vs. Felice", 27th March, 1933. How far is the purchaser to go in order not to be precluded from bringing forward the "actio redhibitoria"? It was laid down that there should be nothing which discloses negligence on his part; if there be, then one cannot say that it was not possible for him to discover the defect, for, by the exercise of ordinary diligence, he would have discovered the defect, and consequently, in any such case, the defect cannot be said to be latent. Of course, in order to say whether a defect is latent or not, the material time is the time of the sale. Now, plaintiff did not inspect the car at the time of the sale, and there was no negligence as far as that duty of his was concerned. Could he have detected the defect at the time? The Court doubts it very much, because the expert's report shows that the crack was very small, its edges were extremely close, and it was covered up with a coat of what appeared to be red paint smeared over another

coat of black paint. Certainly the crack was not easily visible by any means, and was not even accessible, forming, as it does, part of the understructure of the car. One has to crawl underneath the car to come within the possibility of detecting it. Indeed, in his further evidence at page 77, the expert states that it was difficult to detect the crack; and in order to detect it during the reference, the floor of the luggage-boot had to be removed. It should be noted that at the time of the sale (which, it is repeated, is the relevant time) there was no tell-tale patch of oil. The Court, therefore, thinks that, even though plaintiff himself, as a power-station engineer, is not an absolute layman in these matters, and even though the car being bought was expressly stated to be a "used" car, and the buyer, therefore, was expected to be on the look-out for the short-comings, still the crack at the time of the sale was not such that the buyer could have discovered it on inspecting the car with ordinary diligence. Plaintiff is not, therefore, precluded from exercising the action on this score; the defect was a latent one; it was, in fact, not apparent on a reasonable examination;

On the third point, however, an important circumstance intervenes. Plaintiff himself says that on the Saturday following the sale, which was on a Thursday—therefore, as the sale was on the 9th. November, 1950 (p. 22), on the 11th November, 1950 — plaintiff noticed that the oil was leaking from the differential casing. From that day onward it was undoubtedly possible for plaintiff to discover the defect. The oozing of the oil undoubtedly showed plaintiff that something was amiss. Very properly, Mr. Justice Debono, sitting in this Court, held in "Bellia vs. Tabone", 26th. November, 1895, that "inter alia" the defect becomes apparent when it is perceivable by means of some extraneous circumstance which, in some particular way, draws the attention of the buyer—"per altre circostanze estrinseche che sono tali da eccitare particolarmente l'attenzione del compratore" (Malta Law Report, Vol. XV, p. 316). The oozing of the oil was undoubtedly a circumstance of this nature. It could not but have drawn in a particular way the attention of plaintiff to the existence of some defect. On the day of the purchase this oozing was not

present; at least, it was not mentioned as being present; and, therefore; the defect was not apparent thereby. On the 11th. November, however, plaintiff definitely and actually noticed it, and the defect became apparent thereby. From that day plaintiff was in a position to discover the crack by exercising ordinary diligence (vide "Ghigo vs. Muscat", 1st. October, 1928, Civil Court; vide also "Attard vs. Azzopardi", 2. 2. 1929), that is, by taking the car to a garage and having it inspected, as he did on the 18th. November, 1950, when he did take the car to a garage and the crack was immediately detected. The period of one month, therefore, which our Courts have repeatedly held to be incapable of being extended, runs in terms of law, in such a case, from the day when the defect could have been discovered. The Court holds that the defect, once the oozing of the oil was noticed, could with due diligence have been discovered by plaintiff on the 11th. November, 1950. The action was instituted on the 16th. December, 1950, that is after the period of one month had already lapsed. It is quite true that meanwhile plaintiff had spoken to defendant about the leakage, but our Courts have always held that the period of limitation is not interrupted in its running by any such complaint or claim (vide "Cuimbo vs. Pace" 8th. May, 1900, Debono J., and "Mizzi vs. Camoin" 31st. December, 1912, Parnis J.);

This Court is, therefore, of the opinion that the action was brought after the lapse of the period prescribed by law, and is, therefore, barred by limitation;

The Court consequently dismisses the claim, with costs against plaintiff;

By note of appeal plaintiff appealed from the said judgment of the Commercial Court of the 26th. June, 1951, and by petition prayed that the said judgment be reversed and the claim be allowed, with costs;

Omissis;

It has been proven that plaintiff bought the car in question from defendant on Thursday, 9th. November, 1950, after inspecting it himself. On Saturday, the 11th., after a drive he noticed a leakage of oil from the differential casing and, thinking that the leakage was due to the loosening of the

plug of the rear axle, he tightened it; but late that evening, he discovered that the leakage was still there, and again he tightened the plug. The next Monday, he went to defendant's garage, complained about the leakage, specifically mentioned to defendant that the plug was loose, and that he had tried to put it in order; however, he did not know whether the fault actually was due to the plug or otherwise. Defendant's mechanic went underneath the car to check it, and said it was alright. As afterwards he discovered that oil was still dripping from the rear axle, plaintiff, on the 18th. of that month, went to Carlton's Garage, had the car inspected, and was told that on the upper part of the banjo there was a fine crack covered with paint, and that it was from that crack that oil was oozing. This Court, like the Court of First Instance, is satisfied that the crack existed at the time of the sale..... The crack was a very fine one; it was painted over and situated on the upper part of the banjo, which is part of the understructure of the car, and consequently it could not be apparent for plaintiff, even when one considers that plaintiff is an engineer with knowledge of internal combustion engines;

In spite of that fault, however, the car was not unserviceable ad unfit for the use for which it was intended. As a matter of fact, plaintiff could, and did actually, use it. The defect rendered necessary a frequent checking of oil and refilling, with a consequent waste of oil and inconvenience. That defect could however be removed by having the crack properly welded by an expert at the cost of £10. Yet, even that cost would have justified plaintiff to tender a smaller price even if, had he been aware of the defect, he chose to purchase the car. Plaintiff, therefore, was entitled to rescind the sale by the "actio redhibitoria";

By section 1481 of the Civil Code, that action, in regard to movables, is barred by the lapse of one month as from the day of the delivery of the th ng sold. When, however, it was not possible for the buyer to discover the latent defect of the thing, the said period of limitation shall run only from the day on which it was possible for him to discover such defect;

The Court below argued that when on the 11th November plaintiff noticed the patch of oil underneath the car revealing the oil leakage from the rear axle, he should have perceived that there was something wrong with the banjo, and could have detected the cause of the leakage and consequently the defect, by having the car properly inspected by an expert, exactly as he did on the 18th. of November at the Carlton Garage, when the crack was immediately discovered;

This Court is unable to agree with the First Court that plaintiff failed to exercise ordinary diligence. He did exactly what the First Court suggested that he should have done. As a matter of fact, on the 18th. November he took the car to defendant, complained about the leaking rear axle, had it inspected by defendant's mechanic, and was assured that it was alright. It is true that Demicoli of the Carlton Garage detected the crack, it appears, without much trouble. But that car had been in his garage for some time before plaintiff purchased it; and the Court feels suspicious that Demicoli or some one else in his garage might possibly have been aware of the fault. The referee appointed by the Frist Court reported that it was difficult for him to detect the crack (page 77). What could not be detected by defendant's mechanic, and was difficult to detect by the expert referee, could not be easily apparent for plaintiff. The Court, therefore, is not justified to hold that plaintiff could discover the defect before the 18th. November, and consequently the term of one month for the action to be exercised by plaintiff has to be computed from that date. This action, therefore, did not lapse;

It has, however, been admitted by plaintiff that, while the car was in his possession, he had a collision with consequent damage to the car. The damage was not great, and was repaired at once. But a collision always tends to depreciate the value of a car, as, apart from material and actual damage, it creates suspicion on its worthiness. That depreciation has to be deducted from the value of the car, and consequently its corresponding value has to be deducted from the sum claimed back by plaintiff from defendant. The Court assesses that depreciation "arbitrio boni viri" at £50;

The Court, therefore, entertains plaintiff's appeal, reverses the judgment of the Commercial Court afore mentioned, rejects the plea that the action is barred by limitation, and allows plaintiff's claim, except for the refund of the sum of £180, allowing that claim only to the extent of £130; and orders that all costs of both instances shall be borne two thirds by defendant and one third by plaintiff.