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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A. No. 31/84

367

BETWEEN AUCKLAND WATERBED COMPANY LIMITED a duly incorporated company having its registered office at Auckland

PLAINTIFF

A N D PROGRESSIVE FINANCE LIMITED a duly incorporated company having its registered office at Christchurch

DEFENDANT

Hearing : 10th April 1984

Counsel : L.M.C. Robinson for plaintiff
D.H.P. Dawson for defendant

Judgment : 11th April 1984

ORAL JUDGMENT OF CHILWELL J.

The plaintiff is in business in Auckland as a retailer of waterbeds. The defendant is a finance company with its central office in Christchurch. The managing director of the plaintiff, Tony Robert Kirkland, is the uncle of William Robert Farmer, the managing director of the defendant.

The plaintiff commenced business some time in November 1983. On the 27th October 1983 the defendant advanced Mr. Kirkland, as trustee for the plaintiff then about to be formed, $15,000 towards the purchase price of

leasehold premises, fixtures and fittings, situated on the corner of Customs and Commerce Streets in Auckland. The advance was in the form of a hire purchase agreement. The Court has not been informed how the formalities of the transaction were arranged. The matter is not, however, relevant to the issues now before the Court. The finance rate disclosed for the purpose of the Credit Contracts Act 1981 was 21%. From the commencement of business in November 1983 the plaintiff discounted its retail sales by way of hire purchase with the defendant. The plaintiff's finance rate charged to its customers was 27% which the defendant discounted at 25%, thereby leaving a 2% margin.

The plaintiff's supplier was, and presumably still is, a firm called Classic Waterbeds (Classic). Mr. Kirkland arranged to purchase stocks of waterbeds from Classic for an amount in excess of $41,000. Payment was due to Classic on 20th January 1984. The defendant agreed to advance the plaintiff the price of the stock being purchased from Classic. The type of finance is known in the business world as floor plan financing. On 25th January 1984 the defendant's Christchurch office paid a cheque for $41,675.50 to the plaintiff's bank by depositing a cheque in a branch of the plaintiff's bank in Christchurch. The named payee was the plaintiff or bearer. The cheque was not crossed.

On the same day, in Auckland, Messrs. Kirkland and Farmer met at the office of the plaintiff. Mr. Farmer had taken with him for execution by the plaintiff two types of printed document, complete except for certain dates and

subject to certain, now irrelevant, amendments. These two documents were headed respectively "Contract of Loan and Instrument by Way of Security" (the I.W.S.) and "Disclosure and Memorandum of Credit Contract" (the Memorandum). The seal of the plaintiff was affixed in the presence of Mr. Kirkland as director. He also signed the I.W.S. as guarantor and the Memorandum as covenantor. Mr. Farmer witnessed the sealing by the plaintiff and the signatures of Mr. Kirkland. It is common ground that the seal of the plaintiff required the additional signature of the plaintiff's accountancy firm as either director or secretary or both. That deficiency was in fact supplied on 26th January 1984 when a representative of the accountancy firm called at the plaintiff's office and supplied the requisite additional signature. The documents, however, are dated 25th January 1984. Each document was executed in five copies. On 26th January 1984 Mr. Farmer took delivery of three copies of each fully completed document. The only way in which either document was uncompleted was that the Memorandum lacked a signature at the foot of page 1 where there appears in print the words "For and on behalf of Progressive Finance Limited". Neither Mr. Farmer nor any other officer of the defendant ever provided a signature for or on behalf of the defendant. As soon as Mr. Farmer took delivery of the documents he immediately went to the office of the Registrar of Companies at Auckland where he registered the I.W.S. He then telephoned his company's finance controller in Christchurch, Mr. Duffin, and instructed him to stop payment of the cheque for $41,675.50. Mr. Duffin

requested the defendant's bank to stop payment. Payment was stopped, presumably on 26th January, but whether it was effectively stopped on that date remains a matter of conjecture.

Meantime, on 26th January 1984 the plaintiff had obtained from its bank in Auckland a bank cheque payable to Classic for the stock of waterbeds. Presumably, the amount of that cheque was more or less the same as the amount of the cheque paid by the defendant. Mr. Kirkland told me that his bank had made a mistake. He further told me that his bank was left holding the responsibility. This aspect of the matter was not fully investigated in evidence. Accordingly, I am unable to make any finding as to that. It may be that in any event it has little relevance. It suffices to say that the plaintiff received official notice of the stopped payment on 30th January 1984.

The amount of the stopped cheque corresponded with the amount of the advance referred to in the loan documents, that is to say, sum advanced $41,655.50 plus registration fee and stamp duty $20, yielding a total of $41,675.50. The additional charge for credit shown in the documents is $9721.04 which represents a finance rate of 21% per annum. The total repayment figure is $51,396.54 payable by 24 monthly instalments of $2141.52. The last payment is due on 25th January 1986.

The plaintiff issued a bill writ on 21st February 1984. It was served on the defendant on 23rd February. Upon a motion for leave to defend, Roper J. made an order on the

9th March 1984. In the statement of defence dated 12th March 1984, filed 3rd April 1984, the defendant admits drawing the cheque but alleges that it was drawn on terms and conditions which included, and I now quote :-

> "(a) That the Plaintiff and Defendant would reduce to writing and both sign in proper form an instrument by way of security acceptable to the Defendant over the existing stock of the Plaintiff.
>
> (b) That the advance represented by the said cheque would form part of a series of advances whereby the Plaintiff would over a two year period discount all future hire purchase sales through the Defendant in return for a 2% commission in respect of each sale so financed."

In respect of term (a) it is alleged that the proposed written agreement was not completed as contemplated because the terms under which it would operate were in dispute. In regard to term (b) the allegation is that the plaintiff refused to discount future hire purchase sales through the defendant and that by reason of such refusal the consideration for the cheque failed. Thus, it can be seen that, looking at the statement of defence, there is another side of the coin presented than that which appears from the bare narrative of events earlier outlined in this judgment.

For the first of the affirmative defences the defendant relied upon Concorde Enterprises Ltd. v Anthony Motors (Hutt) Ltd. (1981) 2 N.Z.L.R. 385. In that case the Court of Appeal accepted the view of the trial Judge that the parties did not intend to be contractually bound until

contract
the formal/had been executed by both parties. It is sufficient to refer to that part of the headnote where the judgment of the Court is summarised :-

> "The negotiations were conducted partly between the solicitors with reference back to their respective clients and partly between the parties directly. The evidence showed that the purpose of the negotiations was to have prepared by the manufacturer's solicitors and executed by both parties an important commercial agreement of some complexity. In such circumstances the normal inference was that the parties did not intend to be bound before the agreement had been drawn up and executed on both sides. As there was nothing to displace that inference as at the date when negotiations began, the result was that there was no contract."

In delivering the judgment of the Court, Cooke J. referred to the earlier decision of Carruthers v Whitaker (1975) 2 N.Z.L.R. 667. Referring to a particular part of the judgment of Richmond J. in that case Cooke J. said, at page 389 :-

> "This case is in the different field of commercial contracts, where there is not by law the same need for signed writing as evidence, but in our opinion the natural inference is the same in the absence of factors to the contrary.
>
> Unless that inference is displaced the result is that, even although all the terms to be included in the document have been agreed, there is no contract and each party has a locus poenitentiae until at least execution on both sides."

The inference referred to flows from the observation of Richmond J.in the particular circumstances of the case before him where he said that when parties in negotiation for the sale and purchase of a property act in a certain way then the ordinary inference from their conduct is that

they have in mind and intend to contract by a document which each will be required to sign. That was a case where he was satisfied, in the case of an agreement for the sale and purchase of a farm, that the parties and their solicitors had so conducted themselves as to justify the inference referred to.

In the present case I do not think that this particular defence can stand on its own feet because, in my judgment, it is dependent on the second defence. If there were no dispute concerning an oral term with regard to future discounting the hire purchase agreements the documentation to which I have referred was fully completed in the forms prepared by Mr. Farmer. He was careful to witness every signature of Mr. Kirkland whether that signature was that of Mr. Kirkland covenanting in person or that of Mr. Kirkland executing on behalf of the plaintiff. The amendments to the documents were made by Mr. Farmer. He also dated the documents and completed certain blank dates within it. Mr. Farmer carefully initialled all alterations as a witness to those alterations. There was no provision for execution by the defendant of the I.W.S. nor is such execution required by law. It is a document unilateral in form in the sense that the covenants all run from the borrower. The Memorandum had, as I have observed, a printed place at the foot of the first page indicating a signature for and on behalf of the lender. This document is almost wholly unilateral in scope. The only stipulation to be performed by the lender is to advance the money on 25th January 1984 in terms of the document. That had, in

fact, been done. That particular contract was no longer executory on defendant's part.

In my judgment this suffices to distinguish the case from Concorde Enterprises Ltd. v Anthony Motors (Hutt) Ltd. It adds nothing to the facts to be told by Mr. Farmer and by Mr. Duffin that it was intended by them that the defendant would sign. I am, however, satisfied on the evidence, that the defendant would have signed when it took delivery of the documents on the 26th January or, at least, very shortly thereafter. Mr. Farmer was satisfied about the correct witnessing of the seal. He did not know that the signature of the accountancy firm was placed on the document on 26th instead of 25th January. I do not think that that would have made any difference in his attitude to the effectiveness of the document which he regarded as satisfactorily completed by the plaintiff and by Mr. Kirkland. The Memorandum was not signed for or on behalf of the defendant in consequence of an argument, that day, 26th January, between Mr. Kirkland and Mr. Farmer over discounting further hire purchase agreements.

The chattels the subject of the I.W.S. are described in the schedule in the following way :-

> "Stock of the Borrower(s), comprising Waterbeds, bedheads, bases to beds, mattresses and accessories to beds including bedroom furniture comprising the stock of the Borrower(s) situated at Corner of Custom and Commerce Street, Auckland, and any warehouse or storehouse within the ownership or control of the Borrower(s) together with the proceeds of any sale, bailment or exchange of those Chattels which are received by the Borrower(s) and which shall form part of

> the security and which will be kept by and on behalf of the Borrower(s) in a separate and identifiable fund and failure to do so shall constitute default hereunder and give rise to the rights of the Lender under Clause 18 of the terms and conditions hereof:"

That conjeries of words is I presume a fairly typical way of describing chattels for the purposes of floor plan financing. It is noted that the plaintiff is obliged strictly to account for all proceeds of sale, bailment or exchange. Curiously, hire purchase sales are not specifically referred to. Nevertheless the plaintiff would be obliged to account for the cash portion received on any hire purchase sale and the proceeds received by discounting any hire purchase sale agreement. I observe that it would have been quite simple to have provided that all discounting would be made through the defendant while monies were still owing.

It is necessary to go back in time and trace briefly the background and the negotiations leading up to the advance. There is a good deal of common ground in the evidence of Messrs. Kirkland and Farmer. There are, however, significant conflicts in what each states the other said. Mr. Farmer impressed as a fairly careful meticulous businessman. Much more so than did Mr. Kirkland. In any event, Mr. Farmer kept a diary which aided his memory concerning dates and events. Mr. Kirkland did not keep a diary but was not prepared to deny the occurrence of events or the dates. I accept the evidence of Mr. Farmer with regard to those matters. The issue I have to determine

is which account is to be accepted on the significant areas of conflict. I find that Mr. Kirkland was previously in business as a fisherman. Mr. Farmer had assisted him with finance for his fishing boat. Messrs. Kirkland and Farmer were on good terms as uncle and nephew. Mr. Farmer had been in business for 5 years in waterbed retailing. I find that he suggested to his uncle, who at the particular time wanted a new business venture, that he should get into the waterbed retailing business. I find that Mr. Farmer assisted his uncle with general advice, with budgetting advice, in the inspection of one set of premises, in explaining how hire purchase discounting worked, in explaining floor plan financing and by introducing his uncle to Classic as a source of supply and from whom Mr. Kirkland ultimately obtained an informal franchise area centred on the corner of Customs and Commerce Streets, Auckland.

The advice was given by nephew to uncle about 25th October 1983. Mr. Farmer saw Mr. Kirkland again the following day. Mr. Kirkland had made up his mind that he would like to enter the waterbed retailing business. I find that Mr. Farmer, on behalf of the defendant, offered assistance. First, he agreed to advance $15,000 to assist towards the purchase of the leasehold premises, fittings and fixtures. Secondly, he indicated that the defendant would be prepared to finance stock on a floor plan basis. I am satisfied that the initial amount discussed was approximately $40,000 to cover $20,000 worth of stock on the shop floor and the balance stored underneath the retail

premises. That floor plan financing arrangement was indicated as including further advances with the result, quite common in floor plan financing, that the retailer receives continuous finance for his stock. Thirdly, Mr. Farmer offered Mr. Kirkland the defendant's discounting service.

The advance of $15,000 was arranged almost immediately because the document adduced in evidence is dated the 27th October 1983. The discounting of hire purchase agreements commenced. The Court is not aware of how many hire purchase agreements were discounted from November through December until 24th January 1984. The fact is that the defendant did the plaintiff's discounting. Mr. Kirkland maintains that that was because the service was available and it was simple for him to take it, particularly as the matter was, so to speak, within the family. Mr. Farmer maintains that the discounting was more than a mere service available but was part of a total package offered by his company. Nothing was put into writing at that stage with the exception of the hire purchase agreement dated 27th October 1983. I do not have to decide if a contract comprising a package was entered into at that stage. I merely observe that the likelihood was that there was no definite contract then.

On the 24th November 1983, after the plaintiff had commenced business, Mr. Farmer called in order to find out for himself how the business was progressing. There was no further discussion then about any arrangements

between the parties. However, on the 6th or 7th December 1983 there was a meeting between Mr. Kirkland and Mr. Farmer in which serious discussions were held. Mr. Kirkland raised, for the first time, the possibility of obtaining cheaper hire purchase discounting from a firm described in evidence as Nathans Finance. I rather gather that the finance rates were 25% to the customer and 23% to Nathans Finance. I say that because those are the figures ultimately arranged with another firm called Comsec. Mr. Kirkland maintained that these rates, which were 2% lower than the rates offered by the defendant, were better for his customers. He indicated in evidence that there had been customer complaints about excessive interest charged. Mr. Farmer was annoyed that Mr. Kirkland was considering discounting his future hire purchase sales with another concern, such as Nathans Finance. Mr. Farmer told me that he warned Mr. Kirkland that if he did discount elsewhere that would be the end of the floor plan advance of $40,000 approximately. Mr. Kirkland told me that that was not the position and that no such warning was given. He said that he made the decision to reject the approach from Nathans Finance out of family loyalty. It is perhaps significant that Mr. Kirkland did not in fact change. His company continued discounting hire purchase sales with the defendant until the 24th January 1984 when the defendant refused to accept any further discounting.

Mr. Farmer told me in evidence that his understanding of that early December meeting was as follows :-

"My understanding was that he would continue to discount hire purchase through us and we would continue to make available the loan for his stock in trade." (page 18)

"What did you understand regarding the future hire purchase agreements written by Auckland Waterbed Co.? That they would be discounted through Progressive Finance for the full currency of any loans that we had outstanding with Auckland Waterbed Co.

In what way, if at all, did Mr. Kirkland acknowledge his understanding of the arrangement? He definitely did not disagree and secondly we continued to discount hire purchase up till and including 24 January." (page 19)

Early in January 1984 Mr. Kirkland got in touch with Mr. Farmer by telephone. He told Mr. Farmer that he had stock worth $41,000 arriving from Classic for which payment was required by 20th January 1984. Mr. Farmer requested Mr. Kirkland to have the Classic account sent to the defendant. That was done. Mr. Farmer instructed Mr. Duffin to prepare the loan documents already referred to in this judgment. Mr. Farmer was in Auckland on 25th and 26th January 1984. He had with him the documents as prepared by Mr. Duffin and to which reference has already been made. On 25th January he called at the office of the plaintiff. It was on that day that Mr. Kirkland completed the blanks in the document and the amendments and witnessed the signatures. Reference has already been made to those matters. A debate ensued over the need for affixing the company seal. That issue was resolved by a telephone call to the company accountants. Mr. Kirkland then left his office. He went to his solicitor's office, not too far away in the city, and obtained the seal of the

plaintiff. He returned with it. Mr. Farmer physically placed the seal on the documents for Mr. Kirkland. The accountancy firm did not provide their signature then. Mr. Kirkland undertook to obtain it. Mr. Farmer telephoned Mr. Duffin in Christchurch with instructions to write out the cheque and bank it to the credit of the plaintiff. That is the cheque the subject of this bill writ. The probability is that that telephone conversation took place while Mr. Kirkland was out of the office obtaining the company seal. Mr. Farmer arranged to uplift the completed documents on the 26th January. There can be no doubt whatever, particularly having regard to the relationship between Mr. Farmer and Mr. Kirkland, that Mr. Farmer trusted Mr. Kirkland to complete the documents. Mr. Kirkland observed that trust.

When Mr. Farmer called on the 26th January to uplift the documents he was faced with a very angry Mr. Kirkland. Mr. Kirkland's version of the opening or near opening words of the discussion that day were :-

> "Bill, I am not very happy about the fact you are opening another shop up here so close to mine in Auckland." (page 5)

He then went on to say in evidence that he considered his nephew had a certain amount of "muscle" in the waterbed industry and it appeared to him that he was beginning to use it to pressurise Mr. Kirkland in some way. Mr. Kirkland told me he made it clear to Mr. Farmer that he no longer wished to discount hire purchase agreements with

him. Indeed, that he wished to have nothing further to do with him in business whatever. His reason appeared to be his annoyance that Mr. Farmer had in some way got himself involved with Mr. Kirkland's closest competitor, as he called him. The reference was to a concern known as Waterbed World. While Waterbed World appears to have had its main office in Elliott Street, Auckland City, the particular bone of contention appears to have been Mr. Farmer's connection with the financing of a Waterbed World outlet at Dominion Road opposite Barnett Barnett Ltd. Anyone knowing Auckland will appreciate that the distance is really quite vast in terms of commercial competition.

Mr. Farmer's version of this discussion was to the effect that the arrangements between them would have to terminate. He said :-

> "Also said he felt things had changed between us. I advised him I was sorry to hear that. But if that is what he felt there was very little I could do about it. Whilst that part of the conversation was going on he gave me the loan contracts. He then further said, I won't be doing any more of my hire purchase through you either. In fact, I want nothing more to do with you.
>
> What did you say to that? I advised him that we would have no option then but to cancel our cheque. Progressive Finance cheque.
>
> Did you make it clear why? I think it was quite obvious why, because of hire purchase discounting. That was the only reason.
>
> What was his reaction when you told him you wouldn't be completing the loan because of what he said? He got quite angry and said, 'You can't do that. You are too late'. He then moved towards the telephone on his desk, rang through to his bank manager and said, 'I have already drawn on that cheque. Talk to him.' Might not be his exact words. But the telephone was used and he definitely rang his bank manager and it was my understanding that we could have been hoodwinked." (page 21)

The lead into that was the fact that when they first met that morning Mr. Kirkland had told Mr. Farmer about the concern over the Dominion Road venture.

Mr. Farmer also told me that just before he left the premises his uncle said :-

> "You may think I am tough now but just wait and see how tough I can get." (page 22)

That particular remark was not put to Mr. Kirkland in cross-examination. But Mr. Kirkland did indicate in his evidence that he ordered his nephew from the premises. I suppose, if comment is called for, this case illustrates the desirability of always observing the principle that it is unwise to have commercial arrangements with one's relatives. Mr. Kirkland denied that he had been told that the cheque was being stopped. His version was that Mr. Farmer said that he could stop the cheque but would not do so.

The telephone discussion with the bank manager did not in fact take place. As I understand the evidence of Mr. Farmer it was no more than a charade with Mr. Kirkland purporting to telephone a number and holding the telephone out for Mr. Farmer's convenience should he wish to inquire if the bank manager was in and then inquire from the bank manager whether or not it was too late to stop the cheque. Nothing, therefore, hinges on that telephone conversation except that Mr. Kirkland denies the incident.

Mr. Farmer left the office of the plaintiff that day with the financier's usual set of documents which he took immediately to the office of the Registrar of Companies and registered the appropriate copy. He was not asked what happened at that office. However, from my knowledge of this type of work as seen in the Courts, Mr. Farmer would have been required to sign a declaration of due execution and present it with that document. The effect of registering the I.W.S. was to give notice to the world of the defendant's legal interest in the chattels. I am unable to find the passage in the notes of evidence to which I am about to refer. It may be that it was omitted because both witnesses made long speeches and it was very difficult to get their evidence down. I recollect him saying that the reason he registered the document was in order to protect the defendant in case the cheque had not been stopped. After attending at the office of the Registrar of Companies Mr. Kirkland then telephoned Mr. Duffin in Christchurch with the instructions to stop payment.

The relevant evidentiary conflicts relate to the first meeting in October, the third meeting early in December and the final meeting on the 26th January. I have already dealt with the first meeting. I do not consider that one could find any definite contract with regard to floor plan financing but I am quite satisfied that all elements of the alleged package transaction were discussed. In regard to the meeting in early December there is a direct conflict as to whether the elements of that package were inter-dependent and a direct conflict as to whether there was discussed the principle of financing called

"average weighted yield". The relevance of the latter is that Mr. Farmer states it was mentioned in order to allay Mr. Kirkland's impression that the interest rates were too high. Significantly, while Mr. Kirkland denies discussing this with Mr. Farmer, he thought it was discussed with a representative from Nathans Finance. There is no independent evidence from that source about it. Mr. Farmer said he mentioned it. Mr. Kirkland agrees that someone mentioned it. The probability is in favour of Mr. Farmer's version on that particular aspect of the matter which I accept. That still leaves the question of the conflict on the inter-dependence of the individual aspects of the package at the moment unresolved.

The conflicts material to the meeting of the 26th January 1984 were Mr. Farmer stating that he intended to stop the cheque and the incident involving the use of the telephone, viz-a-viz the bank manager. Before I attempt to resolve the conflicts I think I should comment on the aspect of competition which appears to have been the basic cause of Mr. Kirkland's resentment. To say the least, it is a curious type of resentment to find amongst businessmen. Mr. Farmer had been in the waterbed business for 5 years; Mr. Kirkland for a matter of a few months. The specific competitive shop was so far away from the plaintiff company's premises as to be almost in the area of a ridiculous complaint. I think the real reason for Mr. Kirkland's disaffection with his nephew was Mr. Farmer's new association with Waterbed World. That, however, was not discussed on the 26th January 1984. I do not think that the evidence

is strong enough to draw the inference but I suspect that Mr. Kirkland had heard rumours about it. Otherwise it is very hard to understand his obvious anger and emotional response.

There are certain pointers to the consistency of Mr. Farmer's version of the whole agreement being a form of package and his version as to the stopping of the cheque. I refer to the discounting which in fact took place up to 24th January particularly after the discussion involving Nathans Finance and during a time when the plaintiff could have taken the cheaper finance but chose, Mr. Kirkland says for family reasons and for reasons of simplicity, to remain with the defendant. The defendant did not sign the Memorandum. The defendant in fact stopped the cheque. The defendant in fact refused further hire purchase discounting after 26th January. The interest rate was 21%. I infer from Mr. Kirkland's evidence and from Mr. Duffin's evidence that that was, to use my expression, a "mates' rate". On Mr. Kirkland's evidence he ordered his nephew to leave the shop. Is it more probable that he would do that because he was told that the cheque would be stopped or could be stopped? Mr. Kirkland obtained a bank cheque for Classic. Was that because he was late in paying Classic, because Classic required a bank cheque or because he would know that a bank cheque was the equivalent of cash in his hands?

Then there are pointers to the consistency of Mr. Kirkland's version. There is nothing in writing at all to support the full package. The documentation with

regard to the initial loan of $15,000 and the ultimate loan of $41,675.50, were all completed as fully and as complete as possible with the only exception of the failure by the defendant to sign the Memorandum. Then there is the sending by the plaintiff to the defendant of hire purchase agreements for discounting after 26th January which were rejected by the defendant. There is the registration of the Instrument by Way of Security. There is the wording of the schedule to the Instrument by Way of Security which curiously stops short of requiring discounting to be effected via the defendant.

The proper inference from the circumstantial evidence, in my judgment, is that probably Mr. Farmer's version of what occurred on the 26th January is the correct version. I accept it. That, however, leaves two questions still to be determined. The first, is a composite question of fact and degree. Was the contract, i.e. the package, partly oral and partly written? Did the oral part contain the contended for term as to discounting? Was that term a stipulation justifying cancellation under Section 7(3) of the Contractual Remedies Act 1979? Secondly, did Mr. Farmer on behalf of the defendant affirm the contract thereby disentitling the defendant to cancel in terms of Section 7(5) of the Contractual Remedies Act 1979?

With regard to the oral term, the commercial sense of the discussions between the parties renders it more probable than not, in my judgment, that Mr. Farmer's version

is the correct version. He, through his company, set his uncle up in business in the form of the plaintiff. Setting up in business required, as a matter of commonsense, the factors which I have earlier analysed, that is to say, initial advance, floor plan plus further advance and discounting of hire purchase transactions. The defendant is, after all, a financier in business as such. While the family relationship is a matter to be taken into account, neither party really, in any significant way, advanced it as displacing the essential financial character of the negotiations. Large sums of money were involved. Important commercial issues were involved. It is obvious, as a matter of logic, that an advance of $41,000 at 21%, when 23% can be got, is rendered more attractive on the understanding that hire purchase discounting will be continuously coming in at 25% or 27%. Those are the aspects going to the commercial sense of the arrangement to which I have referred and which appear, to me, to require that preference be given for Mr. Farmer's version of the negotiations. In coming to that conclusion I am not finding that Mr. Kirkland gave dishonest evidence. Mr. Kirkland is an emotional man. By contrast, his nephew is a calm, confident businessman, or, at least, gave me that impression. Of the two men the one more likely to have got it wrong, the one more likely to be unreliable in the wide sense and not in the pejorative sense, in my view, is Mr. Kirkland. Finally, Mr. Farmer did have the advantage of keeping some form of diary record from which to refresh his memory.

As to the essential nature of the stipulation, that is a matter of assessment for me in terms of degree. In

principle I find no significant distinction between the Sale of Goods Act condition in Finch Motors Ltd. v Quinn (No. 2) (1980) 2 N.Z.L.R. 519 or the Sale of Land Warranty in Gallagher v Young (1981) 1 N.Z.L.R. 734. The essentiality of the stipulation in terms of Section 7(4) of the Contractual Remedies Act 1979 was, in my judgment, established by the evidence of Messrs. Farmer and Duffin. In any event the evidence brings the case within Section 7(4)(b)(i) and (iii) of that Act. On the assumption that the stipulation for discounting was part of the package then the indication by the plaintiff that future discounting would cease must reduce the benefit of the contract to the defendant or make it substantially different.

I find that there was anticipatory breach by the plaintiff in terms of Section 7(3)(c). That anticipatory breach justified cancellation by the defendant of the whole of the contract. This, Mr. Farmer purported to do by stopping the cheque. The question now is: Did Mr. Farmer, on behalf of the defendant, affirm the contract by registering the I.W.S.? Normally one would anticipate an affirmative answer to that question. First, notice to all the world is notice to the other contracting party of affirmation. Secondly, by registering the document the defendant acquired a title to the goods in question. Mr. Farmer's reason for the defendant taking this course cannot affect its consequence as an affirmation because that reason wasnot made known to anybody except when he gave evidence in Court. The question, as it seems to me, is whether the contract was cancelled before the cheque was

stopped. What, I ask, is the effect of a threat to stop payment? Must it depend on its effect on Mr. Kirkland? He clearly thought that it was too late to stop the cheque. One finds that in Mr. Farmer's evidence and in the fact that the plaintiff succeeded in obtaining a bank cheque. Mr. Farmer was not sure either, that is why he registered the I.W.S. There is some doubt whether the bank did in fact stop the cheque in time, otherwise how would the plaintiff obtain a bank cheque unless the banking system makes room for error which, in the days of computers, has been known to happen on frequent occasions?

This matter of affirmation was not raised by either counsel. It has occurred to me in the preparation of this judgment. It is the only factor which stands now in the way of judgment for the defendant. If the contract was affirmed then the defendant is, by Section 7(5) of the Contractual Remedies Act 1979, disentitled to cancel. If that be the situation the plaintiff would be entitled to judgment. I think natural justice requires that counsel be given the opportunity to consider the issue of affirmation and to decide what further steps ought to be taken. At the very least they should provide me with written memoranda of argument on the matter.

The result is that the foregoing judgment is of an interim nature. The action is adjourned sine die for the purpose of enabling counsel to deal with the last remaining matter which has not been fully argued.

M.J. Adams J

Solicitors :

Plaintiff : Malley, Mahon & Co. Christchurch

Defendant : Joynt Andrews Cottrell & Dawson, Christchurch