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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.561/84

793

BETWEEN: NORTH SHORE MOTOR HOLDINGS LIMITED a motor vehicle dealer of Auckland

Plaintiff

A N D: GEORGE PATERSON of Milford, Auckland, Workman and JANICE PATERSON of Milford, Auckland, his wife.

Defendants

Hearing: 28 June 1984

Oral Judgment: 28 June 1984

Counsel: A B Lawson for defendants in support
M W Vickerman for plaintiff to oppose

(ORAL) JUDGMENT OF HENRY, J.

A bill writ in this action was issued on 5 June 1984 in respect of a cheque dated 29 May 1984 for \$26,000.00 drawn by the Defendants, payment on which was stopped. The affidavits disclose that on Saturday, 26 May 1984 the male Defendant, Mr Paterson, agreed to purchase a Mercedes Benz motor car, a 1976 model, for \$49,000.00. In doing that, he agreed to trade-in his own existing Mercedes Benz at \$23,000.00, leaving a balance payable of \$26,000.00 and for this the

post-dated cheque was issued, the future date being the following Tuesday. It is that cheque which is the subject of this action.

Under Rule 495, which is the basis of this application, the Court can give leave to defend a bill writ upon affidavits which disclose to the Court's satisfaction a good defence, or such facts as would make it incumbent on the plaintiff to prove consideration. The principles upon which that jurisdiction is exercised are now fairly well established and, in general, in a situation like this, leave would only be granted where there was something such as fraud, illegality, or failure of consideration. The authorities were collected by Hardie Boys J, and referred to in his recent decision in Finch Motors Limited v Quin (1980) 2 NZLR 513.

Here, the primary issue raised on the affidavits, and the sole basis upon which Mr Lawson for the Defendants now argues the application, is an allegation that the agreement of 26 May 1984 was a conditional agreement, the condition being that the ownership papers for the vehicle were to be produced and inspected by the male Defendant for the purposes of his confirming certain history details in relation to the car. The allegation is that that condition was not

fulfilled because, on inspection, the papers did not confirm the earlier alleged representations and therefore, it is said, the contract was avoided, this being done on the following Monday, 28 May. If that be the case, then the consequence is that the contract, being subject to a condition subsequent and having been avoided for non-fulfilment, thereby ceased to exist. The necessary consequence of that is that there would be a failure of consideration for the handing over and retention by the Plaintiff of the cheque.

In an application such as this, it is not proper to comment in any detail at all on the nature of the evidence contained in the affidavits, and it is certainly inappropriate to make any findings as to credibility. What the Court has to do - and I accept the tests put forward by Mr Vickerman in his submissions - is really to see whether there is anything of substance which can properly be the subject of trial in the usual form for determination of appropriate factual and legal matters. The affidavits by both Defendants claim, on oath, that there was a condition to which I have referred and which formed the basis for the whole contract.

I have given careful consideration to the many points made by Mr Vickerman in the course of his helpful submissions as to changes of emphasis, as to

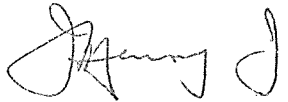
inconsistencies, and as to reasons why the evidence should not be accepted. As I have said, it is not appropriate for me to comment in detail on that, but I do record that I have taken those submissions into careful consideration. Nevertheless, I have reached the firm conclusion that there is sufficient disclosed by way of affidavits from the Defendants to justify leave being granted to defend this particular action. It seems to me that it will necessarily come down to a question of credibility and that will require consideration of both Mr and Mrs Paterson's evidence, should they both choose to give evidence, as well as that of the Plaintiff company's representatives who were concerned in the transaction. On the face of that evidence, I do not think I could properly hold that there is nothing properly arguable able to be put forward to establish the condition, its non-fulfilment, and consequently the lawful avoidance of the contract.

I am therefore disposed to give leave as sought in the application. This leaves the question as to whether or not any security should be ordered as a condition to granting leave. It seems to me that the trend in the authorities, certainly in New Zealand, is to require the giving of security where it is likely that the end result of the case is that some payment will need to be made by the defendant - such as when there are claims and counterclaims, as was the

situation in the Finch Motors case, or perhaps where, as was observed by Speight J. in L D Nathan & Company Limited v Vista Travel Limited (1973) 1 NZLR 233, the prospects of the defence succeeding appeared to be doubtful and there were real reservations as to its genuineness. In this particular case I find I am left in some measure of uncertainty on that point. There is nothing in the nature of the action which would appear to require an ordering of security because if the defence is successful then the avoidance of the contract will be upheld and on these proceedings nothing further will be required.

I do not think in the circumstances it is appropriate to take into account any pending claim made in respect of the sale of the Defendants' own vehicle to the Plaintiff company because it seems to me that a necessary consequence of the Defendants succeeding in this action will be that that transaction must also be set aside. Neither am I, at this point of time, driven to the view that the defence put forward is one which is approaching a sham or approaching transparency, or more than likely not to succeed. As a matter of principle, I think therefore that it would not be appropriate to order any security, and accordingly no such condition will be imposed.

The Defendants are granted leave to file a defence to the writ in the form of the draft submitted. Costs, in the circumstances, will be reserved.



Solicitors:

Keegan Alexander Tedcastle, Auckland, for plaintiff

Draffin & O'Reilly, Auckland, for defendants