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No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

A. No. 247/71

BETWEEN MAXWELL HUNTER EWING of
Auckland, Farmer

Plaintiff

A N D DOMINION FINANCE CORPORATION
LIMITED a duly incorporated
company having its registered
office at Christchurch
Motor dealers

Defendant

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Hearing: 7th September, 1971.

Counsel: Grove for Plaintiff.
Wiles for Defendant.

Judgment: 8th September, 1971.

JUDGMENT OF HENRY, J.

Plaintiff alleges that he is the owner of a Mercedes Benz 220S motor car registered No. AC 9151 (hereinafter called "the said motor car"). The said motor car is admittedly in the possession of Defendant. Plaintiff seeks an order for possession and damages for detention following upon a demand having been made in January of this year. The problem which arises results from fraudulent dealing on the part of a company called Pacific Lend Lease Ltd. which is now insolvent and in liquidation. I shall call it "the Pacific Company". Plaintiff and Defendant are innocent parties and it is clear that one or the other will be the loser as the result of the operations of the Pacific Company.

The Pacific Company in its general business acquired the ownership of motor vehicles and then leased them under a document called a "vehicle lease agreement". Under this document the Pacific Company leased or bailed a motor vehicle for a period of years for the payment of a periodic rental. At the end of the term there was an agreed sum called the residual value of the motor vehicle concerned. The document then provided as follows:-

- " (v) Upon termination of the hiring evidenced by this agreement, the Bailor and the Bailee may agree on the market value of the said chattels which value shall thereupon be deemed to be the terminal value of the said chattels. Should the Bailor and the Bailee fail to agree on the terminal value of the said chattels, the Bailee shall be at liberty to obtain a written offer or written offers to purchase the said chattels from the Bailor for cash from any licensed motor vehicle dealer whose place of business shall not be more than ten miles from the Chief Post Office at Auckland at any time within 72 hours after the Bailor and the Bailee shall fail to agree as aforesaid and thereupon the best such cash offer shall be deemed to be the terminal value of the said chattels. Should the Bailee fail to obtain any such cash offer the figure nominated for this purpose by the Bailor shall be deemed to be the terminal value of the said chattels.
- (vi) In the event of the terminal value of the said chattels as aforesaid being less than the residual value as defined in sub-paragraph (iv) the Bailee shall forthwith after determination of such loss pay to the Bailor the amount of such loss together with interest thereon at the rate of £10 per centum per annum from the third day after determination of loss as aforesaid until the date of payment.
- (vii) In the event of the terminal value of the said chattels as aforesaid being greater than the residual value the amount of such excess less any rental for the full term of the hiring and any other moneys owing to the Bailor by the Bailee shall forthwith after determination be paid to the Bailee. "

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Thus the vehicle might either remain/the ownership of the Pacific Company or the Pacific Company would be required to sell the same and account to the lessee for an ascertainable amount of the sale price.

The Pacific Company did not wait for the said periodical payments but assigned its rights in a series of transactions for cash. The Pacific Company executed a document called a Deed of Assignment whereby for a stated cash consideration it assigned to the named assignee by way of mortgage only but as separate assignments

- " (a) All that the Owner's right, title, claim, interest and demand whatsoever in and to the hiring agreement referred to in the schedule hereto and
- (b) All the Owner's title and property in and to the Motor Vehicle described in the said hiring agreement and schedule "

The Pacific Company then appointed the assignee its attorney in respect of all the rights, powers and privileges it held under the lease and then went on to provide as follows:-

" And if and when required by the (assignee) the Owner will at the owners expenses in all things act as agent of the (assignee) for the purpose of collecting the instalment of rent money or making such inspections, seizures or otherwise attending to the proper performance by the Bailee of the obligations on his part contained or implied in the said hiring agreement "

The Pacific Company also guaranteed the performance by the lessee of all the obligations of the lease. The documents which require registration under either the Chattels Transfer Act or the Companies Act are duly registered.

This action is concerned with three such transactions being:-

- (1) On April 10th, 1967, the Pacific Company leased the said motor car to Frederick George Baker and assigned such lease to the Defendant for a consideration of £1,600.
- (2) On December 13th, 1968, the Pacific Company leased the said motor car to Kevin Patrick Managh and assigned such lease to Plaintiff for a consideration of \$2,400.
- (3) On May 23rd, 1969, the Pacific Company leased the said motor car to Edward David Wikaira and assigned such lease to Defendant for the sum of \$2,571.

The fate of the first lease is not known owing to insufficiency of records, but the lease document is marked "cancelled". The clear inference is that before the second transaction was entered into the Pacific Company had resumed full ownership of the said motor car.

It is clear that, unknown to Plaintiff, the lessee in respect of his transaction made default and that the Pacific Company resumed possession and, again without the knowledge of

Plaintiff, entered into the transaction with Defendant set out in (3) above. Indeed the Pacific Company made payments so as to deceive Plaintiff into thinking that the transaction was still running normally. It should also be mentioned that Plaintiff authorised the Pacific Company to collect all moneys payable under the lease. After payments ceased and with some difficulty Plaintiff ultimately traced the said motor car and these proceedings resulted. The question is who, between Plaintiff and Defendant, is entitled to the possession of the said motor car?

According to a certified copy of a "certificate of registration of motor vehicle" issued under the Transport Act the Pacific Company had the said motor car first transferred to it on March 22nd, 1967. The Pacific Company appears to have been concerned in four registered transfers of the said motor car. They are:-

- (1) To one Alfred McInteer on April 17th, 1967, but it appears again on the certificate on May 25th, 1967.
- (2) On the last named date there is a transfer to Frederick George Baker - which is the first transaction with Defendant.
- (3) On September 16th, 1968, the said motor car was again transferred to the Pacific Company and on the same day was transferred to one Thomas Alfred Longworth Mason.
- (4) On October 15th, 1969, it was again transferred to Pacific Company which on the same day transferred it to Edward David Wikaira, which is the second transaction with Defendant.

It will be noticed that the transaction with Plaintiff does not appear on the registration certificate.

The inference which I draw is that when on April 7th, 1967, the Pacific Company leased the said motor car to Frederick George Baker, the Pacific Company was then the owner of the said vehicle. By the deed of assignment of April 10th, 1967, the Pacific Company assigned to Defendant all its title and property in the said motor car but by way of mortgage only. I draw the inference that the moneys so secured were repaid to Defendant so that, by operation of law, the said motor car would thereupon become the unencumbered property of the Pacific Company once more. Just what happened in respect of the "Mason transaction" mentioned in (3) above is not known but again I draw the inference that the Pacific Company, before the transaction with Plaintiff, became the unencumbered owner of the said motor car.

The situation as I see it is that Plaintiff had an operative transaction with the Pacific Company when that Company purported to transfer the said motor car to Plaintiff in terms of the Deed of Assignment dated December 13th, 1968. This transaction, being earlier in time than the remaining transaction between the Pacific Company and Defendant, will prevail unless Defendant can show some rule of equity or law which will give it priority notwithstanding that it is later in time. Two grounds have been put forward, namely:-

- (1) That Plaintiff's transaction is void by reason of the provisions of the Moneylenders Act, 1908; and
- (2) Defendant got a good title by virtue of the provisions of the Mercantile Law Act, 1908.

I reject the contention that Plaintiff was at the material time a "moneylender". Counsel for Defendant referred only to Section 3 (9) but that definition does not make Plaintiff a "moneylender" except for the limited purpose of re-opening the transaction and giving the borrower relief. Plaintiff does not come within the definition in Section 2 and that is the relevant definition.

I turn now to the provisions of the Mercantile Law Act, 1908. Section 2 concerns the definition of a "mercantile agent" as meaning "an agent having in the customary course of his business as such agent authority" Then follows a number of specified acts of authority. There is no evidence that the Pacific Company had any business customary or otherwise as an agent. The evidence is that it leased cars which it owned and then assigned by way of mortgage the rights it acquired under such lease and its proprietary rights in the vehicle. Defendant's argument fails in limine. It further fails because there is just no evidence to show that the Pacific Company acted within the provisions of Section 3.

I find accordingly that Plaintiff is entitled to possession of the said motor car as against Defendant. I do not consider it matters that his Statement of Claim is based on a claim that he is the owner of the said motor car. The Statement of Claim may be amended to follow the findings in this judgment.

There will be an order for possession to be given within 14 days of delivery of judgment. I fix damages for detention at \$75.00. Defendant will pay costs as on an action for \$1,300, together with Court costs, disbursements and witnesses' expenses to be fixed by the Registrar. I certify for discovery to be fixed also by the Registrar.

Solicitors:

Grove & Walker, Auckland, for Plaintiff.

Nicholson, Gribbin, Montgomery & Co., Auckland, for Defendant.