16/5

NZLR X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 434/83

471

BETWEEN KERRY GEORGE ANSELL of 10 Mathieson Avenue, Wellington, Company Director

First Plaintiff

A N D GAEL LINDSAY ANSELL of 9 Agra Crescent, Wellington, Company Director

Second Plaintiff

A N D ALFRED CONWAY ANSELL of 11 Tupaki Place, Pakuranga, Auckland, Company Director

Third Plaintiff

A N D NEW ZEALAND INSURANCE FINANCE LIMITED a duly incorporated Company having its Registered Office at 103-105 Queen Street, Auckland

Defendant

Hearing: 19, 20, 21, 22, 23 & 30 March 1984

Counsel: R.D. Guy & D.B. Collins for Plaintiffs
B.W.F. Brown & M.A.F. Gilkison for Defendant

Judgment: 14/5/84

JUDGMENT OF QUILLIAM J

This is an action arising out of the sale of a computer following default in payment under a security to a finance company.

The plaintiffs are directors of A.A Ansell & Co. Ltd (the Ansell Company) which was engaged in the business of manufacturing, importing, exporting and marketing of clothing and footware. The company was placed in receivership on 3 August 1983.

On 5 August 1981 the Ansell Company entered into a written agreement with a partnership known as Resource Control Associates (RCA) in terms of which RCA contracted to arrange for the supply to the Ansell Company of computer hardware and to supply directly to the Ansell Company the software system for that computer. The particular computer hardware was to be acquired from Data General NZ Ltd and was to comprise a CS 70 computer with two 50 MB disk drives, a 256 KB memory, six VDU terminals, a printer, and associated equipment. The total cost as charged by Data General was $197,394 which included Sales Tax, currency surcharge and installation. The Ansell Company applied to New Zealand Insurance Finance Ltd (NZIF) for a loan to enable it to complete this purchase and the result was a lease agreement between NZIF and the Ansell Company. As I understand it this form of financing is achieved by the finance company purchasing the equipment and then leasing it to the user. Due presumably to charges involved in the leasing arrangement the total purchase price becomes increased beyond that originally specified by the supplier. In this way the purchase price charged to the Ansell Company, and as shown in the lease agreement, was $201,508.

The lease agreement, which is dated 5 February 1982, provides for the leasing of the CS 70 computer to the Ansell Company for a period of three years and for payment of rent at the rate of $5,006.64 per month. It also refers to what is described as a residual value in the computer of $120,904. The significance of the residual value is twofold. First, it represents the amount which the lessee

would have to pay at the expiration of the three year leasing period if it wished then to complete the outright purchase of the computer. Secondly, it provides a means of calculating the amount which the finance company is to receive in the event of a sale of the computer during the period of the lease. Clause C of the lease agreement provides that if the lessee should fail to pay, when due, an instalment of rent then "the balance of the entire rent for the whole period of the agreement shall become due and payable forthwith". Clause F 1. is of particular relevance and I set it out in full:

> " F. 1. ON the goods being received into NZIF's possession consequent upon the expiration of the period of the agreement or any extension thereof or consequent on NZIF's having retaken possession pursuant to Clause C NZIF shall as soon as practicable sell the goods by public auction public tender or private contract or to or through traders dealing in goods of a similar description (hereinafter called 'the trade') at the best price NZIF can reasonably obtain and the Lessee agrees to pay NZIF on demand (additionally to any rent or other moneys payable by the Lessee) the amount (if any) by which the residual value stated in the First Schedule exceeds the disposal price after allowing for all costs and expense incidental to such disposal (including costs of storage pending disposal); in the event of NZIF's not being able to effect a sale of the goods within 2 months of the date of the goods being so received into NZIF's possession NZIF may obtain a bona fide valuation of the goods by a valuer approved by NZIF and the provisions relating to a sale by public auction public tender or private contract or through the trade shall apply as if the goods had actually been sold for a set price equal to such valuation. "

The lease agreement was executed by the Ansell Company and was also signed by each of the plaintiffs as guarantors. Each of them also gave a mortgage over his residential property in support of his guarantee. It is this fact which is at the heart of the present case because the guarantees have not been met and NZIF wishes to proceed, if necessary, to sell the mortgaged properties.

The rental payments due in July, August and September 1983 were not paid and NZIF, on 14 September 1983, made a formal demand on each of the plaintiffs for the amount then owing in terms of the agreement, namely, $183,963.16. This sum represented the outstanding instalments of rent, the remaining instalments during the balance of the term of the lease and other charges after allowing a credit for interest which would have been payable during the balance of the term. That demand was not met but negotiations had been going on in an endeavour to avoid the danger to the plaintiffs of losing their homes.

The Ansell Company had acquired the computer by way of replacement for two smaller computers which it had been using. After a brief period during which a number of problems had been experienced in operating the computer it was decided that the company could not benefit from it as had been anticipated and so closed it down. This was in about November 1982, and from that time the plaintiffs were anxious to dispose of the computer. The Company Secretary at the time, Mr Murray, discussed the possibility of sale with Mr Dreyer, who had been retained by the company as a computer consultant. As a result Mr Dreyer sent a letter to all the users in New Zealand of Data General equipment, of whom he was aware, offering the CS 70 computer for sale. Although there were some enquiries in answer to that letter no sale resulted. The Ansell Company had arranged to sub-lease the computer for three months to a firm called Infotrol NZ Ltd

(Infotrol) and this was extended to March 1983. They then made another attempt to sell the computer by advertising it for sale in a newspaper, but again without success. They accordingly further sub-leased it to Infotrol for six months from 6 May 1983 with a right of renewal for another six months. The rental payable by Infotrol was $3,800 per month so that the Ansell Company was having to meet the balance of the rent to NZIF, namely, $1,206 per month. Infotrol, having completed the use which it had for the computer within its own business, then further sub-let it to the Wellington Hospital Board. The computer remained at the Hospital Board premises during the balance of the period until it was finally sold.

On 3 August 1983 the Ansell Company went into receivership. On about 8 August 1983 the Wellington Manager of NZIF, Mr Milloy, and his Assistant Manager, Mr Wrigley, called to see the Receiver who said that he had no interest in the computer and that NZIF was free to dispose of it as it thought fit. Then, on 10 August 1983, they went to see two of the plaintiffs, Messrs Gael and Kerry Ansell. There was a discussion as to what should be done with the computer. The plaintiffs wished to be able to continue the sub-leasing arrangement but Mr Milloy indicated that he thought the computer should be sold. There are some fairly minor differences in the accounts given by the various witnesses of this discussion but they are not, I think, of any significance. Before leaving the plaintiffs Mr Milloy and Mr Wrigley took possession of the software which was in the Ansell Company's offices. Again there is a divergence as to just how this was done, but I do not regard it as of any importance. Shortly after this meeting Mr Wrigley went to see Infotrol. A question arises as to whether he then took possession of the computer within the provisions of the lease agreement but for the moment I put that aside.

NZIF decided that the computer must be sold and accordingly it proceeded to advertise it for sale. Advertisements were placed in the Evening Post and Dominion on 27 and 31 August 1983 and in the New Zealand Herald on 31 August 1983. The first advertisement in the Evening Post was, due to an error on the part of the newspaper, placed in the Situations Vacant column and so is unlikely to have attracted much attention. Each advertisement occupied a space of about 30 millimetres (1-1/2") and invited tenders for the computer. Three tenders were received. One was to pay a total of $1,800 for four of the display terminals. A second was an offer of $15,000 for all the equipment advertised. The third, which was from Infotrol and was not in response to the advertisement but because that company knew the computer was for sale, was for $25,000.

On learning of the advertisements and, in particular, of Infotrol's offer of $25,000, the plaintiffs through their solicitors protested at what was being done and asserted that, given reasonable time, it should be possible to sell the computer to much better advantage. They therefore requested NZIF to withdraw the computer from sale by tender. As a result NZIF agreed to withhold any further action until 14 October 1983 to enable the plaintiffs to try and obtain an alternative purchaser. It is not clear what effort was made by the plaintiffs to achieve a sale during that period. NZIF evidently recognised an obligation to make further attempts of its own because on 22 September 1983 another advertisement was published. This was in the Dominion and it appeared under the Computer column, but unfortunately it was headed "Data Journal Equipment" instead of "Data General Equipment".

The direction of the plaintiffs' efforts had evidently moved away from sale because on 16 October 1983 their solicitors wrote to NZIF proposing a new arrangement.

This involved an offer to pay $23,000 to meet outstanding instalments of rent and for the continuation of the sub-lease to Infotrol with the latter company paying rent of $3,800 per month and the plaintiffs making up the difference of $1,206 per month in order to achieve the full monthly rental of $5,006. NZIF's response to that proposal was to ask for a statement of the plaintiffs' personal income position, confirmation that Infotrol would continue its sub-lease until January 1984, and confirmation that the plaintiffs and their wives would agree to a variation of the mortgages over their homes in order to cover, as collateral security, other advances as well which had been made by NZIF to the Ansell Company. The plaintiffs endeavoured to comply with the first and second requirements but protested strongly as to the third. By 25 October 1983 the agreement of Infotrol to an extension of their sub-lease had not been obtained and NZIF indicated that they intended to accept Infotrol's offer of $25,000. They did so the same day.

On 4 November 1983 the plaintiffs' solicitors wrote to NZIF's solicitors saying that the plaintiffs had cancelled their guarantees under the lease agreement by reason of breaches by NZIF of stipulations in the agreement. On 7 November 1983 the present action was commenced and when it was learned that NZIF proposed giving notices to the plaintiffs under s 92 of the Property Law Act 1952 in respect of the defaults under the mortgages the plaintiffs applied for an interim injunction to prevent the notices being given. That application came before Eichelbaum J who upheld the plaintiffs' right to an interim injunction but the matter was resolved at that stage by the giving of certain undertakings pending the outcome of the substantive proceedings.

The action proceeded upon the basis of a second amended statement of claim which contains no less than 17 separate causes of action. These fall into four groups:

1. Breach of contract; (Causes 1, 2, 15 and 17).

2. Breach of implied terms in the contract; (Causes 3, 4 and 16).

3. Liability in tort for negligence; (Causes 5 and 6).

4. Oppressiveness in terms of Credit Contracts Act 1981; (Causes 7 to 14 inclusive).

The principal question which arises, and which is common to a number of the causes of action, concerns whether, as required by cl F 1. of the lease agreement, NZIF sold the computer at "the best price NZIF can reasonably obtain". This is the basis of the first cause of action but in order to resolve it there are a number of matters which must be discussed, some of which form the basis of other causes of action. They are:

A. Whether NZIF had the right to sell the computer.

B. If it did, whether the method of sale used was in compliance with the lease agreement.

C. If it was not, the price which ought to have been obtained.

D. Whether demand was ever made on the Ansell Company in terms of cl F 1.

E. The residual value.

A. <u>THE RIGHT TO SELL</u>

The relevant part of cl F 1. of the lease agreement provides:

> " ... on NZIF's having retaken possession pursuant to Clause C NZIF shall as soon as practicable sell ... at the best price NZIF can reasonably obtain ...."

Provision is then made if there is no sale "within 2 months of the goods being received into NZIF's possession" for a valuation to be obtained and the amount of the valuation is then deemed to be the sale price. The first question then is whether NZIF had "retaken possession". It is, of course, common ground that it did not do so in any physical sense by the removal of the equipment. It was argued for the plaintiffs that possession was never retaken on any basis and that accordingly there was never any authority to sell at all. This is not expressly pleaded in the first cause of action. It forms the basis of the second and ninth causes of action. It is, however, a matter which must be decided as a preliminary to any finding with regard to the obtaining of the best price.

The plaintiffs' case proceeded on the contention that the lease agreement contained no unrestrained right of sale and that NZIF could only sell in the event of default if it had first retaken possession. In answer to that Mr Brown, for NZIF, argued, first, that cl F 1. did not require the retaking of possession before the exercise of the power of sale but that in the alternative, if it did, then on the facts possession had indeed been retaken.

I am bound to say at once that I have a good deal of difficulty with the proposition that it was not necessary for possession to be retaken before there could be a sale. Clause C of the lease provides for the consequences of default. The lessor is given a number of options. One of them is that it may "without notice retake possession of the goods". Clause F 1. then specifies the two circumstances in which NZIF may sell. First, it may do so on receiving the

goods consequent upon the expiration of the period of the agreement or any extension thereof. This would seem to be a normal consequence of its ownership of the goods and the omission of any provision in the lease agreement giving the lessee a further right of lease or any other right of tenure. Then, in the alternative, NZIF having retaken possession under cl C may sell. It was argued that cl F is directory only and designed to regulate the method of disposal. I am unable to agree. NZIF has accepted in its document a clear restriction on the right to sell. It may do so only if possession has first been retaken.

The real and more difficult question in respect of possession is whether, as a matter of fact, possession was in this case retaken. It may be accepted that it is not necessary there should be a physical uplifting and removal of goods for there to be a retaking of possession. Plainly it will depend upon the nature of the goods and all the surrounding circumstances.

I must first set out the evidence as to what was done by NZIF upon the basis of which it claims to have retaken possession. As I have said earlier, on 10 August 1983 Mr Milloy and Mr Wrigley called at the offices of the Ansell Company and saw Messrs Gael and Kerry Ansell. They had previously ascertained from the Receiver that he had no interest in the computer and so it was clear that the matter to be resolved concerned the disposal of the computer. There is little real dispute as to the way the conversation went. The Ansells said they would like the sub-leasing arrangement with Infotrol to continue. If that were possible then the Ansells felt that they could manage to find the balance of the rental and so keep the lease agreement going. Mr Milloy and Mr Wrigley made it clear they were not keen on this and that they wanted to sell the computer. They were prepared, however, to reach no final decision that day but would investigate the question of sale and then discuss the matter

further with the Ansells. In the course of his evidence Mr Milloy said, "We advised the Ansell brothers that under their lease agreement we were obliged, since the company was now in receivership, to take possession of the equipment and to arrange for the sale of it." This evidence could have had a material bearing on the question of whether steps were actually taken to retake possession but I have had to discount it because no cross-examination on the point was directed to either of the Ansells.

Mr Wrigley's evidence was that after the meeting with the Ansells he spoke to representatives of Infotrol. NZIF was not ony aware of the sub-leasing arrangement but in terms of the lease had consented to it. The passage in Mr Wrigley's evidence in which he deals with the matter is as follows:

> " What did you tell them about their sublease? I told them the sublease was, that I felt as the initial leasing had become in default I felt that the sublease also became in default. What then was to happen physically to the computer? That they could, the computer would stay where it was at the Hospital Board. Under what sort of purpose? On clear understanding that we had taken possession of the computer. That computer was being used and maintained on a daily basis by the people that should know about these things. Was there anything said about arrangements for achieving the disposal? They were anxious to avoid a number of people going to the Hospital Board viewing the computer because of the contract they had and I undertook that one of their staff members could be in attendance at all times. At all times when what? When someone was viewing the computer. "

As from the time of Mr Wrigley's discussion with Infotrol NZIF declined to accept any rental for the computer. Infotrol were permitted to go on using it (or to allow the Hospital Board to do so) and recognised that they ought not to be able to do so without payment. They accordingly paid into their own solicitors' trust account $3,800 per month during the period they continued to use the computer but that has never been paid to NZIF. It is upon the basis of Mr Wrigley's evidence that it is necessary to decide whether possession was retaken.

The concept of possession has been the subject of many decisions in both the criminal and civil law. As McGregor J observed in Hamilton v Henderson [1959] NZLR 781 at p 783:

> " It has been said that 'possession' is a word that is incapable of an entirely precise and satisfactory definition. "

In 35 Halsbury, 4th ed., the general nature of legal possession is expressed in para 1111, p 617, in this way:

> " The elements normally characteristic of legal possession are an intention of possession together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering. "

This gives a guide to the way in which the concept of retaking possession under a chattels security should be regarded. Accepting that physical removal is not necessary, I consider that what needs to be shown is that a right to exercise and maintain real control over the goods has been established so that it is clear that the owner or lessor (or

as the case may be) has intervened in what would otherwise be a right to continue in exclusive occupation and possession. This would not need to have been achieved by any particular formula of words so long as the intention and consequences were clear.

Looking at the evidence in this way there could, I think, be no doubt that possession was in this case retaken. It was made clear to the Ansells that although they wished the sub-lease to continue NZIF proposed to sell. It was also made clear to Infotrol that NZIF was stepping in and was proposing to sell. Indeed, it was because of this (and not because of any response to an advertisement) that Infotrol submitted an offer to purchase. It was also made clear that no rental would be accepted and an arrangement was made for possible purchasers to inspect the equipment but in a manner which would not cause embarrassment to the Hospital Board. Moreover, there seems no doubt that Infotrol accepted that to be the position. An argument could perhaps have been offered that NZIF knew of and had consented to the sub-lease and so Infotrol had an exclusive right to possession at least during the term of the sub-lease. This was not relied upon and the reason would seem to have been that Infotrol had not sought to rely upon any such right of possession. There is no suggestion that it tendered any rental or resisted the intention and efforts of NZIF to sell.

A further argument advanced on behalf of the plaintiffs was that while there may have been some intimation to the Ansell brothers that it was intended to retake possession, there had been none to the Ansell Company which was the lessee. There is not, I think, any merit in this. The Ansell brothers were directors of the company and at the time of their discussion with Mr Milloy and Mr Wrigley were acting, at least in the first instance, on

behalf of the company. It may be there came a time when their personal liability was uppermost in their minds, but it is not possible to separate out their knowledge as individuals of NZIF's actions and intentions from their knowledge as directors of the company. For the reasons I have given I am satisfied that there was a retaking of possession by NZIF for the purposes of cls C and F 1. of the lease and so NZIF was then required to sell the computer.

B. THE METHOD OF SALE

Having undertaken to sell the computer NZIF was under an obligation to get the best price reasonably obtainable for it. In terms of cl F 1. they could sell by public auction or tender, private contract, or through dealers in the type of goods concerned.

In the case of the large majority of goods which form the subject of chattels securities there is likely to be little argument as to how the lender should set about getting the best price. In most cases to offer the goods by public auction will be accepted as a reasonably reliable method of testing the market because the goods will be of a kind for which there is already an established and well known market. What was involved here was a computer and some special considerations at once require to be taken into acount. I have no doubt that it is no answer to a complaint that a computer was not sold at the best price reasonably obtainable to say that similar methods were used to those normally employed for the sale of repossessed goods. NZIF chose to advance money on the security of chattels of a kind which have come only lately on to the market and which are of a highly specialised and sophisticated nature. I think it is clear their obligation was to set about a sale in a manner which gave due recognition to that circumstance. It

may be there will come a time when the sale of used and repossessed computers will have settled to a point such as exists today for, for instance, motor cars, but that time had certainly not arrived in August 1983.

What NZIF did was to insert two small advertisements in each of the Wellington daily papers and one in the New Zealand Herald in Auckland over a period of four days. Ignoring the unfortunate fact that the first advertisement appeared in the wrong column, it seems at once surprising that such a complex and expensive piece of equipment should have been so sparsely advertised. The matter of selecting and pursuing the best method of sale appears to have been given a minimum of care and attention by NZIF. Mr Milloy who, in his capacity of Branch Manager at Wellington, was primarily responsible for what was done, simply left it to his Assistant Manager, Mr Wrigley. Mr Milloy was under the impression that advertisements were to be placed in specialist journals and publications normally seen by users of computers and by people dealing in them, but he discovered later this was not done. Mr Wrigley was no more successful. He understood the usual practice was to advertise in Auckland and Wellington twice a week for two weeks and he gave instructions for this to be done but he seemed to be unaware of the fact that even this much was not done. The decision as to the method of sale was made on the advice of the computer operators in NZIF's head office in Auckland. No attempt was made to obtain advice from anyone in the computer industry and certainly none from any computer broker.

In the light of this rather unpromising beginning it is necessary to consider the evidence as to how the sale of a computer should be approached. It is necessary to recognise, first, not only the highly complex and specialist nature of computers but also the value they have to

individual firms and businesses. As I have understood the evidence it is that a computer (to use the generic term) is a combination of a variety of different components. Before a firm acquires a computer it needs to study carefully the use to which it is to be put. In no case is it a matter of deciding on a particular package of equipment and then setting out to make it perform the required work. The result is that a firm may require certain features of the equipment available from a particular supplier, but not others. In this way, with appropriate preparation and advice, a total purchase can be made of those separate components which together will perform the required work. In this regard it should be mentioned that the newspaper advertisements which were published probably did not identify in sufficient detail just what it was that was being offered.

Evidence as to the market for second-hand computers was given by a number of witnesses. Some were basically users who had also been involved in the buying and selling of equipment, and some were brokers whose job it was to arrange purchases and sales. Some again were simply people who had some acquaintance with the market in the sense that they had purchased or contemplated the purchase of computer equipment. I do not doubt that each in his own field was conscientiously giving the benefit, as best he could, of his experience. The evidence varied considerably in its implications. For the most part I have felt that the more reliable evidence of the second-hand computer market comes from those brokers who are actively engaged in that market. This is not in any sense to put lightly aside those others who have, in the course of their businesses, had to buy and sell computers, sometimes in substantial quantity. The approach, however, is a different one.

One of the matters which emerged from the evidence was that the computer market is in such a state of development that new models are constantly appearing and that this has had perhaps inevitably a material effect on the value of computers already in operation. I accept that this must be so and will consider this aspect more particularly in dealing with the price which could have been expected. For the moment, however, I refer to it in the context of the attitude adopted by different witnesses to the market for used computers. More than one witness expressed the view that a firm which has acquired a computer and later finds it to be inadequate for the firm's purposes must be prepared to accept that it really has no resale value at all, even though it may be no more than two or three years old. I found this difficult to accept and it simply does not fit in with the evidence of the brokers who were able to say that they are actually engaged in a used computer market. Plainly used equipment is not to be regarded as valueless, although the price which may be obtained for it may well be heavily discounted from the original purchase price.

Having indicated that I prefer to be guided by those witnesses who were brokers, I should make some reference to the evidence which was given. Mr McLeod had about 21 years experience in the computer industry. It was his view that the computer in question may take some time to sell, perhaps up to six months, and that the first thing to do was to approach the existing users of Data General equipment. He thought this method preferable to advertising. He considered that an advertisement inserted by a finance company would at once invite the inference that the equipment for sale had been repossessed and that this tends to attract mainly those people who are hoping for a bargain. He considered that the best prospects of sale would probably involve selling the equipment in its

component parts. It may be that an existing user needed only a single item in order to achieve an increased capacity and would be prepared to purchase part of a used computer.

Mr McLeod's evidence was criticised, on behalf of NZIF, mainly because of an error which it was said he had made. He considered the CS 70 equipment involved in this case would have used sealed disks whereas it seems that it had actually used unsealed disks. I accept that in this regard Mr McLeod was incorrect, but I do not see that as a reason for discarding his evidence. He plainly had a long experience of the computer industry and, in particular, of the second-hand market.

Mr O'Connor was also engaged on broking. There was an obvious reservation in respect of his evidence in that he was familiar only with Australian conditions and did not purport to express a view as to the New Zealand market. It would, however, be surprising if the larger and more longstanding Australian market differed widely from that in New Zealand so far as the buying and selling of used computers was concerned. One might have expected that the larger market in Australia would have meant that used computers found a more ready market, but still the methods of sale would, in Mr O'Connor's view, have been similar to Mr McLeod's. He considered that the appropriate course would have been to advertise in the daily press and also in specialist publications, but more particularly to have made a personal approach to existing users.

This same method was acknowledged by other witnesses to be appropriate. Mr Channer, the Wellington Manager of a computer marketing company who was called on behalf of the defence, said he would look at the international market and would expect to appoint a broker to try and effect a sale. He would also consider splitting up

the components and offering them separately. All these witnesses accepted that it may be necessary to wait for some months in order to achieve a satisfactory sale. From all this evidence it is clear that the market for used computers is significantly different from that for the more usual range of repossessed goods.

There are other factors which require consideration. It was argued for NZIF that they had reason to believe the plaintiffs were themselves exploring the market and were entitled to take this into account in arriving at their decision to accept the offer by Infotrol, particularly as some two months had by then elapsed since they had notified their intention to sell. Moreover, it was said that about ten months had gone by since the Ansell Company itself started making efforts to achieve a sale.

It is, I think, rather misleading to consider this case on the basis that the computer was on the market for about ten months. It is true that in November 1982 the company's Secretary instructed Mr Dreyer to try and sell it and that Mr Dreyer sent a letter to all Data General users in New Zealand of whom he was aware. It must first be observed that NZIF was unaware of this until it emerged towards the end of the hearing, and so their own actions could not have been influenced by what Mr Dreyer did. Nor did Mr Dreyer's efforts necessarily test the market effectively. As I have already said, I accept that in the case of used computers something more than mere advertising is required and in general the personal approach and salesmanship of someone experienced in the market is probably the only way in which a reasonable price could be achieved. Be that as it may, however, the relevant period is from August 1983 when NZIF decided to sell. For some time prior to that there had been no suggestion of efforts by the Ansells to sell the computer. They had, with the

consent of NZIF, arranged a sub-lease and preferred that to continue. There is no doubt that when the plaintiffs realised that an offer of $25,000 may be accepted they sought and obtained a delay so that they could explore the market themselves. They do not seem to have done much to find a sale and this is presumably accounted for by the fact that they were trying to arrange for a different solution to the problem. They arranged some finance with a view to paying the arrears of rentals and continuing with the sub-lease, but this was not in the end agreed to. There is, therefore, little evidence to suggest that NZIF could have believed the plaintiffs had tried unsuccessfully to find a buyer.

A further submission was that there was no obligation on NZIF to delay a sale for any lengthy period in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at a risk of loss. Reference was made to the provisions of cl F 1. of the lease to the effect that if no sale had taken place within two months then NZIF could appoint a valuer whose valuation would then be deemed to be the sale price. It was argued that this was an indication that no lengthy period was expected to be taken up in the efforts to sell. I do not think any such inference is to be drawn. The lease is a printed form and is plainly intended for general application. Where it is used for goods of a unique or unusual kind then I think it must be construed in the light of that fact.

The obligations of a mortgagee exercising his power of sale have been considered on a number of occasions. A convenient statement of the position appears in the judgments of the Court of Appeal in Alexandre v NZ Breweries Ltd [1974] 1 NZLR 497. That was the case of a mortgagee having sold at auction claiming for the deficiency

remaining under the mortgage. The mortgagor counterclaimed on the basis that the mortgagee had been negligent in the handling of the sale and had not obtained the best price. In delivering the principal judgment of the Court, Richmond J said, at p 501:

> " This brings me to the question - What is the responsibility of a mortgagee in relation to the exercise of his power of sale? The answer to this question has been given in varying ways, as may be seen from the opinions expressed by various Judges in the several authorities referred to by Vaisey J in Reliance Permanent Building Society v Harwood-Stamper [1944] Ch 362; [1944] 2 All ER 75. Cross LJ commented on the problem in Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949; [1971] 2 All ER 633. He said:
>
> > ' A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power' (ibid, 969; 646). "

And later he went on:

> " For present purposes, however, I am content to assume that a duty of care does exist. But whether in any particular case there has been a breach of that duty should I think be judged in a realistic way and with ample regard to the fact that a power of sale is given to a mortgagee to enable him to obtain repayment of his advance. In the Cuckmere Brick case Salmon LJ,

> after reaching the conclusion that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the property at the date on which he decides to sell it, made the following comment:
>
> ' No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line' (ibid). "

Very recently the Privy Council has considered the same topic in Tse Kwong Lam v Wong Chit Sen [1983] 3 All ER 54. In that case a building containing shop, office and flat units had been sold by the mortgagee and purchased at the reserve price by a company of which the mortgagee and his family were the members. The facts are of no particular relevance to the present case. In delivering the judgment of the Board, Lord Templeman referred to the earlier cases and stated the general principle at p 59 in this way:

> " In the view of this Board on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time. The mortgagee is not however bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss. "

It was largely on the basis of this latter observation that Mr Brown contended that NZIF had been under no obligation to wait any longer than it did or to have made a special effort to have sold the computer in its components. Some emphasis was laid on the fact that NZIF had received only three offers in response to its efforts to sell and that the offer from Infotrol was not likely to remain open for much longer. It was therefore said that there was a risk of losing the sale and that this was something they should not be expected to do. I am unable to agree that was the case.

There was no evidence from Infotrol as to what their attitude may have been in the event of further delay. They were, in my view, in a very advantageous position. They were already in possession of the computer and obtaining the benefit of its use. If they were able to purchase it for $25,000 in preference to having to replace it at what would seem inevitably to have been a greatly higher cost, then they would surely have regarded themselves as fortunate. On the evidence I can see no support for the view that they were likely to withdraw their offer precipitately.

NZIF had received an offer from the plaintiffs which placed them in a most favourable position. That offer was to pay arrears of rental amounting to $23,000 and to ensure payment of the full future rental of $5,006 per month. This would have restored NZIF to the position in which they should have been if there had been no default and they would still have had the computer available for sale in the event of further default. It is no part of the decision I am required to make on this first cause of action to say that NZIF should have accepted that offer. The fact that the offer was made to them is, however, a factor in deciding whether it was, in the circumstances, reasonable that some

further time should have been allowed to enable a better price to be obtained.

It was part of the plaintiffs' case that some effort should have been made to see whether the computer could have been sold in another country and, in particular, in Australia. The contrary submission was that neither the lease agreement nor the principles as to a mortgagee's obligation required NZIF to go this far. It is perhaps not necessary in this case to make any firm finding on this, although I am certainly not prepared to say that no such obligation could arise. The terms of the lease agreement do not indicate a view either way. Depending on the nature of the goods, it may well be the case that in order to get the best price reasonably obtainable attempts should be made to sell in another country. That could be so if, for example, there was no market in New Zealand but a market in Australia. So far as computers are concerned I see no real objection to the proposition that some exploration of the Australian market was called for. It would not be a question of sending the equipment there until after a sale had been arranged. Computers are, according to the evidence, frequently sold without having been inspected but upon the basis of a description of the component parts. The evidence of Mr O'Connor was that the computer could have been expected to attract offers in Australia and that the need to pay freight charges would not have deterred a possible purchaser. Mr Graham, the Managing Director of an Australian firm, seemed less sure and was not aware of sales of equipment from New Zealand to Australia. But Mr Graham was not a broker and dealt only in new equipment. It is necessary to treat with care the suggestion that there was an obligation to try and sell the computer in Australia, but I do not exclude it and consider that with relatively little effort the attempt could have been made.

By way of summary as to the method of sale adopted by NZIF, and whether or not the conclusions I have reached are in all respects correct, I am satisfied that the very least which must be said is that the efforts made by NZIF to sell the computer fell far short of those which ought to have been made in order to get the best price reasonably obtainable. Indeed, the attitude of NZIF, as disclosed in their approach to advertising and in their failure to consider any alternative, was casual in the extreme.

C. THE PRICE WHICH SHOULD HAVE BEEN OBTAINED

The plaintiffs' case is that, given proper efforts to dispose of the computer, a price substantially greater than $25,000 could and should have been obtained. Although it was not clear just what price the plaintiffs consider should have been obtained it seems they were claiming on the basis of a figure appreciably in excess of $100,000. The answer offered to this was that NZIF was fortunate to get as much as $25,000 and that realistically the computer could be regarded as having little if any value at all.

There is no doubt that there was evidence on which the latter submission could be based and it came from witnesses with impressive qualifications in the computer industry. Mr Graham, to whom I have already referred, said that after three years it must be assumed that a computer will have dropped in value almost to nothing. This evidence was, however, somewhat inconsistent with an earlier acknowledgment that there is, in fact, a market for second-hand computers, and is perhaps explained by the nature of Mr Graham's business which is confined to the sale of new equipment and which does not involve the acceptance of trade-ins on second-hand equipment.

Dr Boswell was the director of the Computing Services Centre at Victoria University and as such had considerable experience in the use of computers and this had involved him in the need to replace equipment from time to time which, in turn, involved the disposal of equipment no longer required. He gave some examples of sales of equipment at prices greatly reduced from their original prices.

Mr Hogg, the Chief Executive of Databank Systems, gave evidence of a very extensive use of computers by his company and of the situation regarding replacement of them. The effect of his evidence was that the constant appearance of new models meant that the real life of a computer is about five years and that within that time it had become obsolete. He concluded that NZIF were lucky to get $25,000 in this case. What was common to the evidence of all these witnesses was that it is purely a question of supply and demand so that no firm conclusions can be drawn.

As against those witnesses was the evidence of the brokers and again that evidence seems to me to be the more reliable because this is their particular field. In brief, Mr O'Connor considered that the computer in question could well have been sold in Australia for about A.$65,000. At the present rate of exchange this would represent about NZ$87,000. Mr McLeod thought a realistic price in October 1983 would have been at least $100,000, and Mr Channer, called on behalf of NZIF, would have expected a top price, after payment of costs of sale, of $50,000.

The computer in this case was referred to as a CS 70. In about the early part of 1983 there appeared on the market a CS 200B which was Data General's replacement of the CS 70. It was not at all clear what the price of the CS 200B was. This seemed to depend upon what components went

with it. Mr Graham's understanding of the price, including Sales Tax and with the same number of screens as that of the plaintiffs, was about $160,000 to $165,000. Other estimates put it as low as $97,000. I have no doubt that the appearance on the market of a new and updated model in any field is likely to depress the resale value of earlier models. It is for this reason that I feel unable to accept the more optimistic estimates of what the present computer may have brought. I am satisfied, however, that a price significantly in excess of $25,000 could reasonably have been expected. Allowance must, of course, be made for the likely costs of sale and, in particular, for brokerage, because I have already indicated that in this rather new and sophisticated field it was unlikely that a reasonable price could have been obtained without the assistance of a broker. There is no single piece of evidence which leads firmly to the assessment of any particular figure, but taking into account as best I can the evidence which was given, and trying to err, if at all, on the conservative side, I consider a nett price of $50,000 could reasonably have been expected.

D. WHETHER DEMAND WAS MADE

This is the subject of the fifteenth cause of action but also, although not expressly pleaded as such, involves a matter preliminary to a decision on the first cause of action.

Clause F 1. of the lease, after referring to the requirement as to sale, provides that "the lessee agrees to pay NZIF on demand" the difference between the sale price and the residual value. The plaintiffs' case was that there was no evidence of any demand having been made on the lessee and so there could be no liability on the plaintiffs as

guarantors. This is not, in my view, correct. Clause F 1. does not purport to make it a condition precedent to the exercise of NZIF's rights against the guarantors that there should first have been a demand made on the lessee. If, of course, the present proceedings had involved a claim in respect of the exercise of rights against the Ansell Company as lessee, then the position may have been different. But such action is not a prerequisite to establishing the liability of the guarantors. Clause F 1. contains no more in this regard than an undertaking by the lessee to pay. It is, of course, well settled that it is not necessary for a creditor, before proceeding against a surety, to request the principal debtor to pay: (20 Halsbury, 4th ed., p 87, para 159). The failure in this case to make demand on the lessee did not preclude NZIF from proceeding against the plaintiffs.

E. THE RESIDUAL VALUE

The significance of the residual value fixed by the lease agreement for the computer does not directly affect the first cause of action, but it is relevant to the final disposal of the case.

It was argued for the plaintiffs that the residual value was fixed at an unrealistic figure and that it amounted, in effect, to a representation by NZIF that this was the sum which the computer would realise upon a sale at the end of the leasing period. I am not prepared to accept either argument.

It is apparent from the lease as a whole that the residual value is no more than a means of bridging the gap between the total amount of the advance made by the lender and the amounts payable or recoverable under the security. The residual value fulfills two functions. First, it

represents the amount which the lessee would have to pay at the end of the leasing period if it wished to complete the outright purchase of the computer. The total of the rental payments and the residual value would equate with the advance made (that is, the cost to the lender of the equipment), together with interest. Secondly, the residual value provides the means for determining the extent of the lessee's liability in the event of a sale being necessary as a result of default. Again this is simply a means of ensuring the repayment of the full amount advanced together with interest. That, of course, is not the way in which the transaction is framed but the device of a lease agreement is a means of achieving a normal loan on security.

The residual value is no doubt arrived at in different ways, depending on the nature of the transaction, and it is probably the case that in many instances it will be arrived at by a process of depreciation similar to that used for taxation purposes. I can see nothing, however, to suggest that the residual value in this case was ever intended to involve any kind of an undertaking or representation as to what was expected to be the sale price at any particular period. In the present case the residual value was arrived at after adjustments had been made to the rental instalments in an attempt to keep them within the ability of the lessee to pay. Accordingly as the rental instalments were reduced so the residual value was correspondingly increased. It was the total of the two which was of relevance rather than either in isolation. I am satisfied that the figure fixed for the residual value in this case does not afford the plaintiffs any basis for attacking the validity of the lease agreement.

The conclusions I have reached enable a decision to be made on the first cause of action. It was acknowledged on behalf of the plaintiffs that if there

should be a finding on that cause of action that the best price had not been obtained and that the sale price ought to have been greater, then it was unnecessary to go on to deal with the other 16 causes of action because each is pleaded in the alternative and the plaintiffs could not expect to achieve anything additional under those causes of action. It was also acknowledged that if that finding were made then it did not follow that the guarantees given ought to be cancelled.

The relief sought in the first cause of action is:

(a) An injunction to restrain the defendant from taking any steps as mortgagee against the plaintiffs or their wives, and

(b) An injunction to restrain the defendant from taking steps to enforce the guarantees, or

(c) An order under the Contractual Remedies Act 1979 restraining the defendant from taking any steps as mortgagee against the plaintiffs or their wives, or

(d) An order under the Contractual Remedies Act restraining the defendant from taking steps to enforce the guarantees, or

(e) An order under the Contractual Remedies Act setting aside the contract in total, or

(f) An order under the Contractual Remedies Act setting aside the guarantees, or

(g) Damages of $183,963.16 being the amount claimed by the defendant as the amount of the lessee's default.

It follows from the findings I have made that I am not prepared to grant any of the relief sought in those paragraphs. There is, however, a prayer for general relief and this enables an appropriate order to be made.

There will accordingly be a declaration that the defendant did not sell the computer at the best price reasonably obtainable as required by the lease agreement, and that there should be a set-off in favour of the plaintiffs in the amount owing by them under the guarantees of $25,000, being the amount by which the price which ought to have been obtained exceeded the actual sale price. There will be judgment for the plaintiffs to that extent.

I should add that, for the purposes of the first cause of action, the calculation of $183,963.16 as the amount claimed by the defendant to remain owing under the lease agreement was not the subject of scrutiny. There would, of course, need to be an adjustment consequent upon the declaration I have made. If any further question arises as to the final calculation of the amount owing then that may have to be the subject of further argument and consideration, but perhaps counsel will be able to agree upon it.

There is one further matter to which I should refer. In the course of their submissions on the third, eleventh and twelfth causes of action, counsel for the plaintiffs submitted that certain of the defendant's demands amounted to a penalty and so were unenforceable. No reference had been made in the amended statement of claim to the question of penalty and this was raised only in the course of closing addresses. Exception was taken by Mr Brown to the introduction of this topic in the absence of any pleading in respect of it. As it has not been necessary for me to deal with these causes of action I have had to

make no finding on the matter. I should mention that those causes of action would, in any event, have failed because I should not have been prepared to hold that there had been the implied terms in the contract on which those causes of action were based.

The matter went further, however, because it eventually emerged that Mr Guy, on behalf of the plaintiffs, was seeking to argue that cl C of the lease agreement, which provided that in the event of default the balance of the entire rent for the whole period of the agreement should become payable, was a penalty and so unenforceable. This of course, if correct, would materially affect the amount for which the plaintiffs were liable. The argument was based upon the recent decision of the High Court of Australia in O'Dea v Allstates Leasing System (WA) Pty Ltd [1983] 45 ALR 632. There had been no pleading of any kind upon which this submission could be based and it could only have been considered in the event of an appropriate amendment to the statement of claim. Such a course was objected to by Mr Brown and I am satisfied that his objection was sound. The point was raised far too late in the proceedings and I consider I should hold the plaintiffs to their pleadings, particularly in view of the apparently exhaustive nature of them. I am therefore not prepared to consider the question of penalty.

In case counsel are unable to agree on the question of costs they will be reserved.

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Bell Gully Buddle Weir, WELLINGTON, for Defendant