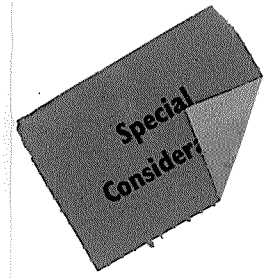


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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 638/82

815

BETWEEN BROADLANDS FINANCE LIMITED a duly incorporated company having its registered office at Auckland, Finance Company

PLAINTIFF

A N D DEREK ALLAN ARMITAGE of Auckland, Company Director

FIRST DEFENDANT

A N D COLIN CLIFFORD JOHNSON of Rotorua, Company Director

SECOND DEFENDANT

Hearing : 12th, 13th, 14th, 15th, and 16th March 1984

Counsel : A.W. Grove for plaintiff
E.M.J. Castles for defendant

Judgment : 18th July 1984

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JUDGMENT OF CHILWELL J.

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The plainciff (BFL), a finance company, claims judgment against the defendants (Mr. Armitage and Mr. Johnson) for $15,858.92. The claim arises out of supposed indemnities given by Mr. Armitage and Mr. Johnson for a loan to Rotorua Truck Sales Limited (RTS), a licensed

motor vehicle dealer. The amount is claimed to be the loss alleged to have arisen by reason of the advance.

The allegations in the statement of claim are that BFL and RTS were grantee and grantor respectively under an instrument by way of security (IWS) dated 27th November 1973 relating to a 1973 Fiat truck, that the IWS secured $24,112.25, that contemporaneously Mr. Armitage and Mr. Johnson executed deeds of indemnity and guarantee in favour of BFL in which each covenanted to indemnify and save BFL harmless against any monetary loss which BFL might suffer by reason of making the advance and that $15,858.92 was lost by that reason. Particulars supplied of causation and loss were that :-

> The Fiat was subject to a charge in favour of Marac Finance Limited (Marac) the debenture-holder of RTS. To secure title to the Fiat and its disposal BFL was obliged to pay to Marac $15,858.92.

In his closing address counsel for BFL suggested that the particulars could have been more accurately phrased :-

> To satisfy claims to the Fiat and its proceeds by the receiver of RTS, BFL paid $17,659.17 but, after giving a credit, there is a net loss of $15,858.92.

Neither the reason for nor the method of calculating the

credit were adequately explained in evidence because the only witness called by BFL, a senior credit officer with limited knowledge of the whole transaction, found it too confusing to explain. No point was taken. Mr. Armitage and Mr. Johnson denied liability in limine. They were not therefore concerned with any deficiencies in BFL's internal accounting.

Both Mr. Armitage and Mr. Johnson pleaded in their separate statements of defence full repayment of the loan by RTS in March 1979, but, if that is not the case, then there was no causal link between the loan and the loss: the amount claimed was part of a sum of money which BFL agreed to pay in settlement of litigation between RTS and a third person Torino Heavy Industries Ltd. (Torino Heavy). In any event, that litigation was settled without the knowledge and consent of either Mr. Armitage or Mr. Johnson. Breach of Section 8 of the Moneylenders Act 1908 was pleaded, but it was conceded at the hearing that in all respects material to this case the Act had been entirely replaced retrospectively by the Credit Contracts Act 1981. See Sharplin v Broadlands Finance Ltd. [1982] 2 N.Z.L.R. 1. The Credit Contracts Act was also pleaded by Mr. Armitage and Mr. Johnson :-

> The purported transaction evidenced by the Deed of Indemnity and Guarantee dated 27th November 1978 is a credit contract within the provisions of the Credit Contracts Act: the contract is in all the circumstances oppressive

within the meaning of Section 10: the contract should be re-opened, should re-opening be necessary.

Mr. Armitage raised defences applicable to him alone :-

(a) When he signed the documents the grantor was Northern Truck Sales Ltd (NTS) a licensed, motor vehicle dealer.

(b) No loan was made to NTS in terms of the documents.

(c) Material unauthorised alteration of the documents by some unknown person whereby RTS was substituted for NTS as the grantor and borrower.

And Mr. Johnson also raised a defence applicable to him :-

On or about 27th November 1978 an oral agreement made between him and Grant Lindsay Morton (Mr. Morton), as agent for BFL, it was agreed that in consideration of Mr. Johnson executing the deed of indemnity and guarantee and security documents, which contained an alteration being substitution of the grantor from NTS to RTS, Mr. Morton would obtain Mr. Armitage's consent and execution to the deed and security documents. BFL's agent, Mr.

Morton, breached the agreement by not ever obtaining Mr. Armitage's consent and execution : in consequence Mr. Johnson is not bound by the terms of the deed dated 27th November 1978.

The material documents comprise :-

(a) A loan application to BFL made on its printed form for a cash advance of $23,000 repayable by 2 monthly payments of $364 and one payment of $23,384.25. The applicant for finance was NTS. The document was dated 27th November 1978. The name of the applicant was subsequently changed to RTS (See Exhibit 14).

(b) A form of Memorandum of Terms of Contract as printed by BFL. The named lender is BFL. The named borrower was NTS. That name was subsequently changed to RTS. The amount borrowed and the instalment repayments correspond with (a). The named guarantors are Mr. Johnson and Mr. Armitage. The nominated security is the IWS. The form is dated 27th November 1978. It purports to be sealed by RTS (not NTS) in the presence of two directors, Mr. Armitage and Mr. Johnson. They did not sign in the separate place for guarantors. There is an express additional term :-

"The borrower authorised (sic) and instructs the lender to pay the sum of $12,735 from this advance in settlement of existing account 21.12.03197.7"

(See Exhibit 1)

(c) An IWS on a form printed by BFL. The named grantor was NTS. That name was subsequently changed to RTS. The named grantee is BFL. The nominated security is the Fiat. The document is dated 27th November 1978. It purports to be sealed by RTS in the presence of Mr. Armitage and Mr. Johnson as directors. (See Exhibit 2)

(d) A Deed of Indemnity and Guarantee on a form printed for BFL. The named covenantor is Mr. Armitage, the named beneficiary is BFL and the company named as the recipient of the loan was NTS. That name was subsequently changed to RTS. It is dated 27th November 1978 and is signed by Mr. Armitage. (See (Exhibit 3)

(e) A similar deed in which the named covenantor is Mr. Johnson, the named beneficiary BFL and the company named as the recipient of the loan was NTS. That name was changed to RTS. The document is dated 27th November 1978 and is signed by Mr. Johnson. (See Exhibits 3 & Q)

The person who purported to witness the sealing by RTS of (b) and (c) was Mr. Morton. The person who purported to witness Mr. Armitage's signature to (d) was also Mr. Morton. In fact Mr. Morton witnessed Mr. Johnson's signature to the sealing process of (b) and (c) and to the signing of (e) while a Mrs. Woolmore witnessed Mr. Armitage's signature to (d) and his signature (with no seal then impressed) to (b) and (c).

(f) A declaration Verifying Execution of Charge on a printed form. This declaration was made by Mr. Morton before a solicitor on 18th December 1978. He referred to a true copy of the IWS annexed. It was not annexed. He declared, inter alia,

1. That RTS made and executed the IWS on 27th November 1978.

2. That he was present together with Mr. Armitage and Mr. Johnson on 27th November 1978 and saw the common seal of RTS annexed

and he certified the signatures of the "directors" and of himself as witnessing the attestation of the IWS. (See Exhibit 5)

The declaration was factually incorrect. Mr. Morton was not present when Mr. Armitage signed the IWS. Moreover,

it then had no seal upon it. It was not Mr. Morton who witnessed Mr. Armitage's signature but Mrs. Woolmore. At no time was Mr. Morton present together with Mr. Armitage and Mr. Johnson when a seal was placed on the IWS. Furthermore, the formalities for the execution of the deed signed by Mr. Armitage, as prescribed by Section 4 of the Property Law Act 1952, were not observed because the witness (Mrs. Woolmore) did not attest the document which she in fact saw signed. The document purported to be attested by Mr. Morton. He did not in fact attest it. Nothing was taken of this point by counsel for Mr. Armitage.

In each deed of indemnity and guarantee it is recited that NTS (changed to RTS) :-

> "..... has been granted at the express request of the covenantor as is so acknowledged by its execution hereof a loan of ..... $23,000.00 (hereinafter referred to as 'the principal sum') conditional upon and with the stipulation that the covenantor pursuant to its being the requesting part as aforesaid should give the Indemnity and Guarantee as hereinafter appearing"

The impersonal "it" is Mr. Armitage in the one case and Mr. Johnson in the other. The operative part of the deed contains an indemnity clause and a guarantee clause. This action is concerned only with the indemnity clause. That clause is couched in extremely wide language :-

> "... the covenantor will indemnify and save harmless the beneficiary against all actions proceedings claims and demands which may hereafter be made against the beneficiary and against any monetary loss it may suffer by reason

> of its having made the loan as aforesaid or any further loans to the company however such loss should arise and without limiting the generality of the foregoing words whether by reason of any ultra vires action on the part of the directors of the company or by reason of any failure on the part of the directors of the company to observe any provisions of the Memorandum of Articles of Association of the company or any regulation or restriction imposed on the directors relating to the exercise of borrowing powers or in relation to the execution by the Company of an Instrument by Way of Security (hereinafter referred to as 'the said security document') in favour of the beneficiary or the affixing of the seal of the company thereto or by reason of the beneficiary and/or the company having failed to comply with any requirement of any enactment or regulation that may in any manner or form result in the moneys expressed to be payable under the said security document being reduced to a lower figure than was intended by the beneficiary or by reason of any enactment regulation judgment or order of any Court postponing or otherwise affecting payment of money or reducing rates of interest or by any other reason or cause whatsoever and such indemnity shall include an obligation to reimburse the beneficiary the total amount of all legal costs (including costs as between solicitor and client) charges and expenses whatsoever which the beneficiary may incur or suffer by reason of its having at its absolute discretion and with or without the consent of the covenantor or the company undertaken and litigation for the purpose of establishing the validity of the said security document and/or any other document collateral therewith." (Emphasis added)

I turn now to the evidence which is more extensive in this case than one would normally anticipate in a claim based on an indemnity in regard to motor vehicle financing. Messrs. Armitage and Johnson were the directors and shareholders of two truck dealing companies, RTS operated by Mr. Johnson from Rotorua, and NTS operated by Mr. Armitage from Drury in South Auckland. In early 1978 BFL repossessed an Erf truck and entrusted it to RTS for sale "on behalf" (see Exhibit E). This does not seem to have been a simple case of bailment for sale. Rather, it would seem that RTS

"bought" the truck for $37,000 by way of a loan from BFL, effectively, for that amount, which sum it was to repay upon sale. This is evidenced by Exhibit E which, in clause 1, required RTS to repay $37,000 plus $20.28 per day from the date of that "authority to sell" (equal to approximately twenty percent interest).

There followed a series of transactions whereby the Erf truck was traded by RTS for varying amounts of cash and other vehicles. In respect of each trade-in RTS and BFL maintained this position of borrower and lender, with a chattel security being taken by BFL over each trade. The goal was that BFL be cleared of its equity in the "trades", which by November 1978 stood at $12,349.10, secured by a Bedford truck. It was in BFL's interest that the vehicles (representing trade-ins on the initial Erf truck) be sold for cash so as to pay out the amount owing. BFL was not interested in financing any more trades.

Against this background Mr. Armitage wrote on NTS letterhead to the manager of BFL's branch at Papatoetoe, on 16th November 1978. In that letter (Exhibit 12) he proposed a scheme whereby NTS could acquire the Fiat truck, which was of considerable value, from a Hawkes Bay licensed motor vehicle dealer, by trading the Bedford plus $10,500 cash. The Fiat was worth $29,000 to $30,000 and was more readily saleable, the point being that it could be quickly turned over to pay off BFL. Mr. Armitage stated in his letter that NTS would then have a worthwhile vehicle "owing us in the region of $23,000 that we would be able to

retail quickly at around the $29,000 to $30,000 mark". The inference was that the vehicle would be encumbered to the extent of $23,000 by reason of the existing $12,349.10 plus the extra $10,500, but that the security was more than covered by the value of the vehicle.

In fact, the terms of the agreement with the Hawkes Bay dealer, Baillie Farmers Motors Ltd., (Baillie) that were/the Bedford plus several other vehicles in the yard of RTS be swapped for the Fiat. Mr. Armitage adverted to this in general terms by saying that "my company would have to exchange the vehicles plus make a cash payout of $10,500." These other vehicles were secured by means of floor plan financing to Marac. The purpose of the $10,500 cash was to pay out Marac's security on the vehicles so that they could be delivered unencumbered in exchange for the Fiat. Notwithstanding these behind-the-scenes tactics it was still true to say that the company would have a vehicle worth at least $29,000 encumbered to BFL for $23,000.

Counsel for BFL contended, without calling any evidence, that this letter was of a sinister character ; first, because Mr. Armitage referred to his company as having completed an IWS over the Bedford truck; RTS had executed that security and although that was also the company of Messrs. Armitage and Johnson, he was writing on NTS letterhead. Secondly, the inference was that the Fiat would cost $23,000 - $12,349.10 on the Bedford plus $10,500 cash - whereas Exhibit F (the sale and purchase agreement with Baillie) put the price at $29,900. It was submitted

that, in truth, stock belonging to RTS to a value of $29,900 was being given in exchange for the Fiat. Under cross-examination Mr. Armitage stated that the letter did not say to whom the $10,500 cash payout was to be made and that in fact such a payment was made, but to Marac. Mr. Johnson corroborated Mr. Armitage on this point. The fact that NTS was paying $29,900 in money's worth for the Fiat is not of great significance, since the difference between that and $23,00 was the equity on the loan for the borrower to do with as it pleased, except as tending to show, so counsel suggested, that the letter was deceptive and intended to be so: RTS was in financial difficulties and Mr. Armitage knew that BFL's manager in Papatoetoe was aware of the position. BFL would only make further advances to NTS, so neither Mr. Morton nor Mr. Armitage possessed any false illusion as to the credit of RTS.

BFL agreed to advance $23,000 to NTS shortly after the letter of 16th November 1978. The next event was on 23rd November when NTS signed the agreement to buy the Fiat from Baillie. (Exhibit F)

On 27th November the documentation for the loan was to be executed at BFL's Papatoetoe office. Mr. Johnson was to pick up the company seal of NTS from the company secretary's office in Rotorua, and to bring it with him to the meeting at BFL's Papatoetoe office. On the morning of 27th an officer of BFL telephoned Mr. Armitage to say that Mr. Johnson had been in touch and would not be able to arrive until 2.30 p.m. that day. Because Mr. Armitage had

to be well out of town on business at that time, he attended BFL's office in the morning and signed in blank the memorandum of terms of contract, the IWS over the Fiat and his personal deed of indemnity and guarantee. Mr. Johnson arrived in the afternoon. He signed the documents, but when he proceeded to put the company seal on them it was discovered that he had brought the seal for RTS and not NTS. Notwithstanding BFL's disclosed aversion to dealing with RTS, rather than decline the loan, Mr. Morton changed the name on all the documents from NTS to RTS. It was made clear to Mr. Johnson, and he so understood, that the advance was to be in terms of the changed documents i.e. an advance to RTS. Mr. Morton must be taken to have understood precisely what he was doing. He was not called to establish the contrary. Mr. Johnson initialled all the alterations. It was understood by both that Mr. Armitage would have to return to initial these alterations before the documents could be regarded as properly executed and also so that Mr. Armitage would, by his signature, acknowledge the change in arrangements whereby RTS became the borrower.

Unfortunately for BFL, Marac exercised its right under the debenture it held over RTS and the following day (28th November) appointed a receiver. BFL had not attempted to register its instrument until 18th December (Exhibit 5). Even then BFL made the error of trying to register the charge at the Auckland office of the Registrar of Companies instead of at the Hamilton office where RTS was registered (Exhibit 5). Its attempted registration fell out of time.

Prior to this, on 7th December 1978, Mr. Armitage attended the Papatoetoe office of BFL. He initialled the alterations to the documents. All parties were aware of the fact of RTS being then in receivership. So, his power as a director to perfect the document as against RTS in receivership comes into question.

Mr. Armitage was employed by the receiver to act as a salesman to dispose of stock. On the receiver's instructions the Fiat was placed with Torino Heavy for sale, accepted by letter of confirmation dated 19th December 1978 :

> "This will confirm we are willing to display the Fiat ..... on our premises for sale on your behalf.
>
> As discussed, we will not negotiate a sale to return you less than $27,000 nett."
>
> (Exhibit A)

Sometime after that, and certainly after BFL had received written confirmation of the receivership by letter of 19th December 1978 (Exhibit 6), BFL located the vehicle at the premises of Torino Heavy. The two companies had a history of dealings with each other. BFL informed Torino Heavy that the vehicle was in fact BFL's and that the latter should account to BFL for the proceeds of sale. This Torino Heavy agreed to do, despite its duty to account to the receiver of RTS. Torino Heavy surrendered its duty in exchange for an indemnity from BFL written not to Torino Heavy but to an associated company Torino Motors Ltd. (Torino Motors) :-

> "We hereby give you a complete indemnity covering the transaction between yourselves on behalf of (NTS) and Les Fenton and Son Limited in relation to any queries concerning title of this unit."
>
> (Exhibit L)

Mr. Armitage, as salesman for RTS in receivership, was responsible for the placement of the truck with Torino Heavy and had mentioned to Mr. Taylor, the commercial vehicles manager of Torino Heavy, that BFL had an interest in the vehicle. It was not a specific statement as to the nature of BFL's interest.

On, it would seem by inference, 21st February 1979 Torino Heavy purported on behalf of NTS (inexplicably) to sell the Fiat for a cash price of $29,500 to Les Fenton & Son Limited (Fenton) by way of a no deposit hire purchase agreement on a BFL printed form (Exhibit I). The agreement was tendered to BFL for acceptance but the transaction was rejected by it as unacceptable. However, on 15th March 1979 the transaction was re-documented as a lease agreement between Broadlands Leasing Corporation Limited (BLC) and Fenton. The confusion at the hearing as to how BLC became the owner of the truck is typical of the confusion generally apparent in the relationship between all the companies and personalities involved. The fault must lie at the door of BFL and its associates because the only witness called by the plaintiff was a senior credit officer who knew very little about the transactions except that she had familiarised herself with one file sufficient to avoid a non suit and deliberately, I suspect, to avoid having to call the

senior personel who did have the knowledge - what I would call "the spindleshanks system" of arriving at the truth in the adversary process. The average senior clerk, called to face questioning of the type that had to be put to this only witness for BLF, would be justified in feeling manipulated by a callous employer, but I must give her full credit for her unflinching faith. "Women are strongest; but above all things Truth beareth away the victory". The most important part of this woman's evidence was the production of documents of which she had no personal knowledge and in particular the production of a ledger entry of BFL in relation to RTS (Exhibit 4). Curiously, for a senior credit officer, she identified a credit of $27,000 as a direct payment from one or other of the Torino companies which almost squared the account: so counsel for BFL was obliged to submit that his only witness for BFL had made a crucial mistake. The managing director of Torino Heavy and Torino Motors had the clearly unpalatable experience of being called for the defence. He was obliged to say that the Fiat had not in fact been sold by his companies and that they never received any monies for it. In the end the Fiat was sold not by his companies but directly by "Broadlands to Fenton". Yet they did receive a commission of $2,500 for introducing the purchaser. The $27,000 appearing in the BFL's ledger entries must have come from elsewhere. The entry is dated 23rd February 1979 which approximates the inferred date of the abortive hire purchase transaction between NTS and Fenton. A Torino company received $2,500 commission which gave BFL the agreed net "return" of $27,000. It was put to me that the $27,000 must have come from BLC (as a book entry purchase only) so as to make BLC the owner and hence

able to dispose of the Fiat by way of lease.

In the result, RTS in receivership sued Torino Heavy for failing to account for the proceeds of sale. The action (A.No. 734/78) was commenced on 12th June 1979. In an amended statement of claim dated 31st January 1980 RTS claimed ownership of the Fiat, an agreement between RTS and Torino Heavy that the latter would act as the agent of RTS to display the Fiat for sale and that RTS was to receive not less than $27,000 from any sale, the sale at $29,500 and failure to account. There was an alternative claim based on a statutory duty to account pursuant to Sections 59 and 66 of the Motor Vehicle Dealers Act 1975. Judgment for $27,000 was sought thereby impliedly recognising some right to a commission. The defence was undertaken for Torino Heavy by BFL. In the statement of defence to the amended statement of claim Torino Heavy alleged that BFL was at all material times the owner of the Fiat, that after agreeing to display the vehicle for RTS Torino Heavy was advised by the true owner, BFL, to hold it at the order and direction of BFL, that Torino Heavy owed no money to RTS. There is an admission that Torino Heavy sold the vehicle for the sum of $25,500 (unexplained).

Pursuant to its undertaking BFL defended the action and ultimately settled out of Court. The RTS receiver (appointed by Marac) settled for half the proceeds of "sale" plus half the interest earned on the money since sale. This was very generous considering the receiver was

entitled to the whole proceeds. One reason why the claim was in this way compromised was that at about that time Marac and Broadlands had merged in what was referred in evidence as "the Challenge merger". Significantly there was also a change of solicitor for RTS at the same time.

It is this money BFL had to pay out under the settlement which it now claims from Messrs. Armitage and Johnson under the deeds of indemnity and guarantee. The issue resolves itself into a dispute over whether the beneficiary under an indemnity should be indemnified for any losses arising from the subject matter of the indemnity or only for those losses reasonably arising from it. The words in the deeds relied upon by BFL are :-

> "..... the covenantor will indemnify and save harmless the beneficiary against ..... any monetary loss it may suffer by reason of its having made the loan ..... however such loss should arise."

The figures calculated in terms of the settlement yielded a payment to RTS of $17,659.57 as follows :-

| | |
|---|---|
| Half the claim of $27,000 | $13,500.00 |
| Half the interest factor of $8,319.14 | 4,159.57 |
| Settlement | $17,659.57 |

There was a further provision that if the sale price of the Fiat was $28,500 then RTS was to receive $14,750 plus half the interest factor of $9,089.43 (i.e. $4,544.71).

It would seem that those parties must have accepted that the commission paid to Torino Heavy did not affect the net price of $27,000 on which the settlement was based. The amount for which judgment is now sought against Messrs. Armitage and Johnson is $17,659.57 less the confusing deduction of $1,800.65, leaving the claim at $15,858.92.

An important admission made by Mr. Berry, the Managing Director of Torino Heavy and Torino Motors, was that at no time did he or his companies receive any alteration to the instructions from the receiver of RTS when Torino Heavy agreed to display the Fiat for sale. An important admission from Mr. Black, the solicitor who acted for the receiver on the settlement, was that neither Mr. Armitage nor Mr. Johnson were consulted about the settlement :-

> "..... it wasn't a matter which directly concerned them. We would have required them as witnesses if the matter had proceeded to a trial but as far as the settlement terms and negotiations of them it wasn't their - it had nothing to do with them or we didn't think so. It was settled by instructions from the Receiver and Marac." (Evidence pages 54 & 55)

The ledger entry exhibit (Exhibit 4) was really a computer print out. No one advised me of the date of the request to the computer. The last entry is on 31st March 1979. I suspect that the date of the request was 2nd August 1979. In any event, as at 31st March 1979, there had been no reversal of the credit of $27,000 entered on 23rd

February 1979.

The present action was commenced on 30th June 1982, 29 days after the coming into force of the Credit Contracts Act. In his closing address counsel for BFL frankly conceded that there had been breaches of the Moneylenders Act 1908.

A comparison between the aborted Hire purchase transaction NTS to Fenton (Exhibit I) and the final lease transaction BLC to Fenton (Exhibits D & S) is of interest:-

| H.P. | | Lease | |
|---|---|---|---|
| Cash Price | $29,500.00 | | |
| Documentation | 50.00 | | |
| Finance charge for 60 months | 16,225.00 | | |
| | $45,775.00 | | |
| Monthly instalments 60 @ $762.92 | $45,775.00 | Monthly rental 60 @ $723.23 | $43,393.80 |

The difference is $2,361.20 which the witness called by the plaintiff was not asked to explain. I asked Mr. Johnson for his expert opinion and whether the difference might represent commission to Torino Heavy. He could not assist me. Counsel for BFL then sought and was given leave to put further questions to Mr. Johnson. Exhibit S (a second photocopy of the lease) was produced and put to the witness. The answer appeared in a page missing from Exhibit D.

$3,885 was stated to be the residual value of the vehicle on termination of the lease i.e. the further sum which Fenton could pay at the termination of the lease to purchase the vehicle. So the total outlay by Fenton to purchase the Fiat would have been :-

| | |
|---|---|
| Lease payments | $43,393.80 |
| Residual Value | $ 3,885.00 |
| | $47,278.80 |

Exhibit 5 then came in by consent. Whatever happened to the commission, the lease transaction bettered the H.P. transaction by $1,503.80. But Fenton defaulted. On 25th January 1981 BLC commenced an action against Fenton and the Fenton guarantors. There were two transactions involved. In regard to the Fiat the total claim was $50,938.80 calculated as follows :-

| | | |
|---|---|---|
| Total rentals and residual values payable | | $47,278.80 |
| Less payments received | | 3,616.15 |
| | | $43,662.65 |
| Plus penalty interest | | 9,036.10 |
| | | $52,698.75 |
| Plus legal costs | $245.00 | |
| Plus repossession fees & storage fee | $650.50 | 895.50 |
| | | $53,594.25 |
| Plus repairs, | $1,087.10 | |
| advertising | 157.45 | |
| & commission | 100.00 | 1,344.55 |

| | |
|---|---|
| | $54,938.80 |
| Less sale price | 4,000.00 |
| Total Payable | $50,938.80 |

(Exhibit P)

The total amount involved in the second transaction was $27,170.78. So judgment was sought for $78,109.58. No defence of lack of title on the part of BLC was raised. The action was compromised in January 1983 (Exhibit O) on the following terms :-

1. Fenton and its guarantors to pay $25,000 at the rate of $250 per month: first payment February 1983.

2. If paid in full, the sum to be accepted in full and final satisfaction of the proceedings commenced under the action.

3. In the event of default, Fenton and its guarantors to confess judgment at $50,000.

4. Action adjourned sine die.

The evidence did not disclose whether Fenton and its guarantors have paid the stipulated monthly instalments. The Court file, A.No. 30/82, is silent on the point. No judgment by confession has been entered, but 100 months have not yet expired.

The history of ownership of the Fiat, for the purposes of the Transport Act 1962, was given in evidence by a Deputy Registrar of motor vehicles and is confirmed by Exhibit T :-

| | Date of Registration | Owner | New Owner |
|---|---|---|---|
| | 21/11/74 | Kirby's Transport (Original owner by purchase from Torino Heavy) | |
| | 8/12/78 | Kirby Transport Ltd. | Baillie Farmers Motors Ltd. |
| | 8/7/80 | Baillie Farmers Motors Ltd. | Northern Truck Sales |
| * | 30/6/82 | Broadlands Leasing Corporation Ltd. | Les Fenton & Sons Ltd. |
| ** | 30/6/82 | Les Fenton & Sons Ltd. | Broadlands Finance Ltd. |
| | 30/6/82 | Broadlands Finance Ltd. | Atlas Building Removals Ltd. |
| | 9/8/82 | Atlas Building Removals Ltd. | DomTrac Equipment Ltd. |

** This document has handwritten alterations in order to make it a notice of seizure. This notice was given by BFL, not by BLC.

* This document was signed on behalf of Fenton as the new owner by a Mr. David Brook, credit controller of BFL. He signed on behalf of Fenton

"pp Les Fenton & Sons Ltd
D Brook - credit controller"

Annexed to * or to ** or both was a statutory declaration made by Mr. Brook on 30th June 1982 in which he solemnly and sincerely declared, on behalf of BFL :-

> "The truck ..... that is the subject of this change of ownership application (and request for duplicate certificate) was secured to this company by a Lease Agreement and subsequently seized through non-compliance of the covenants contained in the said Lease."

That was incorrect. The leasing company was BLC not BFL. But a copy of the lease agreement was annexed to the declaration. The clear difference in company names, noted by the Registrar, did not prevent BFL becoming the registered owner again.

Messrs. Armitage and Johnson contend that they should not be liable for BFL's sloppiness in its transactions, for its illegal conduct, nor for its loss arising from settlement of a claim which was due to its own wrongful behaviour and of which they alleged they knew nothing.

At its simplest BFL's case was that a loan was made to RTS by reason of which a monetary loss was suffered and for which Messrs. Armitage and Johnson were indemnifiers.

Counsel for the defence raised the defences earlier summarised in this judgment. Specifically they were :-

1. Mr. Armitage agreed to indemnify a loan to NTS and that no loan was in fact made to that company; so, he is discharged from liability.

2. If the documents were valid, the loan was repaid anyway, when the vehicle was subsequently disposed of.

3. There is no link between the loss due to the compromise of the claim against Torino Heavy and the loan: such payment was not "by reason" of the original loan.

4. Settlement was undertaken without the knowledge of either Mr. Armitage or Mr. Johnson.

5. The principal document (the memorandum of terms of contract) being invalid for improper execution, then the collateral (the "guarantee") fails with it.

6. The contract contravened the Moneylenders Amendment Act 1933 in regard to the failure to deliver a copy of the memorandum to Mr. Armitage as required by Section 8. Both counsel accepted that the Moneylenders Act has been replaced for the purposes of this case by the Credit Contracts Act.

7. Application was made to re-open the contract under Section 10 of the Credit Contracts Act.

The defences raised on behalf of Mr. Johnson were the same except for item (1). His first defence was that when he agreed to indemnify the loan he did so on the basis that the altered documentation would be perfected by BFL obtaining Mr. Armitage's initials to the alterations, and that BFL, through Mr. Morton, gave an express undertaking to do so.

Counsel for the defence urged the Court to take the following facts into account :-

(a) Failure by BFL to register the IWS so as to avoid the indemnifiers' liability occurring.

(b) Failure to have the IWS properly executed.

(c) The sloppy dealings of BFL were the cause of the Torino Heavy settlement.

(d) No demand was made of either Mr. Armitage or Mr. Johnson even after RTS defaulted.

(e) There was no consultation with either of them regarding the BFL's indemnity of Torino Heavy.

(f) They had no knowledge whatever of the proposals for settlement or of the settlement between RTS

in receivership and Torino Heavy.

(g) The fact of the settlement and the delay for a year before the writ in the present proceedings was issued.

THE DOCUMENTATION

As a preliminary matter it seems desirable to consider the status of the documents in this case. They were alleged to be imperfect for various reasons. First it was contended that the memorandum of terms of contract breached Section 8 of the Moneylenders Amendment Act 1933. However, as already noted, both counsel accepted that the position has been superseded by the Credit Contracts Act. So that, though the contract may have been unenforceable at the time, it has sufficient existence to found a Credit Contracts Act application: it is as though the Moneylenders legislation had never existed. But as a breach of the law existing when the documents were signed it is raised as conduct relevant to Credit Contracts Act considerations. Secondly the IWS was defective in its execution and unenforceable. In the case of both the IWS and the memorandum of terms of contract, in their altered forms, only one director's signature accompanied the company seal. Mr. Armitage supplied his "mark" to the new terms after the appointment of the receiver by Marac; so, he did not have authority to bind the company. A company search (Exhibit K) of RTS was produced but on the application of counsel for BFL I ruled it inadmissible

as to its contents because of the hearsay rule. If article 113 of Table A applied to RTS then :

> "..... every instrument to which the seal is affixed shall be signed by a director and shall be countersigned by the secretary or by a second director"

I cannot be influenced by that provision because it is within the power of a company to have a different provision. From the facts that BFL had had several prior transactions with RTS and NTS, that two directors' signatures were considered necessary by Mr. Morton of BFL and by Messrs. Armitage and Johnson, the proper inference, on balance, is that the signature of one director was not sufficient. But, be that as it may, when Mr. Armitage initialled the alterations he was more than likely functus officio as a director while the receiver was in possession of the assets of RTS. That is not necessarily the position. See generally Blanchard, The Law of Company Receiverships in New Zealand and Australia, para. 1002. The Marac debenture was not produced in evidence so the Court has no terms to examine. Marac is a large, well known and experienced finance company. It seemed common ground that Marac's debenture had priority. In my judgment, as a question of balance, the inference is that the directors' power to bind the company in this manner would have been inconsistent with the terms of the debenture. Although it is not necessary to treat the inference as more powerful I consider it is within the highly likely classification. BFL knew RTS was in receivership when Mr. Armitage placed his initials on

the altered documents. He supplied the initials on 7th December 1978 at the express request of Mr. Morton :-

> "Mr. Morton explained that although the documents had been prepared in the name of NTS Ltd., as per his instructions, the common seal of RTS Ltd. had been affixed when Mr. Johnson signed on 27th November and that he wanted me to initial the alterations."
>
> (Evidence page 22)

No question of apparent authority arises. It is my judgment that the memorandum of terms of contract and the IWS were unenforceable against both RTS and NTS.

However, the Court of Appeal decision in Haddow Nominees Ltd. v Rarawa Farm Ltd. [1981] 2 N.Z.L.R. 16 is directly in point. The effect of that decision is that, even in the face of an express article of association prescribing the manner of execution of a document, an irregularly executed document will still be enforceable as a contract with the company under Sections 42 and 46 of the Companies Act 1955. Not, however, in this case, against the receiver. Thirdly, the IWS was defective for non registration. It was of no effect against Marac. It would have been improperly registered anyway because the declaration verifying execution required to accompany it was false for the reasons earlier given. Since a false declaration could not be a statutory declaration, then the instrument, if presented for registration, would not have been accompanied by a statutory declaration as required by Section 102(1) of the Companies Act 1955. That would not

affect the validity of the instrument inter partes.

MR. ARMITAGE'S FIRST DEFENCE

His counsel argued that on 27th November 1978 Mr. Armitage did not agree to indemnify a loan to RTS, but only to NTS, which was a solvent company.

However, he did return on 7th December 1978 and initial the alteration to his deed so as to indemnify the loan to RTS. His capacity as a director or otherwise is immaterial to his ability to indemnify as an individual. Also, the fact that at that stage the money had already been advanced (implying that it was past consideration) was immaterial. It was not contended that this document was not a deed, conforming to Section 4 of the Property Law Act. If a deed, then an obligation binding on Mr. Armitage was created. Whether or not a deed Mr. Armitage's conduct was an affirmation of some act (the loan) whereby property had passed. For the effect of a deed see Re Wilson's Settlements, Gibbs v Anderson [1972] N.Z.L.R. 13, 22. Although I doubt that it was a deed, for the reasons earlier expressed, Mr. Armitage was in no doubt on 7th December 1978 about the loan being made to RTS. By initialling the alterations he lent his support to that change in identity of the borrower and thereby freed his solvent company NTS from any possible suit for money. This defence must fail.

MR. JOHNSON'S FIRST DEFENCE

It was submitted that BFL, through Mr. Morton,

undertook to Mr. Johnson to get Mr. Armitage's initials to the alterations. Counsel contended that it was a term of the contract of indemnity that BFL perfect the documentation in that way. As a matter of law the proposition is tenable that a contract of indemnity may be subject to an oral or implied term outside the written terms of the indemnity: see for example Horizon Aluminium Products Ltd. v Snook and Parker (unreported; 14th April 1983, Barker J; A.No. 941/77, Auckland) and National Bank of New Zealand v Aherne (unreported; 19th December 1983, Moller, J; A.No. 252/81, Auckland). The burden of proof is high. There was the positive assertion of Mr. Johnson :-

> "..... he gave me an undertaking that he would have Mr. Armitage initial them that day"
>
> (Evidence page 61)

There was a conflict between Messrs. Armitage and Johnson whether Mr. Armitage was made aware of the altered situation on 28th November 1978, the day after the money was advanced. Mr. Johnson said he told Mr. Armitage on 28th November. Mr. Armitage said that he was not aware of the true position until called to Mr. Morton's office on 7th December. On balance the probability is that Mr. Armitage was told that he would have to initial the alterations. Counsel for BFL invited me to draw the inference that the obtaining of Mr. Armitage's initials was Mr. Johnson's responsibility for which he gave an assurance, but I reject that submission.

If Mr. Johnson had been as concerned as his evidence suggests to ensure that the security was perfected, one would have thought (it being in his best interests) that he would have made the utmost endeavours to secure same. On the other hand he ran RTS from Rotorua while Mr. Armitage ran NTS from Drury. As a question of balance I conclude that Mr. Johnson's concern to have the security perfected, and presumably registered, does not accord with his passive attitude to follow up inquiries. Furthermore, even allowing that the representation was made, as alleged, it would not be such as to qualify in law as a term of the contract, or even one inducing the contract, i.e. if there was a representation it would not have been actionable. Mr. Johnson needed the advance urgently and would have given his indemnity anyway. This defence fails.

## THE SECOND DEFENCE OF MESSRS. ARMITAGE AND JOHNSON

They contended that the loan was repaid in March 1979 when the vehicle was sold for $27,000 by BFL to BLC. This argument seemed to have been developed more in aid of the re-opening defence. Although BFL "received" $27,000 in its books, whether notionally or not, the point is that it was the "money" of RTS in receivership. It was not BFL's money. BFL would have been obliged to account to the receiver of RTS or to Torino Heavy who would in turn have been obliged to account to the receiver of RTS. The effect of the settlement of the action against Torino Heavy was that BFL received, in the end, some only of the amount due to it. BFL now seeks repayment of the residue.

There was not a repayment of the loan in fact. This defence fails.

THE THIRD DEFENCE OF MESSRS. ARMITAGE AND JOHNSON

If the loss alleged by BFL were not reasonably related to the loan "guaranteed", so as to make it unreasonable that Messrs. Armitage and Johnson should be liable under the "guarantee", then that would dispose of these proceedings. But the material relationship in this case is one of indemnity and not guarantee: Yeoman Credit Ltd. v Latter [1961] 2 ALL E.R. 294, 300. The covenant by Mr. Armitage and Mr. Johnson respectively was to "indemnify and save harmless" BFL. The distinction is important because, if the contract is one of indemnity, it may be enforceable even if the security between the beneficiary and the principal debtor is unenforceable: See Yeoman Credit Ltd., supra, Heald v O'Connor [1971] 2 ALL E.R. 1105, 1110, and 20 Halsbury's Laws of England 4th Ed. para. 108.

> "..... a guarantee is a collateral contract to answer for the default of another person, and thus is a contract that is ancillary or subsidiary to another contract, whereas an indemnity is a contract by which the promisor undertakes an original and independent obligation":

This established proposition disposes of the fifth defence.

In some cases the distinction may be unimportant

because of an implied term in the contract of indemnity or guarantee requiring the beneficiary (creditor) to adhere to the terms of the security given by the principal debtor so as to protect any ultimate liability of the indemnifier/ guarantor: Horizon Aluminium Products Ltd., supra.

Mr. Armitage and Mr. Johnson each agreed to indemnify BFL for loss suffered "by reason of its having made the loan ..... however such loss should arise". Some support for the breadth of these words is to be derived from the judgment of Barker J. in Broadlands Finance Ltd. v Williamson (unreported; 7th February 1984; M.No. 261/83, Auckland). The Judge said, at page 5 of his judgment, that those words made the indemnifier liable for any loss that the beneficiary might suffer through making the loan.

The loss arose in this case from BFL's actions regarding ownership of the Fiat when it was in the possession of Torino Heavy. BFL could not be expected to have acted that way if it was not owed the money previously lent. The settlement arose from BFL's interference with the truck when in Torino Heavy's possession. There is a causal link running through the events. However, can BFL be entitled to be indemnified against a loss arising from its own negligence (by not registering a valid security), or, worse, by elements of wrongdoing?

In Smith v Howell (1851) 6 Exch. 730, 736; 155 E.R. 739, 742 Pollock, CB. made the general statement :-

> "There is no doubt that, at one time, very wild notions were entertained with respect to the contract of indemnity; but these notions are now exploded and it is now considered, that, by a contract of indemnity, is meant that the party indemnified may recover all such charges as necessarily and reasonably arise out of the circumstances under which the party charged became responsible."

That case concerned the beneficiary of an indemnity seeking to recover from the indemnifier the costs of proceedings he had unsuccessfully defended when such was not necessary because his liability had already been ascertained.

In John Lee & Son (Grantham) Ltd. v Railway Executive [1949] 2 ALL E.R. 581 a tenant indemnified a landlord for all loss which but for the tenancy would not have arisen. The Court of Appeal held that the loss indemnified had to be restricted to loss arising by reason of the relationship of landlord and tenant and did not cover the situation that arose where the landlord's negligence caused the loss. Denning L.J. recognised, at page 584, that to allow the clause the breadth contended for would mean that the landlord could deliberately set fire to the premises and the tenant would have to indemnify the landlord for the loss.

In Wright v Tyne Improvement Commissioners [1968] 1 ALL E.R. 807, the owners of a crane were found liable for damages for personal injuries suffered by a workman. At the time of the accident the crane was under hire. A clause of the hire agreement was that the hirers indemnified the owners for, inter alia, all loss "whatsoever howsoever and

whensoever caused arising directly or indirectly out of or in connexion (sic) with the hiring or use of the said crane". The Court of Appeal held that the indemnity clause extended only to loss arising directly or indirectly out of or in connection with the hiring or use of the crane. This was not a surprising result. Although the use of the crane had not been a blameworthy cause of the accident, the accident causing the loss to the crane owners arose, at least indirectly, out of or in connection with the use of the crane. On a "but for" test the crane was a central factor :-

> "If the crane had been out of use and idle there would have been no accident" (Sellers L.J. at page 810)

In Smith v South Wales Switchgear Ltd. [1978] 1 ALL E.R. 18, the House of Lords held that where a clause, such as an indemnity clause, purports to confer exemption on one party (the proferens) then the contra proferentem rule applies. Consequently, the beneficiary was not entitled to indemnity for his own negligence unless the indemnity clause expressly said so. The clause in that case indemnified the proferens against, inter alia, any loss "whatsoever" under Statute or common law in respect of personal injury. That word was not considered to be sufficiently wide to include negligence on the part of the proferens: it was no more than a word of emphasis.

In the present case Mr. Armitage and Mr. Johnson each agreed only to indemnify BFL for loss arising from the relationship of lender and borrower with RTS. In John

Lee & Son. (Grantham) Ltd., supra, at page 583 Sir Raymond Evershed, M.R. considered the test to be : was the fact that the tenants were tenants of the beneficiary under the indemnity a necessary or material allegation? In this case, on that analogy, the test would be; was the fact that BFL was the lender to RTS a necessary or material allegation?

The answer is in the affirmative. The next question is: did the loss arise from BFL's negligence or wrongful conduct and, if so, is loss due to that covered by the words of the indemnity ("however such loss should arise")? On the authority of the cases of John Lee & Son. (Grantham) Ltd. and South Wales Switchgear Ltd., the contra proferentem rule would seem to operate as a bar to BFL's claim if its conduct in regard to the execution of documents and in regards to the truck in Torino Heavy's hands is found to be negligent or wrongful.

On the other hand, the cited cases dealt with an extraordinary or unusual loss; one not directly pertaining to the subject matter of the relationship between the parties. It was in each case a question of who should bear the loss, in the face of an exception clause. In this case, the obligation to make good a shortfall in repayment of the loan is the subject matter of the relationship. In other words, there is a certain logic in the argument that at the end of the day BFL has received $13,500 plus $4,159 interest in reduction of a $23,000 loan plus interest. If

the present claim as at present constituted is not justified, then is the proper course for BFL to claim under the indemnity for the full loan of $23,000 plus interest? The anticipated retort from Mr. Armitage and Mr. Johnson would be that, if anything is owing, it cannot exceed $15,858.92 because BFL recovered the balance in disposing of the truck; its loss could be no more than the amount paid to the receiver of RTS. They would wish to allege in defence the very circumstances BFL is alleging in its claim.

It is obvious from any view of the evidence that BFL was fortunate to have the claim against it by the receiver compromised. Consequently BFL was better off by a considerable sum. A fortiori, so were Messrs. Armitage and Johnson. This defence fails.

THE FOURTH DEFENCE OF MESSRS. ARMITAGE AND JOHNSON

It was contended that since they were not privy to the settlement, neither Mr. Armitage nor Mr. Johnson should be bound by its consequences.

A resolution of this argument lies in 20 Halsbury, op cit, paragraph 313, wherein it is stated :-

> "The holder of an indemnity, when acting within the scope of his authority, is generally entitled to recover the amount payable by him by virtue of any judgment recovered against or compromise reasonably made by him in any legal proceedings in respect of any matter comprised by the indemnity,

> together with all costs properly incurred in defending such legal proceedings, including his own costs on the common fund basis.
>
> It is not necessary in order to bring the action against the indemnifier that notice of the proceedings should have been given to the indemnifier, but if it is not given it will be open to him to impugn the judgment or the compromise. It is therefore prudent to join him as a third party or, at least, to give him notice of the proceedings, so as to enable him either to admit liability or, where appropriate, to be joined as a party to the proceedings. If, having been put on notice, he then refuses so to act, he will, in general, be estopped from denying the validity of the judgment or the reasonableness of the compromise, and it will be difficult for him to show that any costs incurred in defending the proceedings were improperly incurred. Nevertheless, if they were improperly incurred, he will not be liable for them."

In regard to knowledge of the compromise, Mr. Armitage knew that the action by the receiver had been commenced, a brief of his evidence was prepared (Exhibit C) but he refused to sign it because it contained errors of fact, he was aware of the compromise, of the amount and of the subsequent payment by BFL. Mr. Johnson told me that he was not aware of the compromise. The proper inference is that he was aware of the proceedings in view of his own overall compromise with Marac effected by deed dated 31st March 1981 (Exhibit R). He claimed ignorance of the full ramifications of the situation. I can accept that evidence. But it is my opinion that it would have been an unlikely event for either Mr. Armitage or Mr. Johnson to have wanted to impugn the proceedings and compromise at the time. If one assumes, for the purpose of argument only, that neither had actual or constructive notice of the situation, can either impugn the compromise now?

The criterion for determining whether they should now be able to deny liability by impugning the compromise must be the same as that for whether they are liable under the indemnity at all, i.e. was the compromise a reasonable situation occasioning a loss for which BFL was indemnified?. Since that question has already been answered in the affirmative, it must follow that neither Mr. Armitage nor Mr. Johnson can impugn the compromise merely because of any lack of notice. Absence of notice at the time merely gives a right of challenge later: it does not give any greater force to the merits of the challenge. Were the answer in the negative, the present consideration would not even arise because neither Mr. Armitage nor Mr. Johnson would be liable under his indemnity anyway. This defence must fail.

FIFTH AND SIXTH DEFENCES OF MESSRS. ARMITAGE AND JOHNSON

These have already been dealt with in consideration of earlier pleadings. They do not avail either Mr. Armitage or Mr. Johnson.

SEVENTH DEFENCE OF MESSRS ARMITAGE AND JOHNSON

As one has come to anticipate since the coming into force of the Credit Contracts Act 1981 (the Act) its provisions assume an important part in many actions by borrowers for recovery of money lent. This case was no exception. A substantial part of the hearing was taken

up with the issue of re-opening advanced on behalf of Messrs. Armitage and Johnson.

Prima facie, a deed of indemnity would not seem to be a "credit contract" in terms of Section 3 definitions. However it is deemed to be part of one by Section 4 :-

> "(1) Where it is a term of a credit contract that another contract or a deed be entered into, the following provisions shall apply :
>
> (a) Any part of that other contract or deed that relates to the provision of credit to, or the payment of money by, a debtor under the credit contract shall be deemed to form part of the credit contract for the purposes of Part I of this Act :
>
> (b) If the other contract or deed is to be entered into for the purpose of giving security for the credit provided under the credit contract -
>
> (i) The whole of that other contract or deed shall be deemed to form part of the credit contract for the purposes of this Act (whether or not it is entered into at the same time as the credit contract is made); and
>
> (ii) For the purposes of Part II of this Act, the credit contract shall be deemed to be made when the other contract or deed is made or the credit is provided pursuant to the credit contract (whichever is the earlier)."

It was a term of the memorandum of terms of contract that a guarantee be given. While the words "Deed of Indemnity or" had been crossed out, the guarantee clause referred to documents in the form annexed. No point was taken of the words excised and it seems to have been assumed that the forms were in fact annexed. This is one of those cases where it is hard to assume that anything was done correctly.

so it is a relief to find that on some issues no point was taken.

Counsel for the defence sought to have each deed of indemnity and guarantee re-opened under Section 10 on the grounds of oppressiveness. "Oppressive" is defined in Section 9 as meaning :-

> "oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice."

Counsel pointed to the following circumstances as justifying the assertion, in terms of Section 10 (1)(b), that BFL intends to exercise a right or power conferred by the contract in an oppressive manner :

1. It would be unjustly burdensome for BFL to succeed when it has been a party to an illegal act.

2. Messrs. Armitage and Johnson should not be liable for moneys paid in pursuit of an indemnity given to Torino Motors in respect of an anticipated sale by NTS.

3. (a) Delay in bringing the action.

   (b) Inducement to Torino Heavy to breach its agency.

(c) No prior notice of claim under the indemnity :-

(i) When RTS first defaulted under the IWS, or

(ii) Subsequently until this action was commenced.

and no consultation in regard to the indemnity given to Torino Motors or the settlement of the action brought by the receiver of RTS.

4. The circumstances of the settlement resulting in payment effectively to Marac, which was submitted to be a sham because of the merger of BFL and Marac into Challenge.

Essentially the burden of counsel's submissions was that to require Messrs. Armitage and Johnson to pay <u>now</u> could in no way be seen as being in accord with "reasonable standards of commercial practice."

Counsel for BFL contended that Section 10(1)(a) only was pleaded and further that this provision did not apply. This latter point I find acceptable in this case. It could not be said, in terms of Section 10(1)(a), that, at the time of the credit contract, BFL acted oppressively. The loan was made at the request of Messrs. Armitage and

Johnson: also it was not an excessively high interest rate. It could hardly be said that RTS, or Mr. Armitage or Mr. Johnson were "hapless" debtors, from whom an oppressive bargain was "extracted" by a financier (R.A.Wood Investments Ltd. v Mahony Samuel Becker and Stapleton Nominees Ltd. (unreported; 20th December 1983; Thorp, J.; A.No. 928/82, Auckland) at page 11.)

The pleading of Section 10 in each statement of defence is a general plea. In the absence of any request for particulars there is nothing in the pleading objection raised by counsel for BFL.

I have no doubt that Section 10(1)(b) is the appropriate provision on the facts of this case. The question is, has BFL exercised, or is it intending to exercise, a right to repayment or indemnity conferred by the contract of indemnity in a manner which was, or would be, in contravention of reasonable standards of commercial practice?

Counsel for BFL conceded that Section 4 of the Act might apply to catch the indemnity provision. He submitted, though, that the indemnity clause (purportedly the part referred to in Section 4(1)(a) as relating to the provision of credit) can either be lifted out so as to form part of the credit contract, or it can not (because it did not relate to the provision of credit to RTS). Even if it could be lifted out, the submission proceeded, it becomes part of the credit contract between BFL and RTS, and RTS is

not a party to these proceedings. Alternatively, under Section 4(1)(b) the linked transaction, the indemnity, is deemed to form part of the credit contract and this composite credit contract is deemed to have been made when the money was actually advanced (27th November 1978). This composite credit contract was between RTS and BFL. It is this contract which the Court is asked to review under Section 10. Essentially the contention is that the direct parties are not before the Court. Counsel submitted that if he had known an expanded Credit Contracts Act argument was to be raised he would have joined RTS and NTS.

Mr. Armitage and Mr. Johnson each pleaded Section 10. Counsel should have been prepared to meet all arguments under that section. Moreover, Section 4 deems the indemnity clause to be part of the "credit contract" so as to trigger the application of the Act. Section 10 does not identify the persons at whose instigation the Court may re-open the contract. The criterion is whether the Court considers, under Section 10(1)(b), that any party under a credit contract, which includes the indemnity, is going to exercise a right conferred by that indemnity in an oppressive manner. Obviously the provision identifies the "party" exercising the right: it is the one who has that right conferred by the credit contract. But nothing is said of the person against whom the right is to be exercised. It will in any situation be the person affected who will make application. The persons affected by the exercise of the right to indemnity conferred by the indemnity to BFL are Mr. Armitage and Mr. Johnson. RTS and NTS need not be before the Court.

Counsel for BFL raised a further issue. He contended that Section 10(1)(b) speaks in terms of an intention to exercise a power conferred by the credit contract, contemplating oppressive kinds of activities such as oppressive repossession of goods, mortgagee sale, or appointment of a receiver. See Dugdale, The Credit Contracts Act 1981, 33. It could not, so the argument developed, operate to prohibit the right of a lender to sue: it is aimed at the out-of-Court exercise of power. Section 10(1)(b) refers to "a right or power". An indemnified person has a right to indemnity which is exercised by demand for payment. That is an exercise of a right conferred by the contract. The right to sue arises from that but is separate: it is common to all rights which are sought to be enforced. The exerted party may object to the enforcement by court proceedings of the right, but far from depriving anybody of the right to air their grievances in Court, it allows the issue to be argued in Court. An exerted party cannot just stop the exerter of a right from suing by saying it would be oppressive to sue; full argument is necessary. It is noteworthy that the issue of re-opening a credit contract can be raised "in any proceedings": Section 10(1). The logic of the submission is compelling.

Finally, counsel submitted that, notwithstanding any of the above objections, the exercise of the right to payment under the indemnity would not be oppressive anyway. In the final analysis the issue is whether to allow BFL to exercise its right to payment would be in contravention of reasonable standards of commercial practice.

The preliminary inquiry is whether the exercise of the right would be in contravention of those standards or not. Past conduct leading up to the purported exercise can be relevant evidence to assit in determining the issue. It may be in contravention of reasonable standards of commercial practice to allow the exercise of the power because of the standard of past activity leading to it.

In Udy v Kuzinas (unreported; 9th February 1983; A.No. 1/83; Rotorua) Prichard,J. (page 2) referred to the need to consider each case "on the broad merits of the situation". He was considering the granting of an interim injunction on the grounds of oppression, but the observation seems appropriate in this situation as well. Unfortunately the matter is one of difficulty where, as here, neither party has any clear claim to have acted meritoriously. BFL acted in a slipshod fashion throughout without observing, what I conceive to be, the principles of commercial morality one would expect from one of this country's largest public finance companies. Messrs. Armitage and Johnson purported to act in a naive and unsophisticated fashion inconsistent with their obvious wealth of experience in these matters and their probable knowledge of the situation. On the one hand the Act is consumer legislation designed to prevent the oppression of credit recipients from the machinations of unscrupulous financiers. On the other hand the Act should not be applied unduly to interfere with proper commercial affairs. See generally Hart v Haydon (unreported; 3rd December 1982; Holland J. A.No. 312/83, Auckland) cited with approval by Thorp, J. in R.A. Wood Investments Ltd. v

Mahony Samuel Becker and Stapleton Nominees Ltd. supra, at page 4. It may be that the threshold for the Court's intervention is a "sufficiently serious element of unfairness": Dugdale, op cit, 31.

There is a link between any finding made under the earlier head of connection between the loss incurred and liability under the indemnity, and under this head. If BFL's actions giving rise to the loss incurred were reasonable vis-a-vis Messrs. Armitage and Johnson, it ought not be said BFL acted in contravention of reasonable standards of commercial practice. Conversely, if BFL's past conduct was of a low standard, so as to contravene, vis-a-vis Messrs. Armitage and Johnson, reasonable standards of commercial practice if it were to exercise its right of payment, then they would probably not be liable under the indemnity anyway for the loss incurred would be outside the terms of the indemnity.

There were other cases cited by counsel in argument. In Goulston Discount Co. Ltd. v Clark [1967] 1 ALL E.R. 61 the indemnifier was liable for the outstanding payments on a hire purchase agreement. Lord Denning, M.R. distinguished Unity Finance Ltd. v Woodcock [1963] 2 ALL E.R. 270 as being a case of illegality, his proposition being that an indemnity will not cover the consequences of the beneficiary's own illegal act. The point about the Unity Finance case was that clearly the beneficiary under the indemnity self-engineered the misfortune. By illegally repossessing the car from the hirer, the hirer was statutorily absolved from any further liability under the hire

purchase agreement. In effect the indemnifier was only liable for outstanding liability on the agreement, which had been made nil by the beneficiaries' own action. In the present case, BFL's actions in fact gained money to the benefit of Messrs. Armitage and Johnson. Bentworth Finance Ltd. v Lubert [1967] 2 ALL E.R. 810 was concerned with an indemnity against loss arising out of or consequent on the plaintiffs having entered into a hire purchase agreement or which might arise from the agreement being unenforceable against the hirer. Lord Denning, M.R. held that the loss arose from the financiers having allowed the dealers to deliver the car to the hirer without a log book in breach of an implied term that there would be one. Hence the loss did not arise from the matters stated in the indemnity. The agreement was unenforceable because of the breach and accordingly no instalments became due. The point was briefly made and not well explained. The decision is not, with respect, a satisfactory precedent. The financiers were liable, or responsible, for the dealers' default. The decision can be justified by application of the contra proferentem rule. Assuming that the financiers were responsible for the dealers' wrongful act, in the absence of clear words, an indemnifier will not be liable for loss occasioned by the misconduct or negligence of the beneficiary of the indemnity.

Marac Finance Ltd. v Virtue [1981] 1 N.Z.L.R. 586 was also cited. The Court of Appeal held that, notwithstanding the documentation, the transaction was

a moneylending legislation. The documentation was a sham, but, in all the circumstances, the Court thought it would be inequitable not to enforce the transaction in terms of Section 55 of the Statutes Amendment Act 1936 (now seemingly retrospectively repealed by the Credit Contracts Act: Sharplin v Broadlands Finance Ltd. [1982] 2 N.Z.L.R. 1, 6). The relevance of the case is difficult to perceive except on the basis that if the documents in the present case had been held to be enforceable against RTS under the former legislation, though irregularly executed, the consequences could have been extremely unfortunate.

Though the evidence left one suspicious that illegal acts had been committed such as the making of a false declaration, the encouragement of a licensed motor vehicle dealer to breach its contract with its principal, inducing a principal to fail to account either in terms of the Crimes Act 1961 or the Motor Vehicle Dealers Act 1975, conspiracy to defeat the rightful claim of the receiver of RTS, unauthorised representation that an officer of BFL was an officer of Fenton, none of these things were proved to the higher standard of proof required for such matters in a civil action. In any event, though this may not have sufficed if criminal offences had been proved, the effect of the activities of BFL was to recoup for BFL $15,858.92 which could otherwise have been lost. To that extent Messrs. Armitage and Johnson have benefited. These activities were not detrimental to their respective liabilities under the indemnity.

There is nothing to the point that the indemnity given to Torino Motors related to the anticipated sale by NTS because BFL and the two Torino companies regarded the arrangement as applying to the subsequent lease by BLC.

The sham argument is based on a lifting of the veil of incorporation and of the reasons for the settlement of the action between the receiver of RTS and Torino Heavy: the nominal parties were RTS v Torino Heavy but when one lifts a veil or two what emerges is Marac (Debenture holder) v BFL (Indemnifier) both of whom had, by the time of settlement, merged into Challenge: in the result the reality is that the action became Challenge v Challenge. On that line of reasoning the 50/50 compromise is exposed for what it is - a mere adjustment of accounts within a merged group of companies. Counsel submitted that the compromise was a sham, that BFL had no need to disgorge half the value of the Fiat which it had effectively seized from Torino Heavy and then disposed of and then credited RTS with $23,000 principal plus $4,000 in BFL's ledger for RTS. This submission is but a recantation of the submission that there was no causative link between the advance and the loss claimed i.e. that the loss claimed was caused by the company merger and the sham compromise of the Court action. I have already held in favour of BFL on causation. If one is to lift veils then the process must apply on both sides of the litigation. RTS borrowed $23,000 from BFL. Of that sum $12,735 was retained by BFL to repay prior indebtedness. The balance of $10,265 plus $3,735 of RTS money was used to free from Marac floor plan finance the vehicles traded

in for the Fiat. The Fiat was owned by BFL under the IWS. On the next day, due to crystallisation of Marac's debenture and the unenforceability of the IWS, the Fiat became Marac's. So Marac got $10,265 plus the Fiat from the transaction. BFL had nothing but the unsecured debt of an insolvent company plus indemnities from its two shareholders. BFL seized the truck and disposed of it. Thus Marac was put in the position originally intended; so was BFL. Marac and BFL merged. From then it mattered not if the Fiat was the property of Marac or of BFL. What did matter was that no one ever repaid BFL or the merged companies the advance of $23,000. Therefore RTS still owe it since RTS was never wound up. It went out of receivership in March 1981. Under the guarantee clause, as distinct from the indemnity clause, Messrs. Armitage and Johnson may have been called upon to pay $23,000 plus interest. Instead, under the indemnity clause, they are being asked to pay $13,500 plus interest $4,159.57 from 15th March 1979 (date of Fenton lease) to 11th May 1981 (effective date of compromise of the receiver's action). From the viewpoint of Messrs. Armitage and Johnson it is difficult to see oppression in terms of Section 9 of the Act or a contravention of reasonable standards of commercial practice in the cutting in half of their respective indemnity liabilities.

On the question of delay, there was no element of prejudice to either Mr. Armitage or Mr. Johnson established on the evidence. They are both intelligent, experienced, hard headed businessmen who are very experienced in motor vehicle dealing and all aspects of financing in

the trade. Moreover, the delay had the beneficial consequence of permitting the difficult question of ownership of the Fiat to be clarified. So it really comes back to the compromise of the receiver's action. This present action was commenced about thirteen months' later. It is difficult to appreciate how oppression by that delay begins to arise.

Finally, on the question of notice, Mr. Armitage clearly knew a good deal about the receiver's action and the compromise. He may not have had much prior notice of intention to commence this action. Mr. Johnson was instrumental in getting RTS out of receivership. Both he and Mr. Armitage paid Marac $17,500 for a discharge from Marac's debenture. That discharge applied to RTS, NTS, another associated company and all guarantors. The settlement is recorded in a deed dated 31st March 1981 (Exhibit R). It would be naive of Mr. Johnson, or Mr. Armitage, to contend that they had no, or insufficient, comprehension of their potential liability to BFL and the potential enforcement of that liability by Court action right from the time the receiver was appointed. With their business acumen and experience the contention is not maintainable. Nor was there any evidence of oppression as defined in Section 9 of the Act in regard to this action being commenced without prior notification.

For the reasons given I decline the applications of Mr. Armitage and Mr. Johnson to re-open the transactions evidenced by the respective deeds of indemnity and

guarantee.

## CREDIBILITY AND RELIABILITY

Generally speaking I found a favourable view of the credibility in the widest sense of Messrs. Armitage and Johnson. I formed the impression that they endeavoured to assist the Court to get to the truth of this involved and unsatisfactory transaction. Per contra, little assistance came from BFL. There was just enough evidence at the close of BFL's case to avoid a non suit. No such application was made. I reject the allegations of dishonesty levelled at Messrs. Armitage and Johnson in cross-examination and further pressed in counsel's closing address. To the extent that I have found facts or drawn inferences against any evidence of Mr. Armitage or Mr. Johnson those findings do not result from any adverse view, in the pejorative sense, of the evidence of either.

JUDGMENT

The Plaintiff is entitled to judgment against the defendants for $15,858.92 plus interest on the sum of $13,500 at the rate of 11% per annum from 11th May 1981 to the date of judgment plus costs according to scale on an action for the amount of the judgment inclusive of the interest plus disbursements and witness expenses as fixed by the Registrar. I certify for four extra days and the whole costs of the action.

6th July 1984.

Solicitors :

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| Plaintiff | : | Anthony Grove & Darlow Auckland. |
| Defendants | : | Jamieson, Wilkinson, Castles, Auckland |