

Rubbing salt in the wound--rescinding a contract for misrepresentation

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Dispute Resolution analysis: The Court of Appeal has ruled that a consumer was able to rescind a contract for the purchase of a car after a significant delay--notwithstanding depreciation and use and enjoyment of the vehicle in the interim. Henry Warwick, a barrister specialising in commercial law and finance at Henderson Chambers, comments on the consequences of *Salt v Stratstone Cadillac Newcastle*.

Original news

Salt v Stratstone Specialist Limited trading as Stratstone Cadillac Newcastle [2015] EWCA Civ 745, [2015] All ER (D) 195 (Jul)

The Court of Appeal has ruled that a consumer was entitled to rescind a contract for the purchase of a luxury car when it was misrepresented to him that the car was brand new when it was not. At first instance a district judge found that damages were the only available remedy as the car had been registered, had depreciated in value and given the lapse of time since purchase. This decision was overturned on first appeal to HHJ Charles Harris QC in Oxford County Court.

The Court of Appeal, on a second appeal, has ruled that the approach of HHJ Harris was correct notwithstanding the passage of four years and significant depreciation in the interim, finding rescission to be the normal remedy for misrepresentation, absent a bar to such relief. The customer was able to return the car to the dealership and have a full refund of the purchase price. Permission for a final appeal to the Supreme Court has been refused.

What is background to this case?

The consumer, Mr Salt, purchased a Cadillac from the defendant dealership in September 2007. The car had been described to Mr Salt as 'brand new' by the defendant's sales representative. The car was in fact manufactured in 2005 and had been involved in a collision. Following purchase, the car suffered numerous defects. These were repaired by the defendant, but in September 2008 Mr Salt sought to reject the car, asking for his money back. The dealership refused.

In March 2009 Mr Salt brought proceedings against the dealership and stopped using the car in September of that year. The true age and history of the car came to his attention following disclosure. By amended particulars of claim, he claimed misrepresentation under the Misrepresentation Act 1967 (MA 1967) and sought to rescind the contract of sale.

At trial, District Judge Hickman at the county court in Milton Keynes found that Mr Salt relied on the misrepresentation and would not have bought the car if he had been aware of its history. However, he declined to order rescission. He considered he was unable to put the parties back into their original position and *restitutio in integrum* was impossible because:

- o the car had been registered since purchase
- o a considerable period of time had elapsed, and
- o he was unable to adjust the purchase price to allow for depreciation in the absence of evidence

He ordered that damages be paid assessed as the difference between the actual value of the car at sale and its value had it been new.

That decision was reversed on appeal to HHJ Charles Harris QC, sitting in Oxford County Court. He found that it was possible to restore the parties to their original position--the car still existed and neither the length of the delay, nor registration of the car was sufficient to operate as a bar. Any difference in value was to be at the risk of the party making the misrepresentation. He ordered rescission and repayment of the purchase price in exchange for return of the car. The dealership appealed.

What are the key issues in the Court of Appeal?

The four key issues before the Court of Appeal were:

- o Did HHJ Harris QC wrongly interfere with an exercise of discretion under MA 1967, s 2(2)?
- o Could the parties be restored to their original position?
- o Were the damages awarded at first instance adequate?
- o Was a delay of nearly four years between the contract of sale and the seeking of rescission a bar to relief (as it had been in *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693)?

The dealership also appealed against the decision of HHJ Harris to vary an order for costs given at the hearing of the first appeal, so as to require the defendant to pay costs on the indemnity basis.

Interference with exercise of discretion under MA 1967, s 2(2)

MA 1967, s 2(2) provides:

'Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.'

The district judge had not made clear whether his award of damages was made under MA 1967, s 2(2). The Court of Appeal observed that the dealership might have been liable for damages under MA 1967, s 2(1) in the absence of proof it had reasonable grounds to believe, and did believe, the misrepresentation to be true.

But, resolving a conflict of authority, it accepted that the discretion to award damages in lieu of rescission under MA 1967, s 2(2) arises only where the claimant 'would be entitled...to rescind the contract' and is not therefore available if there is a bar to rescission. Had the judge been correct to say that restitution in integrum was not possible, the discretion under MA 1967, s 2(2) would not have been available to him. Any exercise of discretion was therefore made on the wrong basis.

Could the parties be restored to their original position?

The Court of Appeal did not accept that returning a registered car was something different from any other purchased article. If it was, it would be impossible to rescind a contract for the sale of a car in these circumstances. Registration (being a legal concept) did not change the physical article.

That the value of the car had depreciated and Mr Salt had used it in the interim were not found to be reasons for saying restitution was impossible. The court can order an account and/or inquiry to determine the terms upon which restitution should be made, and the dealership compensated. The court confirmed, on a review of relevant authorities, that rescission was the normal remedy for misrepresentation and should be awarded if possible. It is available if practical justice can be achieved such as by compensating the party making the representation.

However, once a party who has suffered a misrepresentation shows a right to relief, the burden falls upon the party to show that he has precluded himself from that relief. It was found that the absence of evidence as to the car's depreciation in value should not have operated to the detriment of Mr Salt.

Were the damages awarded at first instance sufficient?

On the basis that rescission is the normal remedy for misrepresentation unless restitution was truly impossible, Mr Salt was found to be entitled to recover in full the purchase price he had paid.

Was a delay of nearly four years a bar to rescission?

The Court of Appeal gave consideration to the principles deriving from the often cited case of *Leaf v International Galleries* in which rescission of a contract for the purchase of a painting wrongly represented to be by 'J. Constable' was precluded by significant delay.

The court reasoned that the decision in *Leaf* was based, in part, upon the premise that a representor should not be put in a worse position than (s)he would have been in had it been a term of the contract of sale that the painting was by Constable. Put another way, a purchaser claiming misrepresentation should be no better off than a purchaser prevented from rejecting the picture and claiming damages for non-delivery by reason of a lapse of time. The Court of Appeal here doubted whether that proposition has remained good law since the enactment of MA 1967, s 1, which entitles rescission whether or not a misrepresentation became a term of the contract.

The court confirmed that as rescission is an equitable remedy, lapse of time may only serve as a bar where it is such that it would be inequitable in all the circumstances to grant that relief. The period between Mr Salt's discovery of the true age/history of the car and his seeking to rescind was considered insufficient in all the circumstances to preclude rescission.

Will there be a final appeal?

The Court of Appeal refused permission for a final appeal to the Supreme Court. The defendant dealership has until 6 August 2015 to apply to the Supreme Court for permission to appeal. It is unclear at the moment whether this will happen.

For those advising on sale contracts, including vehicle sales, what are the implications?

Rescission is to be regarded as the normal remedy for misrepresentation and is likely to be granted unless putting the parties to their pre-contractual position is impossible. This is so regardless whether the goods are, as is the case with vehicles, wasting assets. Those advising should be aware that the courts may order that goods be returned and the purchase price repaid on the grounds of misrepresentation even where a considerable period of time has passed since sale and notwithstanding that goods have been used in the interim or are worth a good deal less now.

The proper course is for the court to account for depreciation or for use of the vehicle when determining the sum to be repaid. A lack of reliable evidence on those matters should not prevent the court from ordering that the contract is rescinded where there has been a misrepresentation.

Whether a consumer may be refused such relief by reason of delay depends upon equitable principles. All relevant circumstances will be taken into account. These may include whether a consumer can be taken as having had the opportunity of examining the goods, but it should be borne in mind that consumer rights in this regard are to be the subject of considerable reform when the Consumer Rights Act 2015 comes into force.

The Court of Appeal has also made clear that damages may only be awarded in lieu of rescission under MA 1967, s 2(2) where there was no bar to the grant of that remedy. The contrary view taken in *Witter (Thomas) Ltd v TBP Industries Ltd* [1996] 2 All ER 573 by Jacob J should no longer be followed.

Finally, when can a court amend a costs order given following judgment?

Following his judgment in the first appeal, HHJ Harris ordered the defendant to pay Mr Salt's costs on the standard basis. Counsel for Mr Salt contacted the judge shortly after the hearing referring him to an offer to settle made by her client in 2009 and asking for costs to be ordered on the indemnity basis.

After oral argument, HHJ Harris made the order as requested. The Court of Appeal upheld that decision on the basis it has long been recognised that the court has the power to alter the terms of an order at any time before it is entered and perfected, a rule that has survived introduction of the Civil Procedure Rules 1998, SI 1998/3132.

Interviewed by David Bowden.

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