Law Reports

A. No. 358/72

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

BETWEEN ROSS EDWARD EVANS
Plaintiff

AND CREDIT SERVICES INVERCARGILL LIMITED
Defendant

Hearing: 22nd and 24th August, 1972
Counsel: Grove for Plaintiff
Holland for Defendant

Judgment: 12 OCT 1972

JUDGMENT OF WOODHOUSE, J.

This is an action for the recovery of amounts paid in respect of an agreement relating to a motor vehicle. The amount claimed at the time when the writ was issued was $2,240 but the claim embraces certain payments made by the plaintiff to the defendant company since that time. The allegation is that the agreement is in breach of regulation 8 (b) of the Hire Purchase and Credit Sales and Stabilisation Regulations 1957 (reprinted as 1967/192). The regulation provides that:-

"A person shall not -

(b) Enter into any transaction or make any contract or arrangement, whether orally or in writing, for the purpose of or having the effect of, in any way, whether directly or indirectly, defeating, evading, avoiding, or preventing the operation of these regulations in any respect."

The contention is that the transaction entered into by the parties was illegal by reason of that provision.

The facts as I find them to be are as follows. The plaintiff is a young carpenter. He had been purchasing an inexpensive Singer motor vehicle under a hire purchase agreement and by February, 1970 the payments due by him under that agreement were completed, or almost completed. He valued the car at about $800 and that seems to have been a realistic figure. He desired to purchase a somewhat better vehicle and

so on the evening of 11th February he drove in his Singer car to the premises of Cord Motors Limited, a licensed motor vehicle dealer in Auckland. There he examined a 1958 Buick motor car which was standing in a dealer's yard. While doing so a Mr. Monaldson, the manager of the company at the time, approached him and encouraged him to take the Buick away for a short trial drive. On plaintiff's return he enquired the price of it and was told $2,800. His reaction was to tel Monaldson that such a price "was completely out of my price range"; and he explained that his only asset was the Singer car then standing in the street outside the Cord Motors premises. Monaldson then suggested discussing the matter and the plaintiff replied that "if there was a chance of owning the car I would like to discuss it". At this point Monaldson indicated to the plaintiff that it would be possible to obtain the Buick for $2,800 by transferring the Singer car at a figure of $800 and making monthly payments of $60 for four years with a residual payment at the end of that period. In the result the plaintiff decided to proceed with the transaction. He passed across his Singer to the Cord company and signed the agreement. It was all done on the same evening and the plaintiff thereupon drove away in the Buick motor car.

At a later stage, in mid 1971, the plaintiff returned to the Ford premises where again he saw Monaldson. He had been having difficulty in meeting the monthly payments of $60 and enquired whether the transaction could be ended and the car sold on his behalf. It was then left in the Cord yard on display for sale and was there two months or so until the plaintiff decided to take it back. In the meantime he had carried on with the monthly payments. It seems that about this time he first became aware that the written agreement contemplated that he could never become the owner of the vehicle and he therefore consulted his solicitors.

He was asked in evidence about his understanding of the transaction when he signed the agreement and he agreed that he had noticed that the printed heading of the document contained the word "lease" but he explained that he had understood that the whole arrangement involved a new way of purchasing a motor vehicle. As to that explanation I am satisfied (from this and other statements he made in evidence) that he had equated the word "lease" with the rather loose understanding many people have of the implications of the word "hire" in a hire purchase agreement. What is more I am in no doubt that when the matter was being discussed Ronaldson was deliberately very careful to say nothing to the plaintiff that would disillusion the latter in this respect. Indeed I accept completely the plaintiff's evidence that he had specifically asked Ronaldson on the original occasion if he would become the owner of the car at the end of the period and was told in answer to that question that he would have to pay $390 as a residual value on the car "and then by signing a transfer of ownership form, registration or something, the car would come back to me from Credit Services" (the defendant company) "and would be mine". The plaintiff also said that he definitely would not have entered into the agreement if he had known that he was merely renting or leasing the vehicle since he could not afford to pay out the sums of money involved (which included, of course, the transfer of his modest but hard-won Singer car) and at the end have nothing left.

But the agreement he signed is, in fact, no more than a leasing agreement and it contains a provision which states in specific terms that the lessee can never become the owner. Yet merely for its use during four years the document commits the plaintiff to a payment of more than $4,000. Whatever the legal effect of that written agreement taken by itself I have not the slightest doubt that the plaintiff believed that he had entered upon a transaction

whereby he would slowly acquire the car as a capital asset; he was actively encouraged in that understanding of the transaction by Ronaldson; and he certainly would not have embarked upon it otherwise.

It happens that a day or two before the day fixed for hearing of the action Mr. Holland on behalf of the defendant company filed an application for its adjournment. The request was argued on the morning of that day and one reason then given for the application was that since it had been filed in the Court Registry a few days earlier Ronaldson (considered by the defendant company to be a necessary witness) had departed for Fiji. When the application for the adjournment was made he had been in New Zealand but he had left the country on a Saturday morning with knowledge that the fixture had been made for the following Monday. It seemed that no very strenuous effort had been made to persuade Ronaldson to remain here and I was told that it was uncertain whether he would be prepared to return to the country for some time ahead. So I decided that the action should NN proceed. However after the plaintiff had given his evidence I was informed that a telephone communication with Fiji had ensured that Ronaldson would return to New Zealand within two days if the further hearing of the case could be adjourned for that period. This application I granted and Ronaldson duly appeared. Accordingly the findings of fact that I have outlined take into account his evidence which in a number of respects is directly in conflict with that of the plaintiff. It will be obvious, therefore, that where there is such conflict I have accepted the evidence of the plaintiff and discarded the contrary version given by Ronaldson. In doing so it is necessary (though I regret the need) to record my opinion of Ronaldson as a glib but unreliable witness. I do not accept Ronaldson's attempt to persuade me that the plaintiff understood

precisely what the leasing arrangement involved. Nor do I believe Donaldson when he suggests that he was in communication with the defendant company during the period of the negotiations which led to the completion of the transaction. Those negotiations began and ended (as I am satisfied) on the occasion of the original evening meeting as I have earlier described it. In essence therefore I believe that the matter developed precisely as it was described to me by the uncomplicated and rather unsophisticated young man who is now making the present complaint. In my opinion he is to be regarded as an honest witness providing an accurate account of a dealing that was for him one of considerable importance.

The written agreement to which I have been referring is a document generally in the same form as that considered by the Court of Appeal in Credit Services Limited v. Quartel 1970 N.Z.L.R. 933; and it is identical with the amended form of the Quartel agreement as it came before the Court of Appeal in Credit Services Investments Limited v. Carroll. (Judgment delivered 23rd August, 1972). This latter form of the agreement had already come under review by Perry J. in Heath v. Ford Motors Limited and Credit Services Limited (Auckland Registry Judgment 16th December, 1971).

It will be noticed that in each of those cases the present defendant figures as a principal party. In the first of them it was held that the transaction was in contravention of regulation 8(b) and judgment went against Credit Services. The second case was decided while the case with which I am concerned was being heard. Here the Court of Appeal held in favour of Credit Services on grounds that the amended form of leasing agreement expressly contemplated that the lessee of the car concerned could never become its owner and was not invalidated by the regulation. It is necessary to notice, however, that the lessee had clear

knowledge and understanding of that fact. It is in this last respect that the Smith case was different. It was concerned with the same amended form of agreement but Perry J. found (as I do myself in this present case) that the lessee was actively encouraged by Cord Motors to believe that the transaction amounted to a trade-in and purchase; and it was admitted by Credit Services that Cord Motors was its agent. That admission has not been made in the present case although I observe in passing that on both occasions Cord Motors was the dealer concerned, the transactions developed in exactly the same fashion and they took place within a month of one another. Perry J. found in favour of the plaintiff.

The factor that distinguishes the present case from Carroll is that the present plaintiff was misled by Cord Motors concerning the nature of the leasing agreement. If it were not for this matter the fate of the action would of course be determined by the decision of the Court of Appeal in Carroll and the plaintiff could not succeed. However, as there is the distinction two issues require to be determined by me. The first is whether the motor dealer was the agent of the finance company when it handled the transaction with the plaintiff. The second issue is whether for the purpose of regulation 8(b) of the Hire Purchase and Credit Sales and Stabilisation Regulations 1957 the transaction is tainted by the assurances given by Donaldson that promoted execution of the written agreement. In the context of this case it is my opinion that the answer to both issues is "yes".

The question as to whether the motor dealer acted as agent for Credit Services Limited is something to be determined as a question of fact within the context of this case. But Mr. Holland invited me to hold as a matter of general principle and on the authority of Branchbite v. Hampshire Motor Finance Limited (1963 3 All E.R. 104) that such a dealer arranging a leasing agreement between his

customer and a finance company could not be regarded as the latter's agent. The case is one in which the House of Lords considered whether in a typical hire-purchase transaction a motor-dealer should be presumed to be the agent of a finance company in the absence of rebutting circumstances. And by a majority it was held that there was no such initial inference of agency although the case is distinguished by a forceful dissenting speech of Lord Wilberforce in which Lord Reid concurred. The majority accepted that Pearson L.J. had correctly stated the law in Mercantile Credit Company v. Hamblin (1964) 3 All E.R. 592). He said at p. 600:-

> "There is no rule of law that in a hire-purchase transaction the dealer never is, or always is, acting as agent for the finance company or as agent for the customer. In a typical hire-purchase transaction the dealer is a party in his own right, selling his car to the finance company, and he is acting primarily on his own behalf and not as general agent for either of the other two parties. There is no need to attribute to him an agency in order to account for his participation in the transaction."

As I understand Mr. Holland's submission it amounts to an argument first that the normal activities and the status of the dealer in the conventional hire-purchase type of transaction are to be equated with those of the dealer who promotes a leasing arrangement of the type under consideration in the present case; and second that the statement of Pearson L.J. should persuade me that the general way in which the present leasing arrangement was carried forward could not give rise to any inference of agency.

I must, of course, recognise the high persuasive authority of the Hamblin decision; although I confess that I find much attraction in the powerful and lucid discussion of the matter in the dissenting speech of Lord Wilberforce.

However in the present context I do not think the case is of any decisive assistance. I think, for example, there are factual distinctions to be drawn between the position of the dealer in the normal hire-purchase transaction and the motor-dealer who initiates and concludes the sort of leasing arrangement with his customer that is now under review in this case. Here Donaldson alone and without prior reference to Credit Services negotiated to finality all the essential details of the transaction so far as the plaintiff was concerned Donaldson displayed the Buick car; he agreed to take the Singer as a trade-in; he varied the size and duration of the periodic payments originally suggested by him; he gave the assurances to which I have referred; he produced the forms that the finance company had supplied for use on such an occasion; he then had them signed; and having done all this he completed the whole arrangement as I say in a final sense by accepting the Singer and forthwith passing across to the plaintiff possession of the Buick. I am satisfied moreover that it was a routine that had been habitually followed. On the facts I am left satisfied that whether or not Ford Motors and Credit Services recognised in a formal sense the relationship of principal and agent as existing between them, the course of dealing exemplified by the present transaction clearly establishes what amounts in law to such a relationship and certainly it was a relationship that applied on the present occasion. Pearson L.J. rejected the idea that the dealer in hire-purchase transactions should be presumed to be acting as an agent for the finance company but even so he went on to state:-

> "Nevertheless the dealer is to some extent an intermediary between the customer and the finance company, and he may well have in a particular case some ad hoc agencies to do particular things on behalf of one or the other or it may be both of those two parties. For instance, if the car is delivered by the dealer to the

customer after the hire-purchase agreement has been concluded, the dealer must be making delivery as agent of the finance company."

I think Lord Wolfe noted as agent for the defendant not only in making delivery of the car but also during the whole of the negotiations that led up to delivery.

The remaining issue is whether the written agreement must stand alone and be given effect on the basis that this case is indistinguishable from Credit Services Limited v. Carrolls or whether the transaction is invalidated when the associated discussions that led to its completion are taken into account.

It will be remembered that Regulation 8 (b) provides that:

"A person shall not -

(b) Enter into any transaction or make any contract or arrangement, whether orally or in writing, for the purpose of or having the effect of, in any way, whether directly or indirectly, defeating, evading, avoiding, or preventing the operation of these regulations in any respect."

On the facts of this case I am in no doubt that the transaction was arranged by both parties for the purpose of circumventing the Hire Purchase and Credit Sales Stabilisation Regulations 1957 and in particular Regulation 3. That last regulation reads:-

"Except as otherwise provided in these regulations, a person shall not dispose of any goods in pursuance of a hire purchase agreement or a credit sales agreement entered into after the appointed day unless the requirements specified in the First Schedule hereto are or have been satisfied in relation to that agreement:." (My emphasis).

The plaintiff's sole purpose was to acquire the Buick car and he wished to do so pursuant either to a hire-purchase agreement or to a credit sales agreement because he had insufficient funds to purchase it outright. Nor had he the funds to meet the requirements of the regulations in respect of a disposition either by hire-purchase agreement or on credit. All of this was understood by Ronaldson who then put forward the transaction under review as one that would overcome the problem. The plaintiff was assured that by payments he could meet he would have the use of the car during the extended period and eventual ownership of it when the payments had been complete I am satisfied that on both sides the purpose of the written agreement against the background of discussion that preceded it was to defeat, evade, avoid or prevent the operation of the regulations. The plaintiff may not have had an informed appreciation of the regulations or their precise effect and he may not have had the conscious purpose of defeating them by the arrangement but that was the real end he had in view just as it was the real purpose or end in view of Ronaldson. And whether or not that mutual purpose was enforceable at law is immaterial as North P. pointed out in the Quartel case at p.3[illegible] (ll. 2 and 3.) I add my opinion that I do not think the reference to "transaction" and to "arrangement" in regulation 8 (b) are confined to what lawyers in a common law sense would consider to be the "terms of the contract". In a word the transaction in the present case is evidenced not merely by the written agreement but also by the general circumstances in which it was made and by the mutual understanding of the parties.

Accordingly the plaintiff is entitled to judgment together with costs, witnesses' expenses and disbursements. I would be glad to have from counsel an agreed calculation of the precise amount for which judgment should be entered.

Solicitors:

Messrs. Greve and Walker of Auckland for Plaintiff
Messrs. Wynn Williams & Co. of Christchurch for Defendant

Judge's Chambers,
Supreme Court, Box 60
Auckland.
20th October, 1972

The Editor,
N. Z. Law Reports,
Box 472,
WELLINGTON

Dear Sir:

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On page 10 of this judgment, reference is made to the Quartel case at p. 957. Will you please alter the page number fo 947?

I regret any inconvenience caused you.

Yours sincerely,

Shirley Field

Associate to the Hon.
Mr. Justice Woodhouse.