In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014 No: 276

BETWEEN:-

GRACE-ANN FOX
(t/a Mini Mega Transport Services)

Plaintiff

-v-

THE MINISTER OF TRANSPORT

Defendant

JUDGMENT

(In Court)

Date of hearing: 26th and 27th October 2015
Date of judgment: 20th November 2015

Mr Gordon Woolridge Jr, Phoenix Law Chambers, for the Plaintiff
Mr Norman MacDonald, Attorney-General's Chambers, for the Defendant

1. By a specially endorsed writ of summons dated 7th August 2014 the Plaintiff claims damages for misrepresentation from the Defendant. The amount of damages claimed is $107,200.00 for loss of profit. The background to her claim is as follows. The Plaintiff has at all material times run a business providing transport services via minibus. Sometime in July or August 2011 she applied to the Defendant to expand her fleet from two minibuses to four. She intended to import two new minibuses from overseas.

2. The Plaintiff submitted two documents to the Transport Control Department ("TCD"), which falls within the Defendant's portfolio. First, a completed form headed Application to Operate a Public Service Vehicle. The notes at the start of the form include the statement: "*Applicants are advised not to purchase a vehicle before the approval of a permit has been granted*". Secondly, technical specifications for the two minibuses which she wished to import.

3. Terry Spencer, who was Registrations Manager of TCD at the time, stated in evidence that importing a minibus and operating one required separate approvals resulting from separate approval processes.

4. Mr Spencer explained that the decision whether to approve an operating permit was a matter for the Public Service Vehicles Licensing Board ("the Board"). Section 32A(1) of the Motor Car Act 1951 ("the 1951 Act") provides that no person shall use, or cause or allow any other person to use a minibus, except under the authority of a valid permit granted by the Board and authorizing the operation of a minibus service. Section 32A(4) provides that an application for a permit shall be made in writing to the Board, which may in its discretion either grant or refuse to grant a permit, and that the Board may impose conditions as to the specifications of the minibus to be used. Mr Spencer said that once lodged with TCD, an application for an operating permit would be forwarded to the Board to consider at its next meeting. The circumstances of the application would be explained to the Board, which would decide whether to grant the application.

After the meeting, Mr Spencer would write to the applicant to notify her of the Board's decision.

5. Mr Spencer explained that someone applying to import a vehicle they would submit a letter of request together with the technical specifications of the vehicle. TCD would then forward these documents to the Technical Team for approval or otherwise. Upon receipt of the Technical Team's decision, Mr Spencer would notify the applicant whether she had been successful.

6. He did so in the present case by a letter to the Plaintiff dated 9th August 2011. This stated:

"*The Transport Control Department has reviewed the emissions certificate/information and technical specifications provided for the following vehicle.*

Make: Toyota
Model: 2011 Coaster Bus

Approval is therefore granted for the above make and model to be imported for use on Bermuda's roads as a mini-bus."

7. The letter went on to set out various requirements as to headlights and tinted windows with which the vehicle would have to comply.

8. The Plaintiff submitted that a reasonable person would have understood the letter to mean that her application for an operating permit had been granted, although in fact it had not. She gave evidence that upon receipt of the letter that is what she had understood it to mean. She had, after all, only submitted one application. This is the alleged misrepresentation upon which her case is founded.

9. Although the Plaintiff had not previously applied for permission to import any vehicles, she had previously applied successfully for permission to operate them. In April 2006, she applied for approval to operate a limousine. On 11th August 2006 , Mr Spencer wrote to advise her of the outcome of her application:

"*I am pleased to inform you that the Public Service Vehicles Licensing Board has approved you application to provide a transportation service between the Bermuda International Airport, Ariel sands and Grotto Bay Hotels.*"

10. In November 2009 the Plaintiff submitted an application to operate a public service vehicle using the same application form as she was to use in 2011. By a letter dated 24th February 2010, Mr Spencer informed her:

"*I write on behalf of the Public Services Vehicles Licensing Board (PSVLB).*

Having reviewed your application, the Board has approved your request to acquire a permit to operate a mini-bus service.

The permit fee is $5,000. The permit will not be issued until this fee has been paid in full and the vehicle is registered at the Transport Control Department."

11. In my judgment it is a reasonable inference that the Plaintiff knew that she had to obtain approval to import the two minibuses because otherwise she would not have included their technical specifications with her application. The letter of 9th August 2011 states that approval is granted to import a vehicle of a particular make and model for use on Bermuda's roads as a minibus. It does not state that it is written on behalf of the Board; that the Board has approved the Plaintiff's request to operate two additional minibuses; or that payment of a permit fee is required. In short, it does not, on its face, represent that the Board has granted the application for an operating permit. The Plaintiff, with her prior experience of applying for operating permits, should have realised that.

12. Mr Spencer gave evidence that he contacted the Plaintiff shortly after he wrote the letter. He said that he explained that the letter allowed for the importation of the vehicle but that there had to be a separate application to the Board for an operating permit.

13. When cross-examined, the Plaintiff accepted that she had spoken to Mr Spencer by telephone less than a week after she received the letter. She accepted that he did not tell her that the Board had approved her permit application – although on re-examination she said that no-one ever told her

that it hadn't – and that after the phonecall she did not know whether she had a permit. Thus she accepted that the understanding of the permit situation which she had formed upon reading the letter had changed as a result of the telephone call.

14. I am satisfied that, by the end of her telephone conversation with Mr Spencer, the Plaintiff would have understood that she did not yet have an operating permit for the two minibuses that she wished to import, even if she did not understand this beforehand.

15. The Plaintiff obtained a reference dated 14th November 2011 from a client, Meyer Tours Ltd, which she submitted to TDC. She said that Mrs Sealy, who worked at TCD, told her that this was necessary. Mr Spencer stated that Mrs Sealy was the Senior Traffic Officer and that she processed all the applications and documents which went before the Board. It is reasonable to infer that the Plaintiff understood that the reference was required for purposes of her application for an operating permit and hence that when she submitted the reference the permit had not yet been granted.

16. The Plaintiff's application went before the Board on 20th December 2011. The Board deferred the application. Mr Spencer explained that this was because in June 2011 the Defendant had placed a moratorium on the issue of minibus permits. The Plaintiff said that she was unaware of any such moratorium. I accept her evidence on this point. Although the moratorium received coverage in The Royal Gazette, that was not until 1st May 2012.

17. The Plaintiff said that she was unaware of the Board's 20th December 2011 meeting or its outcome. I accept her evidence on this point also. Mr Spencer said where a decision was deferred it would have been normal practice for Mrs Sealy to notify the applicant by telephone. However he did not do so in this case and I did not hear from Mrs Sealy.

18. When cross-examined, the Plaintiff stated that in December 2011 she still did not know whether she had an operating permit, although she stated that she knew (it would be more accurate to say that she thought she knew) in

January 2012 that she had one. January was significant because that was when she placed the order for the two new minibuses. But as on her own admission she did not know in December 2011, it is not credible for her to say that she placed the order in reliance on a representation made back in August 2011.

19. When asked about what happened between December 2011 and January 2012 to firm up her state of knowledge, the Plaintiff stated that it was a response by Mr Spencer to her attorney, Mr Woolridge. She said that Mr Spencer and Mr Woolridge had talked, and although she didn't know when, it was after she met the then Minister, Derrick Burgess, in November 2011. When pressed, however, she accepted that she had not met Mr Burgess until May 2012. As we shall see, an operating permit was eventually granted. But there was no evidence that Mr Spencer represented to Mr Woolridge or anyone else that an operating permit had been granted before in fact it had been, and none was pleaded.

20. There is little more to tell. On 27th March 2012 the Board considered the Plaintiff's application but incorrectly treated it as an application to upgrade her two existing minibuses to two new ones rather than as, was in fact the case, an application to add two new minibuses to her existing fleet. I have heard no satisfactory explanation as to why the Board treated the application in this way, but for present purposes it does not matter.

21. On 18th September 2012 the Plaintiff's application came before the Board once more. Mr Spencer informed the Board that, on account of the moratorium, it had not granted the Plaintiff's application to add minibuses to her fleet. He said that he had consulted the Attorney General's Chambers and was advised that the moratorium was not legal because it was not Cabinet approved. He said that based on this information it would be a decision for the Board as to how to deal with the application. The Board decided to allow it.

22. Mr Spencer notified the Plaintiff of the Board's decision by a letter dated 20th September 20102. This was in similar terms to his letter of 24th February 2010:

"*I write on behalf of the Public Services Vehicles Licensing Board (the Board).*

Having reviewed your application, the Board has approved your request for permits to operate two (2) additional mini-buses.

The permit fee is $5,000 each. Your permits to operate will not be issued until the fees have been paid in full and the vehicles are registered at the Transport Control Department."

23. Although the Plaintiff has labelled her claim as misrepresentation, it is common ground that by this she means negligent misstatement in the sense described by Lord Morris in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 PC at 503:

"*Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.*"

Lord Hodson agreed with this formulation at 514, and Lord Reid expressed himself in similar terms at 486.

24. When Mr Spencer wrote to notify an applicant of the outcome of her application for an import permit or an operating permit he was acting pursuant to the statutory duties of TCD under the 1951 Act in the one case and the Board in the other. However, as the Plaintiff's case is founded on negligent misstatement not breach of statutory duty, the pertinent question is whether the 1951 Act excludes a private law remedy. See Gorringe v Calderdale MBC [2004] 1 WLR 1057 HL(E) *per* Lord Steyn at para 3. I am satisfied that it does not. I am further satisfied that Mr Spencer owed the Plaintiff a duty of care not to make a negligent misstatement when communicating the result of her application to her.

25. However, for the reasons given above, I am satisfied that Mr Spencer did not breach this duty and that the 9th August 2011 letter was not a representation that the Plaintiff had been granted an operating permit for the two minibuses which she wished to import. I am further satisfied that the Plaintiff did not believe that it was when she placed an order for the minibuses in January 2012. The Plaintiff's claim is therefore dismissed.

26. I need not go on to consider the Plaintiff's claim for damages. However, even if the Plaintiff had succeeded on liability it is not clear to me that she would have suffered any loss. The damages which she claims are for loss of the profit which she would have earned had the 9th August 2011 letter in fact granted an operating permit. But it didn't. Whether or not it purported to grant one (and I have found that it did not) is beside the point.

27. There is one further matter. The Defendant argued that the proper defendant to the Plaintiff's claim was the Board or its Chairman rather than the Minister. The Board was established under section 28 of the 1951 Act, which prescribes its powers and duties by reference to other sections of the Act. Its members are appointed by the Governor and hold office during his pleasure. However in the exercise of these powers the Governor is required to act on the advice of the Minister. Under section 29 the Minister may give the Board general directions; under section 30 the Board may call upon TCD to provide advice and assistance; and under section 31 the Board is to furnish the Minister with such reports etc as he may from time to time require.

28. This point fails because the 9th August 2011 letter was not written on behalf of the Board but of TCD, a Government Department for which the Defendant is responsible. Therefore I need not decide whether the Minister is a proper respondent to a claim properly brought against the Board or its Chairman. As I did not hear full argument on the point I shall postpone consideration of the issue to some future case. Had it been necessary to join the Board or its Chairman to these proceedings, however, I would have done so under Order 15, rule 6 of the Rules of the Supreme Court 1985, which

deals with the misjoinder and non-joinder of parties. Rule 6(1) provides that: "*No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party*."

29. On the principle that costs follow the event I am minded to order that the Plaintiff should pay the Defendant's costs. This would be on a standard basis, with costs to be taxed if not agreed. However if either party wishes to address me as to costs they may do so, provided that they file and serve written notice of their intentions within 7 days after the date of this judgment.

Dated this 20th day of November, 2015

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Hellman J