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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY CP.70/86

LOW PRIORITY 1396

BETWEEN HATMAK ENTERPRISES LIMITED
Plaintiff

AND BRIAN THOMAS MITCHELL
Defendant

Hearing: 23 September 1986 (in Court for Chambers)

Clounsel: M.S. McKechnie for Plaintiff
J.N. Briscoe for Defendant

Judgment: 23 September 1986 (in Court for Chambers)

(ORAL) JUDGMENT OF BARKER J

This is an application for summary judgment in the following circumstances.

The plaintiff entered into two written agreements with the defendant for the sale by the plaintiff to the defendant of certain valuable photographic equipment. The first agreement, dated 14 April 1984, fixed the purchase price for certain equipment at $150,000. This sum was payable as to $2,500 deposit and the balance by 59 equal consecutive monthly instalments of $2,500 payable by the first of each month. The second agreement in respect of additional equipment fixed the purchase price at $25,000 with a deposit of $12,500; the balance was payable by 59 equal consecutive monthly instalments of $211.86.

Curiously enough, the agreements provided that possession was to be given and taken on 14 April 1984 and that, from that date, the chattels were to be at the sole risk of the defendant as purchaser. It appears clear that ownership in the goods passed on that date, despite the fact that, certainly in respect of the goods in the first agreement, most of the purchase price had not been paid.

There is no doubt that the defendant signed the documents. There is no allegation by him of fraud or of undue influence or duress or anything of that nature. The plaintiff seeks to enforce these agreements.

The defendant filed two affidavits which say in summary that he entered into these agreements as the manager of a company called Kandid Kamera Krafts Limited ('the company') of which he was then manager in Gisborne. He had no financial interest in the company which is now in receivership. He claims that, although he entered into the agreements as principal rather than as a servant of the company, he did not fully appreciate his true position. He further claims instalments were paid by the company and the deposit was paid by the company; therefore, the plaintiff had notice that the company was really the purchaser and not the defendant.

I cannot accept this submission. The agreements are clear on their face. They were entered into by the defendant personally; there is no suggestion of fraud by the plaintiff. The director of the plaintiff, a Mr Kidd, wrote a letter to the defendant prior to the agreements being signed which advised him that Mr Kidd was having agreements prepared by a solicitor which would be ready shortly. The letter summarised the terms of the agreements and said to the defendant: "If there is anything I have missed or misunderstood we can always adjust accordingly".

There is some dispute as to the source of the instalment payments which apparently came by automatic transfer from one bank account to another. Even if it were to transpire that these payments were made by the company, in my view, that does not mean that there was a novation by the plaintiff or that the plaintiff was required to look solely to the company rather than to the defendant for payment in terms of the documents.

Mr McKechnie referred me to the decision of Thorp J in Towers v R & W Hellaby Limited (Judgment 13 May 1986, CP.185/86,

Auckland Registry). That was a case where summary judgment was given to enforce a written agreement between the parties. His Honour discussed r.136 which gives the Court discretion to enter summary judgment where the plaintiff satisfies the Court that a defendant has no defence. At p.7 of the unreported decision, Thorp J said:

> "The critical question in r.136 will generally be whether the Court is satisfied that the plaintiff's case is unanswerable, and that it will not reach that conclusion if it can see an arguable defence. So as the English cases assist in determining whether in any particular case an arguable defence may exist, I see no reason why they should not be applied."

Thorp J also referred to the well-known decision of Prenn v Simmons, (1971) 3 All ER 327 where Lord Wilberforce indicated that agreements should not be isolated from the matrix of facts, nor are they to be interpreted purely on internal linguistic considerations; it may be appropriate to look at the factual background known to the parties on or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction.

Thorp J rejected the suggestion in the Towers case that documents in that case did not mean what they said. I myself am driven to a similar conclusion in the present case. The documents are unambiguous; they must be interpreted according to their tenor for the sake of commercial certainty and reality.

I am satisfied that the plaintiff's case is unanswerable. There will accordingly be judgment for the plaintiff.

The amount of this judgment is not clear. Clause 11 of the contract reads as follows:

> "11. IF THE Purchaser shall make default in payment of the purchase price or any part thereof or any interest thereon or in the performance or observance of any stipulations or agreements on the part of the Purchaser herein contained and such default shall be continued for the Purchaser herein

contained and such default shall be continued for the space of FOURTEEN (14) days the time for such payments and performance fixed by this Agreement being strictly of the essence of the contract then and in any such case the Vendor may without prejudice to his other remedies forthwith or at any time hereafter at the Vendor's option exercise all or any of the following remedies namely:

(a) Enforce specific performances of this Agreement including the payment of all monies payable hereunder in which case the whole of the unpaid purchase price shall be deemed to have become due and payable to the Vendor notwithstanding the due date of payment thereof as aforesaid may not have arrived.

(b) Rescind this Agreement in which case all monies paid by the Purchaser to the Vendor hereunder shall be absolutely forfeited to the Vendor as and for liquidated damages.

(c) Re-enter upon the premises occupied by the Purchaser and take possession of the Chattels without the necessity of giving any notice or making any formal demand.

(d) Without being under any obligation to tender a Transfer or any other legal assurance of the Chattels to resell the Chattels either by public auction or private contract either all together or in such lots and upon and subject to such terms and conditions as to payment of the purchase monies or otherwise as the Vendor shall think fit and the deficiency (if any) arising on any such resale and on every attempted resale together with all expenses whatsoever attendant on the same shall be forthwith made good and paid by the Purchaser to the Vendor as liquidated damages and any increase in price on such resale after deduction of such expenses shall belong to the Vendor."

It seems from Clause 11(a) above quoted, that the whole of the purchase price is now payable, since there has been failure to pay instalments.

The clause relating to interest is Clause 2 which reads as follows:

> "2. IF from any cause whatever (save the default of the Vendor) any portion of the purchase price shall not be paid upon the due date for payment thereof the Purchaser shall pay to the Vendor interest at the rate of TWENTY (20) per centum per annum on the portion of the purchase price so unpaid from the due date until payment thereof BUT NEVERTHELESS this stipulation is without prejudice to any of the Vendor's rights or remedies under this Agreement."

There is therefore an argument - I say no more than that - that 20% penalty interest accrues only on the outstanding instalments. Whilst the whole of the purchase price is now payable, I leave it to counsel to work out exact figures.

There will be judgment for the balance of the purchase price, together with interest at 20% in respect of each instalment as it fell due.

I do not think it proper in the circumstances to grant any further interest under the Judicature Act in addition to interest on the instalments provided for in the agreements.

The plaintiff is entitled to costs of $600 and disbursements as fixed by the Registrar.

R.D. Barker J.

SOLICITORS

McKechnie Morrison Shand, Rotorua, for Plaintiff

Chrisp & Chrisp, Gisborne, for Defendant