IN THE COURT OF APPEAL OF NEW ZEALAND 15/5 CA 210/90

BETWEEN UDC FINANCE LIMITED
a duly incorporated company having its registered office at Wellington

Appellant

698

A N D PAUL RICHARD HULJICH
of Auckland, Company Director

First Respondent

AND CONTINENTAL CAR SERVICES LIMITED a duly incorporated company having its registered office at Auckland, licensed motor vehicle dealer

Second Respondent

Coram: Hardie Boys J
Gault J
McKay J

Hearing: 14 November 1991 and 19, 20 March 1992

Counsel: R B Stewart and R M Gapes for Appellant
Wendy Brandon for First Respondent
M P Reed and Glenese Adams for Second Respondent

Judgment: 14 May 1992

JUDGMENT OF THE COURT DELIVERED BY McKAY J

This appeal is from a judgment of Robertson J declaring the first respondent, who was first plaintiff in the Court below, to be the lawful owner of a motorcar; that a document executed by a Mr Cargill and by the appellant, who was defendant

in the Court below, was not a customary hire purchase agreement; and that the appellant had acquired no interest in the car under that document. The car in question is a Ferrari Testarossa initially sold for the sum of $450,000.

The first sale was by the second respondent ("Continental") to Cargill in February 1987. The purchase price was satisfied in part by the trade-in of a Porsche for $200,000, a Ferrari 308 for $150,000, and a Honda owned by a friend of Cargill for $17,000. The balance of $83,000 was paid by a cheque drawn by a company controlled by Cargill. Sale agreements were completed in respect of each of the cars involved. No mention was made, however, of the fact that the Porsche and the Ferrari were subject to instruments by way of security in favour of the appellant ("UDC") under which there was owing a sum of $225,000.

The Judge accepted the evidence of Cargill that he spoke to Mr Tuohy the manager of UDC, who had agreed that there would be what the Judge called a roll-over of UDC's security, meaning that UDC would release its security over the cars being traded in and would accept some substitute security. As Cargill saw it, this made it unnecessary for him to inform Continental that there was money owing to UDC. Continental received what it believed to be unencumbered vehicles, together with a cheque for the balance of the price.

Late in March 1987, according to the Judge's findings, Cargill again contacted Mr Tuohy of UDC. He had been a good customer of UDC in the past, and he wished to raise money on the Testarossa in order to carry out renovations to his home. Mr Tuohy decided that instead of securing this new advance and the money which was already owing in respect of the trade-ins by taking an instrument by way of security as UDC had done in its previous transactions with Cargill, UDC would take security in the form of a conditional purchase agreement over the Testarossa. According to the Judge's findings, Cargill was asked by UDC to obtain

a document from Continental in respect of the vehicle, and he accordingly asked Continental's receptionist Mrs Murphy to send to Mr Tuohy evidence of Cargill's purchase of the vehicle. Mrs Murphy typed and sent an invoice dated 30 March 1987.

Mr Tuohy obtained Cargill's signature to a conditional purchase agreement which was dated 1 April 1987, and on that day handed him UDC's cheque for $124,630.14. According to the Judge's finding, on 21 April Mr Tuohy requested a more detailed invoice from Continental to show the credits for each of the trade-ins and the amount of the balance paid in cash. An amended invoice which included these details was prepared and dated that same day and sent to UDC. Cargill maintained his payments to UDC in terms of the conditional purchase agreement throughout 1987 and 1988 and until the beginning of 1989.

In August 1987, however, Cargill sold the vehicle back to Continental for $350,000. He did not inform UDC. He made no mention to Continental of his borrowing from UDC or of the conditional purchase agreement he had signed with them. He received from Continental a Ferrari priced at $160,000 and the balance of $190,000 in cash. The Judge found that the purchase of the Testarossa by Continental from Cargill in August 1987 was innocent on the part of Continental, and without knowledge of the existence of the conditional purchase agreement between Cargill and UDC.

Cargill had thus purchased the Testarossa from Continental for $450,000, but had sold it back in August 1987 for only $350,000. Despite aggressive marketing and extensive advertising and display of the vehicle in both Auckland and Wellington over a period of 14 months, Continental was unable to resell the vehicle until October 1988. A sale was then effected to the first respondent, Mr Huljich. It was accepted that Mr Huljich had no reason to doubt that he was acquiring a good

title to the vehicle. According to the Judge's finding, Continental had also acted in good faith. He said "there was nothing which had been said or done which to that stage could have led Continental or its servants or agents to have any inkling that UDC might claim to have an interest in the vehicle".

At the beginning of 1989 Cargill defaulted in his payments to UDC. On 3 March 1989 UDC searched the Register of Motor Vehicles and ascertained that Mr Huljich was the owner. They seized the car from him without warning that same day, in purported reliance on their 1987 conditional purchase agreement with Cargill. Five days later the present proceedings were issued against UDC by Mr Huljich and Continental. They claimed a declaration that UDC's conditional purchase agreement with Cargill was not a customary hire purchase agreement, orders restraining UDC from disposing of the vehicle and requiring it to be returned to Mr Huljich, an enquiry as to damages and costs. As an alternative, they alleged that UDC was estopped by its conduct from claiming any interest in the vehicle, and as a further alternative they claimed damages on the ground of negligence.

An ex parte order was obtained by the plaintiffs restraining UDC from selling or otherwise disposing of the vehicle. Agreement was then reached between the parties for the car to be returned to Mr Huljich as his property, and for Continental to provide substitute security to UDC in respect of its debt pending the outcome of the proceedings. This was confirmed by a deed executed by the parties. The deed confirmed the abandonment by UDC of any interest it might have in the vehicle, and confirmed Mr Huljich's ownership of it. Thereafter the contest was effectively between Continental and UDC, although Mr Huljich remained a party to the proceedings and was represented by counsel both in the High Court and in this Court. Amended pleadings were filed and were later the subject of a further amendment, as recorded in the Judge's Minute of 5 June 1990. The result was that

claims for monetary recompense were abandoned, and the only issue became the question as to who had title to the vehicle.

UDC's claim to ownership rested on the conditional purchase agreement between it and Cargill dated 1 April 1987. This is a curious document. The only parties were UDC and Cargill, and the operative clauses were as follows:

> "1. The Purchaser hereby requests UDC to purchase from the Dealer named on page 4 of this document (in this Agreement called "the Dealer") the goods which the Purchaser has selected and which are described in Part I of this Agreement (in this Agreement called "the goods"), and UDC agrees to purchase the goods accordingly.
>
> 2. UDC agrees to sell the goods to the Purchaser who agrees (jointly and severally if more than one) to purchase them by way of conditional sale and purchase upon the terms set out in this Agreement being -
> (a) The PRINCIPAL TERMS set out in Part I below; and
> (b) The OTHER TERMS set out in Part II on pages 2 and 3 of this document."

The "Dealer named on page 4" was Continental. It was named in a portion of the document which purports to be a separate contract, but is undated and unexecuted. It is headed "Sale of Goods to UDC and Related Obligations". Its operative wording is as follows:

> "At the request of the Purchaser named on Page 1 of this document ("the Purchaser") ***CONTINENTAL CAR SERVICES LIMITED*** (the "Dealer" of ***40-46 GREAT SOUTH ROAD, NEWMARKET*** offers to sell to UDC Finance Limited ("UDC") the goods described in Part I of the Conditional Purchase Agreement ("the Agreement") set out in the document on the following terms."

Provision was made for signature on behalf of the dealer and on behalf of UDC, but neither signed.

Page 1 of the document sets out the principal terms of the agreement between UDC and Cargill, including the description of the car. It provided for the sale to Cargill at a price of $450,000 inclusive of GST, less a cash deposit of $100,000, leaving a balance of $350,000 as the amount financed. Finance charges were shown totalling $84,000, making a total amount still to be paid of $434,000. Payment was to be by 11 monthly instalments of $7,000 each, followed by a final instalment of $357,000. There is no mention of the sum of $124,630.14 actually advanced by UDC to Cargill on the day the agreement was dated, but it appears from the evidence that this was the balance of the $350,000 after deducting the moneys which Cargill already owed to UDC on the cars he had traded-in to Continental. The other significant provision is clause 2 of the "Other Terms" on page 2 of the document. It provides as follows:

> "Delivery of the goods to the Purchaser is made on the express condition that the property in the same shall not pass to the Purchaser until all monies owing by the Purchaser under this Agreement shall have been received by UDC in cash and until the Purchaser shall have performed all obligations on his part contained or implied in this Agreement."

In form, therefore, the agreement contemplated that UDC would purchase the Testarossa from Continental, and would then sell it to Cargill under the conditional purchase agreement. This was not possible, as Continental no longer owned the car. They had sold it to Cargill the previous month. No attempt was made to obtain Continental's signature to the portion of the form containing the purported agreement by Continental to sell to UDC.

It was put to Mr Tuohy that sometimes financiers would buy a car directly from a member of the public and sell it back by way of conditional purchase agreement. According to Mr Tuohy, UDC did not do that. He firmly rejected any

suggestion that UDC had in this case purchased the car from Cargill and sold it back to him. He was insistent that UDC had purchased the car from Continental.

As the Judge pointed out, there are major difficulties in his evidence. He denied that Mr Cargill had told him that he had already purchased the car from Continental in February, but the Judge rejected his evidence on this point. As far as Mr Tuohy was aware, UDC had not previously done business with Continental, yet he made no attempt to obtain the signature of Continental to the document purporting to be a sale from Continental to UDC. He said he believed that the invoice which Mr Cargill had typed by Mrs Murphy of Continental provided UDC with sufficient evidence of title. This invoice was addressed to UDC, and although unsigned was on Continental's letterhead, but its wording is equivocal as to whether the purchaser is UDC or Cargill. Mr Tuohy and UDC made no contact with Continental prior to handing over the cheque to Cargill on 1 April. No payment was made by UDC to Continental, which had already received from Cargill on 10 February the trade-ins and the cheque for the balance. UDC made no response to the invoice until it sought and obtained the more detailed invoice on 21 April. Even that was obtained not by an approach from manager to manager, but by Mr Tuohy on his own evidence asking one of Continental's staff for a replacement invoice recording the details. He then visited the premises of Continental "partly for a public relations exercise, and also to verify that the payment of the balance of $83,000 had in fact been paid by Cargill to Continental". He went unheralded, did not seek the manager, but introduced himself to a sales person in the showroom. This person went out the back and returned confirming that the amount had been paid. Mr Tuohy was adamant, however, that so far as UDC was concerned it had purchased the car from Continental, and all parties to the transaction had intended that the purchase be effected in this way.

The appellant's case depended to a considerable degree on the credibility of the witnesses on either side as to the sequence of events and as to the respective knowledge of the parties at particular times. The Judge recorded that he found Mr Bailey, the governing director of Continental, and Mr Cargill "both witnesses of truth whose recollection we accept as reliable". He added

> "They were both cautious, compelling and confident in the presentation of their evidence. An endeavour was made to discredit Mr Cargill because since that time he has been convicted of offences of dishonesty. The circumstances of his offending were not fully detailed, but having had an opportunity to observe him both in reading his prepared brief and more particularly as he confronted sustained cross-examination, I have real confidence in his evidence about relevant matters."

The Judge did not find Mr Tuohy's evidence convincing, and on a considerable number of points he rejected it. The Judge was obviously in a better position than this Court can be to make that evaluation. Having looked at the relevant documents and the sequence of events, and having perused Mr Tuohy's written evidence and the transcript of his oral evidence, we are satisfied from that alone that the Judge had substantial grounds for preferring the evidence of other witnesses.

At the conclusion of a four day hearing Robertson J made five fundamental findings of fact. He did this in the hope that the parties might then be able to resolve their differences, but this did not prove possible, and the matter was set down for a further hearing. The findings as set out in the Judge's oral interim judgment and as recorded in his final judgment were as follows:

> "First, I find that on 10 February 1987, there was a concluded lawful and binding sale and purchase of the Ferrari Testarossa from Continental Cars to Mr Cargill.

> Secondly, I find no evidence of a purchase of the Ferrari Testarossa by UDC from Continental.
>
> Thirdly, I find no evidence that Continental had any knowledge of an interest by UDC in the Testarossa car and I am addressing the entire period before me up until at earliest, a date in February 1989, when there was a first enquiry which might have put Continental on the alert.
>
> Fourthly, I accept that Continental in good faith, purchased the Ferrari Testarossa from Mr Cargill on 17 August 1987, reasonably believing that the car was unencumbered at that time.
>
> Finally, I find that Continental had no knowledge of an interest of UDC in the car at the time of sale of the vehicle to Mr Huljich on 28 October 1988."

The Judge also found that in the discussions in March 1987 Mr Cargill told Mr Tuohy that he purchased the Testarossa the previous month. This finding was attacked by Mr Stewart, counsel for UDC. He accepted that an appellate Court would be slow to reverse a finding of fact especially in the context of resolving conflicting testimony. He submitted, however, that the finding left unexplained why Cargill extracted an invoice from Continental in March 1987 directed to UDC. Cargill's evidence was that he was asked by UDC to obtain evidence from Continental of his purchase and of the price. Mr Stewart submitted that he could have provided this by giving UDC a copy of his purchase agreement or of the invoice he had himself received from Continental. It is clear, however, that Mr Tuohy had his own reason for wanting a document from Continental that was addressed to UDC. His evidence was that UDC would not acquire a vehicle from a customer and sell it back to him as a means of securing finance, but would only buy from a dealer. He did not explain the reason, but one very obvious advantage in purchasing from a dealer is the recourse that is available against a dealer in respect of its warranty of title under section 89 of the Motor Vehicle Dealers Act 1975. That recourse is backed by the Motor Vehicle Dealers Fidelity Guarantee Fund established under Part III of the Act. According to Mr Tuohy, he did not intend to

ask Continental to execute the form of agreement providing for a sale of the vehicle from Continental to UDC, because "when we tried to get dealers to execute this in preference to issuing us an invoice we had enormous problems". This appears to be the reason why Mr Tuohy asked Mr Cargill to arrange for Continental to send UDC evidence of his purchase.

Mr Stewart submitted that Cargill could have simply asked Continental to copy the earlier invoice issued to him, but instead the office lady had generated a fresh invoice directed to UDC and dated 30 March 1987. According to the receptionist who prepared and sent out this invoice, however, she did so in response to a telephone request "for a copy of the sale of the Testarossa". She did not include the details of the trade-ins as shown on the original invoice to Mr Cargill and on the later invoice requested by UDC on 21 April, because she was asked by the caller to do it in the way which she did. The Judge found her to be "a trustworthy and persuasive witness". The relevant portion of her evidence is as follows:

Q. "Now the original one addressed to Mr Cargill, Doc. 11, has all the details on it doesn't it?
A. Yes

Q. Now Doc. 13, only refers to the Testarossa doesn't it?
A. Yes

Q. Can you give the court any explanation as to why that document has less information on it?
A. That is how I was instructed to type it.
...

Q. Do you have any recollection as to why you were asked to put only the Testarossa on the document and not the trade-ins?
A. Well I was asked for a copy of the sale of the Testarossa.

Q. Was it in your mind meant to be a new sale invoice to UDC?
A. In no way.

Q. Why are you so sure when you say that?
A. I'm very sure that vehicle had been bought several weeks prior to this, it had been driven away by the owner, it had been paid for."

Mr Stewart submitted that Cargill's version was inherently unlikely, in that if he had told Mr Tuohy he had traded-in the Porsche and Ferrari in order to purchase the Testarossa and would repay the amounts owing to UDC at a later date, Mr Tuohy would surely have insisted on substitute security at that time over the Testarossa. This submission must be considered in the light of the buoyant trading conditions in the pre-crash early 1987 period, Mr Tuohy's previous dealings with Mr Cargill as a valued client, and the clear evidence of Mr Tuohy's slack approach to documentation and detail in the transaction he concluded on 1 April.

Mr Stewart also referred to Cargill's conduct in not informing UDC of his resale of the Testarossa back to Continental in August, his acceptance of a refinancing offer from UDC in September 1988 without disclosing that he had sold the Testarossa which was proposed as security, and his convictions for theft, forgery, and uttering. We have considered these and the other points made by Mr Stewart, but we are not satisfied that they provide sufficient grounds for doubting the correctness of the Judge's finding, and certainly not sufficient to justify reversing that finding.

In this Court Mr Stewart accepted in the light of the evidence in the High Court that Continental had in fact sold the car to Cargill in February 1987, and that despite what Mr Tuohy said was UDC's understanding at the time, UDC never acquired title from Continental. His principal submission, however, was that in terms of the conditional purchase agreement of 1 April 1987 UDC was constituted the owner of the vehicle and Cargill the conditional purchaser. Cargill was the owner immediately prior to the agreement being made. No other party was

involved. He submitted that the terms of the agreement plainly and unmistakably provided that UDC was the owner and Cargill the conditional purchaser.

There can be no doubt that it was within Cargill's power as owner of the vehicle to transfer title to UDC and to enter into a conditional purchase agreement to acquire the vehicle back from that company. In the absence of delivery of the vehicle, such a transfer of ownership would only be effective if supported by consideration, but a transfer for consideration could arguably be inferred either as a necessary part of the conditional purchase agreement, or as a separate contract of sale to be inferred from the circumstances including the conditional purchase agreement.

In ***Paintin and Nottingham Ltd v Miller Gale and Winter*** [1971] NZLR 164 the appellant had built a dredge on a cost plus basis for a company called Owers Bros Ltd. The dredge was completed and delivered, property passing to Owers. Paintins then sought security for the balance owing to it. The parties entered into a conditional purchase agreement naming Paintins as vendor and Owers as conditional purchaser. Owers subsequently defaulted, and Paintins seized the dredge under the powers conferred by the conditional purchase agreement. Some three years later, execution creditors of Owers caused the dredge to be seized on the basis that it was in fact the property of Owers. Interpleader proceedings were commenced to resolve the matter. Wilson J found that both parties were aware that ownership had passed on the original delivery of the dredge to Owers, that Owers was the owner at all material times and that the conditional purchase agreement was a sham. This Court took a different view, and treated the conditional purchase agreement as a genuine document which effectively defined the true relationship between the parties.

Turner J, in a judgment with which Haslam J expressed substantial agreement, noted that on the facts as found in the Court below Owers was legally

competent to transfer the property in the dredge back to Paintins at the time the conditional purchase agreement was executed. Counsel for Paintins submitted that such a transfer had been achieved by an oral contract in order to enable Paintins to sell the dredge back to Owers under a formal conditional purchase agreement and thus obtain security for the moneys due to it. Turner J said at 174:

> "Such a contract did not have to be in writing. It is true that if it is not in writing a contract like this must in some cases be very difficult to establish - but in this case there is no trouble at all about the terms agreed upon. Both parties agreed in evidence that this is what was done, and I think that the fact - observed and noted by Wilson J - that the parties included in the conditional sale agreement the barge and truck-crane, which could not have been Paintins' property unless by deliberate transfer from Owers, reinforces the conclusion to which I have come. I think that there can be no doubt that Mr Atkinson's primary submission must be accepted; that it must follow from the evidence that some such contract as I have indicated was entered into between these parties, and that this contract took effect according to its tenor."

The basic facts are similar to those in the present case, but there are significant differences. It cannot be said in this case that "both parties agreed in evidence that this is what was done". Mr Tuohy was most insistent that UDC had not acquired ownership from Cargill, but had acquired it from Continental, and that there was "no way" that UDC would have dealt on any other basis than acquiring ownership from a dealer. The conditional purchase agreement itself, which was the contract between UDC and Cargill, included as the first of its two operative clauses an undertaking by UDC to purchase the car from Continental. In Paintin's case, the Court was asked to treat the conditional purchase agreement as a genuine document intended to take effect according to its tenor. In the present case, UDC asks that the document be treated as taking effect contrary to its tenor, and contrary to the emphatic evidence of its own manager who arranged the transaction. The other party, Mr Cargill, was equally clear that he was seeking a loan of money to help

him to finance house alterations, and was offering as security a vehicle which he had already purchased. His previous borrowings from UDC had been secured by chattels security over motor vehicles, and he did not at the time appreciate the different form of the document which he was asked to sign on this occasion.

The fact that the owner of a vehicle enters into what purports to be a conditional purchase agreement with a financier will not necessarily vest ownership in the financier. In ***Marac Finance Ltd v Virtue*** [1981] 1 NZLR 586 the respondent obtained a loan to enable it to purchase a truck and trailer. The primary question was whether the transaction was a money lending one, and if so, whether relief should be granted for a breach of the requirements of the Moneylenders Amendment Act 1933. The document relied on by the appellant was in the form of a conditional purchase agreement. This Court held that the transaction was a money lending one, and that the conditional purchase agreement was intended only as a means of providing security for the advance and was not intended to operate independently as a sale of the vehicles from the appellant to the respondent. The agreement did not reflect the true intent of the parties and was a sham (see per Richardson J at 590 and per McMullin J at 593).

The case primarily relied upon by Mr Stewart for UDC was ***Broadlands Finance Ltd & Anor v Australian Guarantee Corporation (NZ) Ltd*** (CA 160/83 judgment 13 December 1985). In that case a company called Mid-Island Transport Ltd (MIT) was to obtain an advance of $560,000 from Australian Guarantee Corporation (AGC) on the security of 27 vehicles in MIT's fleet. The original proposal was that MIT would sell the vehicles to an associated company Hautapu Motors Ltd (HML), which would then sell to AGC, and AGC would then enter into hire purchase agreements with MIT. Eventually 27 hire purchase agreements were executed by MIT and AGC. The proposed purchase by HML from MIT and sale by HML to AGC did not take place, although HML sent to AGC invoices

purporting to record sales and each showing credit for a deposit. The hire purchase agreements were signed between AGC and MIT in a form which contemplated a sale to AGC by a dealer, but this part of the form was not completed and no dealer was named. The undisputed finding of the Judge in the High Court was that MIT did not sell to HML, nor HML to AGC. No deposit was ever paid by anyone. There were thus elements of "sham" in the transaction. It was held that neither MIT nor AGC ever intended that HML should have more than a nominal or colourable part in the transactions. This Court, differing only slightly from the approach adopted in the High Court, held that the payment of the $560,000 by AGC to MIT was made in consideration of its acquisition of the vehicles from MIT, and that MIT had recognised by entering into the hire purchase agreements that AGC then had property in the vehicles which MIT agreed to buy back from it. The necessary inference from the facts was that MIT agreed to sell to AGC and that AGC agreed to buy the vehicles and thus acquire title to them.

The case clearly turns very much on its own facts. It has some similarities to the facts of the present case, as it does also to the facts in ***Paintin's*** case. It differs from the present case in that neither party ever intended that HML would play more than a nominal role. The Court effectively upheld the conditional purchase agreements according to their tenor. Although the printed forms had provisions to cover the situation where AGC was acquiring a vehicle from a dealer, the relevant portions of the form had not been filled in and there was no named dealer to which such clauses could apply. One was therefore left with the conditional purchase agreements in which AGC was named as vendor, and the fact that money had been paid by AGC to MIT. The Court was able to draw the inference that MIT sold the vehicles to AGC for the amount paid to it by AGC and then agreed to buy them back on the terms set out in the conditional purchase agreements.

The present case is clearly different. The conditional purchase agreement in this case included an express agreement by UDC to purchase the vehicle from a named dealer. It was certainly not contemplated by Mr Tuohy that the dealer would be involved in a merely nominal capacity. He said he would not have contemplated a transaction which involved acquiring the ownership of the vehicle from Cargill.

If the owner of a vehicle accepts a sum of money from a financier and enters into a contract by which he agrees to buy the same vehicle from the financier over a period with interest, one can readily infer that the parties intend and agree that the vehicles should be sold to the financier and then repurchased by the original owner. Such an inference is not in any way in conflict with the written agreement, nor with the apparent intentions of the parties. It enables their intentions and their written agreement to take effect. It is quite another matter, however, to find such an agreement when there is clear evidence that it was not intended and would not have been contemplated, and where it is contrary to the express terms of the written agreement. Such a finding cannot be reached by inference, but only by substituting some different arrangement for that which was intended by the parties. The fact that they have failed to achieve their intention does not entitle the Court to create and impose on them some different contract which they did not intend.

Much of the argument before us was directed to the question whether or not the conditional purchase agreement should be regarded as a sham. That term is properly applied to a situation in which all the parties to a document have a common intention that the document is not to create the legal rights and obligations which it gives the appearance of creating: ***Paintin and Nottingham Ltd v Miller Gale and Winter*** [1971] NZLR 164 at 168, 175 and 182. Although in the present case the Judge referred to the document as "a charade", he appears to have done so rather in the sense that while Mr Tuohy may have believed he was acquiring rights for UDC from Continental, Continental was not cognizant of what was happening,

and was in any case not in a position to give title to the vehicle. In the present case it is not a matter of looking behind an agreement or disregarding it as a sham, but rather a matter of taking it at face value, and applying it to the extent that it can be applied in the situation which actually existed.

An alternative argument based on estoppel was advanced by Mr Stewart on behalf of UDC. It was contended that if UDC did not obtain title to the Testarossa from Cargill, then Continental was nevertheless estopped from denying its title by virtue of its representation that title passed to UDC. The representation relied upon was the invoice or copy invoice which Mrs Murphy of Continental sent to UDC at the request of Cargill, and the more detailed invoice which she supplied to Mr Tuohy at his request on 21 April. The latter was some three weeks after UDC handed its cheque to Mr Cargill, and after the completion of the conditional purchase agreement. There is no evidence of any reliance on the second invoice such as could give rise to an estoppel. In any event, it merely provided additional detail of the original transaction by identifying the trade-ins and the cash payment received from Mr Cargill, and could hardly be said to represent that there had been a transfer of title to UDC which had played no part in the transactions which the document described.

The earlier invoice of 30 March has already been referred to. It was addressed to UDC for the attention of Mr Tuohy, but it also contained Mr Cargill's name. It is equivocal as to who was the purchaser. It was issued by the receptionist in response to a request for a copy of the original invoice, and on the Judge's findings this was all that Mr Tuohy had asked Cargill to obtain and all he had any grounds for believing that he had received. The Judge found that he had already been informed by Cargill that Cargill had purchased the vehicle and paid for it the previous month. There is no sufficient factual foundation to support the argument based on estoppel. Mr Tuohy was aware of the true position, and could

not have relied on the invoice of 30 March as a representation by Continental that it was selling on that date to UDC. Indeed, when pressed in cross-examination to say in which respect he relied on that invoice he was unable to point to anything.

It follows that UDC at no time acquired the ownership of the Testarossa. Continental is not estopped from relying on the true position. The conditional purchase agreement is effective as a contract to the extent that it can be applied to the factual situation. It was ineffective to vest ownership in UDC in the way which it contemplated, involving a purchase from Continental, and ineffective to do so in the totally different and inconsistent way now contended.

The appeal is accordingly dismissed.

It is unnecessary to consider the alternative arguments raised on behalf of Continental based on the Sale of Goods Act 1908, the Mercantile Law Act 1908 and the Chattels Transfer Act 1924. It is likewise unnecessary to deal with the issue of fraud alleged by Continental against UDC and raised in the original notice of cross-appeal. The only issue in the cross-appeal which does need to be dealt with is in respect of costs.

In his substantive judgment the Judge reserved the question of costs and any other issues for later consideration. Counsel appeared before him on 3 September 1990, costs then being the only issue outstanding. In a written memorandum, a copy of which was provided to us, counsel for the respondents as plaintiffs requested the Court "to determine and certify the costs to be allowed", and to award a sum in excess of that calculated according to the schedule to the Rules. An award of $15,000 was sought for each plaintiff. In the alternative, it was submitted that the Court might think it appropriate to award costs on a solicitor and client basis. In a reserved judgment delivered on 14 September the Judge rejected the request for separate awards for each plaintiff, and that decision is not

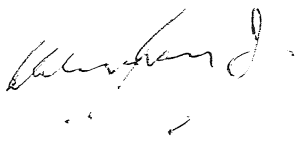
challenged. He was not persuaded that there was any argument for dealing with the matter other than on the basis of scale costs. There was a difference between counsel as to the calculation of costs according to scale, the respective figures being $25,410 and $18,355. Either amount would be in excess of the ceiling of $5,750, which is provided in Item 36 of the Second Schedule to the High Court Rules "unless the Court certifies for the whole costs of the proceeding". The Judge did not certify for the whole costs, but instead exercised the power of the Court under Rule 46(2)(c) and fixed the amount to be allowed at $12,600.

The exercise of that power and the fixing of the amount of costs are matters of discretion, and the trial Judge is clearly in the best position to determine what is appropriate. In this case, he had the advantage of hearing submissions from counsel, and he gave a considered decision. It was not suggested that in reaching that decision he had made any error of principle, counsel accepting that the criteria for assessing an award of costs were not in issue, the question being one of applying these criteria to the facts of the case. Various factors were urged on us in support of the contention that a more generous award would have been appropriate. We were referred to the awards made in a number of other cases, but except where some principle is involved little help can be obtained from such comparisons.

We would not be disposed to interfere with the Judge's discretion were it not for the apparent inconsistency between his finding that there was no argument for dealing with the matter on any basis other than scale costs and his fixing of an actual amount that is substantially less. We agree with the Judge that scale costs were in this case appropriate, and we see no reason for departing from the scale and exercising the power of the Court under Rule 46(2)(c) to fix costs at any amount. We would not have taken any different view on costs if we had upheld the second respondent's submissions on fraud.

We therefore allow the cross-appeal in respect of costs. In lieu of the costs ordered in the High Court, the respondents as plaintiffs are allowed one set of costs in accordance with the scale, together with Court fees and disbursements, all as fixed by the Registrar. There will be a certificate under Item 36 of the Second Schedule for the whole costs of the proceedings. Under Item 9, Preparing for Trial, there will be a certificate for the maximum of $3,450, and there will be certificates for $170 in respect of Items 28 and 29 relating to the listing and production of documents.

In this Court, costs are allowed to the second respondent in the sum of $7,500. No order is made in favour of the first respondent whose counsel did not take an active part in the argument.



Solicitors
Simpson Grierson Butler White, Auckland, for Appellant
Ellis Gould, Auckland, for Respondents