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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.696/80

571

BETWEEN MARAC FINANCE LIMITED

First Plaintiff

A N D PETER JAMES STEWART and
ROBYN STEWART

Second Plaintiffs

A N D AUSTRALIAN GUARANTEE
CORPORATION (N.Z.) LIMITED

First Defendant

A N D M.P. & C. SOLE LIMITED

Second Defendant

A N D WAIKATO TRUCK & TRACTOR
SALES LIMITED

Third Defendant

A N D THE MOTOR VEHICLE DEALERS
INSTITUTE INCORPORATED

Fourth Defendant

Hearing : 30th April 1984

Counsel : I.D.R. Cameron for 4th Defendant in support
A.M. Boyle for 2nd Plaintiffs to oppose
M.C. Black for 1st Plaintiff to oppose

Judgment : 30th April 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an application by the fourth defendant to
strike out that portion of the plaintiffs' statement of claim

as affects the fourth defendant. In these proceedings, issued almost four years ago, the plaintiffs seek compensation in respect of a motor vehicle purportedly sold by the third defendant to the first defendant in circumstances where it is alleged by the plaintiffs that the third defendant had no right to effect this sale and the first defendant obtained no title to the vehicle.

The second plaintiffs were hirers under a hire purchase agreement from the first plaintiff; the vehicle was a large truck said to be worth about \$29,000. The second defendant is the guarantor of the second plaintiff's hire purchase agreement with the first plaintiff. It is alleged, in summary, that the vehicle was placed with the third defendant, a licensed motor vehicle dealer, for sale on commission as the plaintiffs' agent; the third defendant is alleged wrongfully to have sold it to the first defendant; the third defendant's managing director absconded with the proceeds of sale paid by the first defendant.

The second amended statement of claim does not carefully spell out the plaintiffs' allegations against the fourth defendant. In my view, counsel for the fourth defendant was quite correct to apply to strike out the statement of claim as it presently reads as against the fourth defendant. However, Mr Cameron properly acknowledged that, on a hearing of a motion of this nature, the Court must assume that the plaintiff is able to prove everything alleged in the statement of claim and that, for the motion to succeed, even with any reasonable or foreseeable amendment, there can be found to exist no cause of action against the fourth defendant.

After discussion with counsel, it appears that the cause of action by the plaintiffs against the fourth defendant can be summarised as follows:

The third defendant breached its statutory duty as a licensed motor vehicle dealer under Sections 59 and 60 of the Motor Vehicles Dealers Act 1975. In general terms, these sections require a licensed dealer to account for monies received on behalf of a principal. Part III of the Act sets up a fidelity guarantee fund administered by the fourth defendant; in particular, Section 39(b) of the Act states that the fund can be used to reimburse persons who suffer inter alia as a result of a breach by a licensee of Section 59 or 60 of the Act. It will be alleged by the plaintiffs, at least in the alternative, that there was a breach of one or both of Sections 59 and 60, and that the plaintiffs have thereby suffered loss in that they have been unable to obtain restitution from the absconding dealer, the third defendant.

Mr Cameron submitted that the fourth defendant had never indicated its unwillingness to comply with its statutory obligations and that therefore, it should not have been joined. I am of the view that, given a responsible statutory body like the fourth defendant, there was probably no need to have joined it as a defendant; particularly in view of its present intimation, made through counsel, that it will give favourable consideration to paying out if there should be judgment against the third defendant based on breach of Section 59 and/or Section 60 of the Act.

However, that is not the same thing as holding that the

plaintiffs are not entitled in law to sue the fourth defendant. I think that in the circumstances indicated, there could be a viable cause of action based, not on any breach of a statutory duty, but on a statutory right of indemnity given to persons who suffer loss through the misconduct of motor vehicle dealers in certain circumstances.

I therefore consider that, should an amended statement of claim be filed which sets out the plaintiffs' allegations with proper precision, including particulars of any breach by the third defendant under Section 59 or 60 which would bring into play the liability of the fourth defendant Institute, then one could not sustain a motion to strike out such a pleading.

I therefore do not dismiss the motion presently; if an amended statement of claim is filed within 7 days and it discloses a cause of action against the fourth defendant, then I shall give consideration to formally dismissing the fourth defendant's motion; rather than require counsel to attend, a memorandum could be supplied whereby counsel can indicate that there is a cause of action against the fourth defendant in their view; I could then formally dismiss the motion.

As indicated, the fourth defendant was fully justified in bringing this application which was brought about through the inadequacy of the plaintiffs' pleadings. Therefore, I have no intention of ordering costs against the fourth defendant.

It may well be that, after discussion with counsel, if it appears to the fourth defendant that the whole question is to be litigated properly (and all indicates are that it will be) then

the fourth defendant will be able to indicate to the Court that it abides its decision; it would not then be necessary to put the fund to the additional cost of the fourth defendant being a spectator to a tripartite argument. There of course could be advantages to the fourth defendant in being in the proceedings; if it paid out pursuant to judgment or direction of the Court, there could be no challenge to its action in so doing.

More importantly from the plaintiffs' point of view, if they obtain judgment against the third defendant, then unless the fourth defendant was a party to the proceedings, they might conceivably have to issue fresh proceedings. It is obviously in the interests of justice that there should be but one set of proceedings arising out of one transaction.

R. J. Barker J.

SOLICITORS:

Rudd, Watts & Stone, Auckland, for First Plaintiff.
Nicholson, Gribbin & Co., Auckland, for Second Plaintiffs
Scott, Morrison, Dunphy & Co., Wellington, for Fourth Defendant.