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IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

LOW PRIORITY

CP 37/89

BETWEEN ELITE CARS (NORTH SHORE) LIMITED (formerly trading as ROYAL OAK MOTOR COMPANY LIMITED trading as Team Royal Toyota)
Plaintiff

AND PETER SAIES-ALLEN and DENISE SHIRLEY DURHAM OGLE
Defendants

Hearing: 9 November 1989 and 12 December 1989

2303

Counsel: Susan Hughes for Plaintiff
P F Carrington for Defendants

ORAL JUDGMENT OF MASTER J H WILLIAMS, QC

This is an application by way of summary judgment for the balance claimed by the plaintiff to be due to it by the defendants pursuant to a hire purchase agreement. The matter had to be adjourned part heard on an earlier occasion, because the papers were not then in a completely satisfactory state and even now some of the evidence perhaps leaves a little to be desired, but is in a state where the matter can be determined.

On 8 November 1986 the defendants entered into a conditional purchase agreement with the plaintiff company, then called Royal Oak Motor Company Limited, for the purchase by the defendants of a Toyota Dyna double cab white commercial truck, registration no. MY5676 for a price which is expressed in the agreement to be $44,463 The agreement is in conventional form and showed a trade-in at net $13,000 on a 1984 Pulsar motorcar. In fact according to Mr Saies-Allen there were two vehicles traded in, one belonging to his wife and one to himself, but he agreed with the net figure. Under the heading "Insurance Particulars" appears the entry "AA Auckland full comp" and in the financial details box under "Insurance

premiums" of $3,995 appears the notation "PPP" which it appears from papers now before the Court stands for "payment protection plan". There was initially it seems some dispute about the ambit of the insurance cover on which the defendants intended to rely, but that was expressly disavowed at the second hearing of this matter, and in any case it now seems from Mr Saies-Allen's affidavit that, presumably at the time the policy was taken out, he and his wife were shown an abstract of the details of the insurance, so that that concession was probably correctly made.

An additional difficulty as far as the conditional purchase agreement is concerned is that, as I said, it records the cash price as $44,463. There is actually no evidence as to what the cash price was of the Toyota, but according to Mr Saies-Allen, and this is not countered by any evidence from the plaintiff in rebuttal, in fact the amount which the Saies-Allens borrowed was increased by some $10,000, that being what a Royal Oak salesman represented to them was the probable cost of a motorhome body which they intended to mount on the truck. In fact Mr Saies-Allen says, immediately after they had entered into the conditional purchase agreement, he and his wife found out that it would cost them about $26,000 to put such a body on the truck. He says he remonstrated with the salesman but was told that he had to continue with the conditional purchase agreement. Mr Saies-Allen says he was not told of his option to cancel the agreement, but that is clearly enough set out in the statutory form in the conditional purchase agreement.

The conditional purchase agreement was assigned and then reassigned. There is some uncertainty as to the names of some of the companies appearing in those assignments, but no point is taken of that by the defendants, and that matter is only of importance in that by 25 August 1988 at least NZI Finance, who was reassigning the vehicle, was writing to the Saies-Allens c/o P O Box 677 Hawera. It is clear that the Saies-Allens paid a number of the instalments of $1,022.93 payable under the

agreement from 8 December 1986 onwards, and that in total they paid the sum of $15,200.59. But it is equally clear that by early 1988 they were slipping behind in their payments. It seems that it was at about that time that Mr Saies-Allen was declared redundant from his job, and for a period part of the instalments due was paid by First Pacific Insurance pursuant to the insurance policy previously mentioned. But by about mid 1988 Mr Saies-Allen had been dismissed from his job and arrears under the conditional purchase agreement were mounting.

It is of course necessary for the plaintiff to demonstrate that it complied with the various requirements under the Hire Purchase Act 1971 in order to demonstrate its entitlement, if any, to summary judgment. In the first place, the Saies-Allens aver that they did not receive the required notice before repossession pursuant to s 26 of the Act. A copy of such a notice has now been put before the Court. It is dated 28 March 1988 and was addressed to 7 Marua Road, Ellerslie, Auckland, with a notation on it that a copy was also sent to Mrs Saies-Allen's mother. The Saies-Allen have not responded to that piece of evidence. There is no evidence as to how the vendor or the assignee knew of that address, but it is clear under Clause 26 of the agreement that it is the purchaser's obligation to give written notice to the vendor of any new address, so presumably whether in writing or in any other way the vendor had become aware of the Ellerslie address. In any case, the address of the mother, 17 Calais Terrace, Ostend, Waiheke Island is the address given for the Saies-Allens in the conditional purchase agreement. Also to be borne in mind are the provisions of s 46 of the Act which provides for a notice under the Act to be sufficiently served or given if it is delivered to that person or if it is left at his usual or last known place of abode or business, or at an address specified for that purpose in the Hire Purchase Agreement or if it is posted as a letter addressed to him by name at that place of abode or business or address. Under s 46(4) such notices if sent by registered letter are deemed to have been delivered on

the fourth day after posting. The plaintiff does not say whether or not the notice was sent by registered post, but the only inference to be taken is that the notice was properly prepared and forwarded in accordance with s 46.

The vehicle and motorhome body were retaken into the possession of the plaintiff or its assignee on 2 June 1988. The circumstances in which that came about need to be considered in somewhat greater detail. The Saies-Allens were clearly in arrears under the conditional purchase agreement at that stage. Mr Saies-Allen said that as a result he got in touch with a Mrs Heyder of NZI Finance, who was then administering the matter, in April 1988, and was told of the arrears and told that instructions had been issued to repossession agents and some comment was allegedly made concerning Mrs Saies-Allen's employment. As a result Mr Saies-Allen says:

> "On the basis that we had been advised that the repossession agents were coming to pick up our vehicle and that if we surrendered the vehicle no interest would be payable from the date of surrender as advised by Mrs Heyder I drove to Auckland from Hawera where my wife and I were living and surrendered the vehicle to NZI Finance Ltd."

He then goes on to say that the body was not then on the truck, so that he drove back to Hawera to pick it up and then returned to Auckland. He goes on to say:

> "My wife and I understood that on surrendering the vehicle the conditional purchase agreement would be closed and we signed a surrender form stating that the value of the goods in our estimation amounted to $63,000."

And he concludes:

> "We were under the clear understanding that when the vehicle was repossessed we would have no further liability under the contract and understood that with a completed body on the deck the vehicle would easily satisfy the balance due pursuant to the agreement."

Mrs Saies-Allen says that in May 1988 she telephoned Mrs Heyder and that:

> "Mrs Heyder went on to convince me that it would be better in all the circumstances if my husband and I returned the vehicle and that if we did so we would not be subject to any further action by NZI Bank Ltd. For those reasons my husband returned the vehicle and signed a consent to sell notice."

She then says:

> "I absolutely deny that I said to Mrs Heyder that all the money owing under the agreement would be paid as I was under the clear impression that because the vehicle had been returned that there was no longer any money owing."

In response Mrs Heyder, who worked for Marac Finance and then following its takeover for NZI from 1985 down to August 1988, said that the first contact from Mr Saies-Allen was in early March 1988 after he had been made redundant. He apparently said that the couple were living in the truck and would have nowhere to go if the vehicle were repossessed and that they could not afford to pay any penalty interest. As a result she says she agreed that:

> "Provided he made his payments on time and kept NZI informed at all times as to his whereabouts and kept in touch with me if for any reason he couldn't make his payments then we would waive the penalty interest being charged on his arrears. This arrangement was made to make it easier for the defendants to meet their repayments."

She says however that no payments were received and that they had difficulty then locating the defendants, but managed to find them in May 1988. She says at that point she had a discussion with both defendants. She said that the phone call was abusive. She told Mr Saies-Allen that no further repossession costs would be charged if he returned the vehicle to Auckland, and she says:

> "I absolutely deny that I agreed or stated or implied in any way to either defendant that there would be no further liability under the agreement once the vehicle was repossessed. NZI never write these sums off, which in this case were quite substantial. We had not even established the shortfall at that stage."

She then gives details of a visit by Mr Saies-Allen to her premises in June 1988. It is unnecessary to go into details of that, but she does say that:

> "Every time I spoke to Mr Saies-Allen he told me he would pay everything owing in full. Denise Ogle, as Mrs Saies-Allen then was, also said we would be paid all the money owing under the agreement."

To an extent at least those statements are confirmed by a letter from Mr Saies-Allen to the plaintiff dated 7 August 1988 addressed from c/- P O Box 677, Hawera, in which he says:

> "My intention is of course to settle the account in totality as soon as possible."

But he does go on to make certain other allegations about the plaintiff's conduct and the interest rates it charged. It will be convenient to refer back to that factual recital a little later in this judgment, once the narrative of facts is completed.

The vehicle was surrendered to the plaintiff or its assignee as was the body on the back, and the parties and the Saies-Allens signed documents agreeing to the surrender, including what was their estimate of the worth of the truck and body. On 16 June 1988, not 16 August 1988 as Mr Saies-Allen says in his affidavit, the required notice was forwarded by NZI pursuant to s 28 of the Act. Mr Saies-Allen says that that notice was not received. It was addressed to P S Allen and D S D Ogle, 59 South Road, Hawera. Again there is no evidence as to how that address was ascertained. Mr Saies-Allen asserts that they did not receive that notice but that is somewhat gainsaid by a letter from NZI Finance which was sent to him at Unit 6, Dilworth Motel, Great South Road on 27 July 1988 which speaks of "your query of 25 July 1988 requesting a settlement figure on the above account" and giving that figure current up to 8 August 1988, in the same amount which appears under the s 28 notice. There was then clearly some correspondence between the parties because NZI Finance wrote again to Mr Saies-Allen, this

time c/- P O Box 677, Hawera, on 18 August 1988, thanking him for his letter of 7 August recording the voluntary return of the vehicle and the signature of the consent to sell noted, and saying:

> "We then sent you an advice to purchasers detailing your right to reinstate or settle this agreement."

and recording that the Saies-Allens had had discussions with McMillan Motors, one of the other companies mentioned in the assignments regarding the sale of the vehicle and its likely value. Once again there seems nothing in the evidence to suggest that s 46 was not complied with in the forwarding of the s 28 notice.

The vehicle and the body were detached and sold separately. The total sale price was $25,660, some $600, perhaps $660 with GST, being the sum which was obtained for the body. There were repairs which were carried out by the plaintiff, which seem, despite the Saies-Allen's assertions, readily enough required when one peruses the photographs which are before the Court. Then on 18 October 1988 the plaintiff sent the defendants a statement of account after sale pursuant to s 32. The Saies-Allens complain that they were never advised of the proposed offering of the goods for sale by tender, which was the means adopted for sale, and there seems no evidence to countermand that assertion, but having regard to the history of the matter through Mr Saies-Allen's redundancy and then his dismissal from work and the financial stringency from which the couple had obviously suffered during the period from approximately March 1988 onwards, there seems no reason to suppose that the Saies-Allens would have been in a position to redeem the truck and body in any case. In any event, pursuant to s 28(7),(8), all that is required is notice to be given, which does no more than invite the purchasers to bid at an auction or put in a tender, although s 28(9) does say that the onus of proving that the goods have been sold in accordance with this section shall be on the vendor.

That statement of account after sale was sent to the defendants at P O Box 677, Hawera, and was followed by a letter of demand sent to them this time care of Mrs Saies-Allen's mother, 17 Calais Terrace, Waiheke Island on 18 November 1988, recording the original account sent to P O Box 677, Hawera. The notice of 18 October 1988 refers to a sum due from the defendants to the plaintiff of $13,650.61 and Mr Saies-Allen makes some criticism of the difference between that sum and the sum originally sought in this proceeding, $23,573.62, but given the time which has elapsed since then and the rate of penalty interest payable on instalments and arrears, there seems no reason not to accept the plaintiff's figures in that respect.

As to the facts, it remains to add that following the repossession of the truck and body the insurance cover was cancelled by the plaintiff and a sum received from the insurance company which has been credited against the amount claimed. The defendants sought to call that action in aid as evidence in support of their claim that the plaintiff was estopped from asserting its rights in this matter, notwithstanding that it seems clear that the first the defendants knew of the plaintiff's action in that respect was when they received these papers.

There are therefore three matters of substance which need to be dealt with in deciding this matter. The first, the lack of notice as to the tender, can be swiftly disposed of. Although it seems that the plaintiff was in breach of the Hire Purchase Act in that respect it is to be noted that that breach of itself does not either make the contract illegal or unenforceable: the Hire Purchase Act 1971 s 52.

The second matter relates to the conflict between the Saies-Allens and Mrs Heyder as to what may have been said during their conversation leading up to the surrender of the vehicle as to the Saies-Allen's liability beyond surrender. I

remind myself that this is an application for summary judgment and that the onus is on the plaintiff and that where there is a dispute as to facts in such an application it will not often be right to enter summary judgment. Pemberton v Chappell [1987] 1 NZLR 1 at 4 per Somers J. The approach to affidavit evidence is as set out in the well-known decision in Eng Mee Yong v Letchumanan [1980] AC 331 at 341 and Attorney-General v Rakiura Holdings Ltd (1986) 1 PRNZ 12 at 14. In the well-known speech of Lord Diplock from the former case his Lordship said that:

> "A Judge is not bound to accept uncritically as raising a dispute of fact which calls for further investigation every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself it may be."

I also remind myself of the approach to claimed factual disputes enjoined by the Court of Appeal in Bilbie Dymock Corporation Ltd v Patel and Bajaj (1988) 1 PRNZ 82. In that case the learned President said that:

> "Whilst exercising judicial caution the balancing exercise to be undertaken in such cases sometimes requires a robust and realistic judicial attitude to the resolution of claimed factual disputes."

Having regard to those authorities, in my view the following matters are of importance.

1. At the time the representation is said to have been made by Mrs Heyder the plaintiff was quite unaware of the value of the vehicle or of the body and thus whether or not there would be a shortfall, and if so of what amount.

2. At the time the representation is alleged to have been made repossession had not been undertaken and in fact the plaintiff had lost contact with the defendants, who had failed to advise them of changes of address.

3. At the time the representation was made Mr Saies-Allen had recently been made redundant and had had to call on the insurance company to assist the couple in bringing their payments up to date.

4. It can only be described as inherently improbable that Mrs Heyder, an experienced officer of a finance company, would have made a statement which would have committed the finance company to a course of action which may well have involved it in substantial loss, when the circumstances of the matters just referred to were quite unknown to her. She must have known that in many such cases there is a shortfall and that she would be doing her employers a disservice if she were to make statements such as those alleged. The alleged statement is also somewhat at variance with documents produced at round about the same time, and in particular the correspondence from and to Mr Saies-Allen shortly after the repossession.

In those circumstances I hold that, exercising a robust and realistic approach to the affidavits the only conclusion which the Court can reach is that no representation was made by Mrs Heyder that the defendant would have no further liability to the plaintiff if the defendants voluntarily surrendered the vehicle and the truck body.

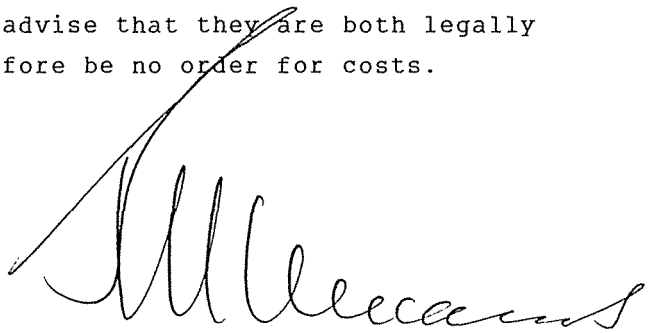
The third and final matter is that the defendants claim either that the plaintiff has waived its rights or is estopped from relying on them. Having reached the factual conclusion which I have the necessary consequence is that there is no unequivocal representation to which the defendants can point which would have induced them to alter their position to their detriment in reliance on it. They were, it must be remembered, in arrears at the time. Mr Saies-Allen was out of work. Their chances of meeting the instalments were poor. They were invited to surrender the vehicle and body to the plaintiff to avoid incurring further repossession charges, already quite

substantial, and they did so. But that cannot amount to an unequivocal statement by the plaintiff that it would not rely on its rights. In fact the evidence suggests that the plaintiff made it clear that it intended to assert its rights and offered surrender of the vehicle to the defendants only as a means of minimising the financial result. See Connor v Pukerau Store Ltd [1981] 1 NZLR 384.

A similar fate befalls the alleged defence of estoppel. Once again there is no representation which has been accepted by the Court, and it would be difficult for the defendants to claim that any actions which they took in any case were to their detriment, having regard to the position in which they found themselves at the time. Those alleged offences are therefore rejected.

On that basis the plaintiff has satisfied the Court pursuant to R 136 that the defendants have no defence to this proceeding, and there will be summary judgment for the plaintiff against each of the defendants for the net sum now owing which amounts to $21,257.86 plus interest as per counsel's memorandum, $5,116.68, a total judgment of $26,374.54.

The defendants' counsel advise that they are both legally aided. There will therefore be no order for costs.



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Master J H Williams, QC

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