NZLR.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M. 285/77

No Special Consideration

205

IN THE MATTER of the Hire Purchase Act 1971

AND

IN THE MATTER of an application by SLIPPER ISLAND RESORT LIMITED for orders pursuant to Section 37 of the Hire Purchase Act 1971

AND

IN THE MATTER of a Hire Purchase Agreement dated the 12th day of December 1975 made between THAMES STREET MOTORS LIMITED and SLIPPER ISLAND RESORT DEVELOPMENT LIMITED

BETWEEN SLIPPER ISLAND RESORT LIMITED

Appellant

AND THAMES STREET MOTORS LIMITED

Respondent

Hearing: 25 March 1981

Counsel: In Person for Appellant
Mr Craven for Respondent

Judgment: 13 April 1981

JUDGMENT OF GREIG, J.

This is an appeal against the decision of the Learned District Court Judge dismissing an application under s.37 of the Hire Purchase Act 1971 for a reopening of a hire purchase transaction.

At the hearing of the appeal, the appellant was not represented by counsel but was represented by a director of the company who made submissions on the matter and has since submitted some further written submissions relating to the matter.

The original application in this matter by the appellant as applicant was filed in the District Court at Morrinsville on 1 April 1977. There was a lengthy hearing of the evidence over some five days in early June 1977. In a lengthy and careful reserved decision given on 19 August 1977 the Learned Magistrate dismissed the application. The appellant filed notice of appeal out of time but by order of Ongley, J. on 8 September 1978, the time was extended to validate the notice of appeal already filed. That appeal was filed on 1 December 1977.

An application was made by the respondent to strike out the appeal on the ground that the appellant had not prosecuted it with due diligence and this came before the Court on 11 August 1980 when Bisson, J. adjourned the matter and reserved costs. On 8 October 1980 the matter again came before Bisson, J. There was no appearance for the appellant and the appeal was struck out for want of prosecution. The appellant then applied further and on 18 December 1980 the appeal was reinstated and once again, the question of costs was reserved.

On 4 February 1981 the appeal was called for hearing but because of certain representations made to me

on behalf of the appellant, the matter was adjourned to 25 March 1981. I ordered costs to the respondent on that occasion in the sum of $50.

The original application and this appeal arises out of a hire purchase agreement dated 12 December 1975 under which the appellant purchased from the respondent a number of items of farm machinery on instalment terms. Somewhat unusually, the repayment of the nett balance payable, including the finance charge and other charges, was to be made in two instalments, on 31 May and 30 November 1976. The appellant failed to pay the first instalment and after some difficulty a tractor included in the hire purchase agreement was repossessed. Thereafter, the appellant paid to the respondent or the finance company to which the hire purchase agreement had been assigned moneys to meet the instalment then overdue, penalty interest and costs of repossession. In fact, more than the amount actually due then was paid and the balance was credited to the remaining instalment. The appellant re-took possession of the tractor previously repossessed.

The appellant failed to pay the balance of the second instalment due on 30 November 1976. The respondent then took steps to repossess the same tractor or other chattels included in the hire purchase agreement. There was again difficulty and in the course of its attempt to repossess the tractor and other chattels, the

respondent incurred considerable expense in the employment of men in making searches for the tractor and other chattels and in engaging a helicopter to make an air search. In the result, the respondent took possession of a haybaler and some other items and these have remained in the possession of the finance company since.

In accordance with the Hire Purchase Act, the respondent and the finance company have claimed in the amount claimed under the hire purchase agreement, costs of repossession and storage, including the cost of the hire of the helicopter which is one of the substantial matters in dispute.

After the second repossession, the appellant paid some moneys which repaid the balance nominally due under the hire purchase agreement together with some additional interest but has refused to pay the repossession costs claimed.

There was a preliminary question raised before the Magistrate as to his jurisdiction to deal with the matter at all but by consent of the parties, jurisdiction was accepted.

The application claimed, in terms of sub-paras. (a) to (d) of s.s. 1 of s.37 of the Act, a number of matters under which it was said that the interest or other expenses charged or made under the terms of the hire purchase agreement were excessive and that the transaction and the powers conferred by the hire purchase agreement

were exercised by the respondent in a harsh and unconscionable way.

It was conceded by counsel for the appellant at the hearing before the Magistrate that the interest was not excessive so that that part of the application disappeared immediately.

In the end, the applicant claimed that the amounts charged by the respondent for its enquiries and work in endeavouring to make the repossessions and in particular the charge for the hiring of a helicopter were excessive and that the powers conferred by the agreement and in particular the operations of the respondent in undertaking the repossessions, particularly the second repossession, were exercised in a harsh and unconscionable manner.

In accordance with the provisions of s.37 of the Hire Purchase Act, a Court, before reopening a transaction and taking an account between the parties must be satisfied that the interest or the charges are excessive or that the terms or the exercise of the powers are harsh and unconscionable.

After a careful and lengthy consideration of the evidence before him, the Learned Magistrate concluded that the expenses and other charges made by the defendant were not excessive and that the conduct of the respondent was not harsh or unconscionable. In the result then, the

Learned Magistrate refused to reopen the transaction and awarded costs to the respondent. It may be noted that in the course of his decision, the Learned Magistrate observed that even if he had been satisfied on any of these matters, he would have been very hesitant to exercise his discretion to reopen the transaction in the applicant's favour.

I have carefully read all the evidence which was given in this matter, both by affidavit and orally and I have examined the exhibits which were produced. As the Learned Magistrate said, there was a considerable amount of irrelevant evidence given before him as it appears that there has been created between the parties, a considerable amount of resentment and bitterness over this whole matter.

Among the matters which were referred to in the Magistrate's Court and were repeated by the appellant before me, were suggestions that certain of the chattels included in the hire purchase agreement had been improperly introduced without the knowledge of the appellant or its officers, that moneys paid by way of deposit were in completion of the purchase price of certain of the goods, that both parties on occasions complained to the police as to the conduct of the other party, that after the first repossession of the tractor tyres were substituted for the correct tyres by the respondent and were not replaced for some time, that a scow owned by the appellant sank in suspicious

circumstances connected with the respondent and that the respondent through its officers in general had behaved badly and to the detriment of the reputation and character of the directors and shareholders of the appellant. Many of these matters were not referred to by the Learned Magistrate in his decision and if I may say so, properly, because they were without foundation as well as being irrelevant to the matters in issue.

After lengthy hearing during which two of the directors and shareholders of the appellant gave evidence as well as an officer of the respondent, the Learned Magistrate made a finding of credibility against the appellant which was expressly recorded in his decision and he made it clear that he accepted the evidence of the respondent where there was a discrepancy between the evidence of the parties. I have not had the advantage of hearing the witnesses but I should observe that on my examination of the evidence there was certainly sufficient evidence to support the findings of fact made by the Learned Magistrate.

After dealing in detail with the various allegations the Learned Magistrate found that none of the charges made by the respondent in relation to the repossessions were excessive and that, in my view, is amply justified on the evidence. The Learned Magistrate's finding as to the manner in which the respondent exercised its rights of repossession depended upon his view as to the conduct of the appellant and its officers

and he found that they had obstructed the attempts at repossession which necessitated considerable extra effort and expense and justified the use of the helicopter to attempt to find some of the chattels. It should be observed that the appellant owned or occupied or made use of the chattels on Slipper Island which is some 8 kms off the coast of the North Island, at Pauanui or Tairua and at Pukekohe.

The evidence was that attempts were made to repossess chattels at all these properties, particularly on the second occasion. Apart from the Learned Magistrate's finding as to credibility the weight of evidence clearly justified his finding that the conduct of the respondent was in no way harsh or unconscionable.

The burden of the submissions and statements made to me by the appellant were substantially a repetition of the factual matters all of which were canvassed. There were some additional matters of fact raised by the appellant but this did not in any way add to the matters which are to be considered by me. The fact is that the appellant in a lengthy hearing before the Learned Magistrate, with the assistance of counsel, had every opportunity to put in open Court everything that could be properly said. Indeed, as I have noted, a number of irrelevant matters were put forward. In face of the finding as to credibility and my view as to the justification on the evidence for the Learned Magistrate's decision, I cannot be assisted by repetition of the

factual disputes which are now settled and resolved by the Magistrate's decision. There is certainly nothing in law which would lead me to disagree with or reconsider the Learned Magistrate's decision. There is nothing in the facts either which would take me in that direction. In my view, the Learned Magistrate was correct in law and in fact.

The appellant properly failed in the Lower Court and must fail in its appeal. The appeal is dismissed and the respondent is entitled to costs. As I have noted earlier in my judgment there are a number of matters upon which costs have been reserved. I have already fixed in favour of the respondent costs of $50 on 4 February 1981. That order will stand as will the order of the Learned Magistrate in his decision. In addition to these matters and taking into account the other matters upon which costs were reserved, there will be an order for costs to the respondent in this court in the sum of $250.

Solicitors for Respondent: Allen Needham Sanford & Lang

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