IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 1136/90

BETWEEN W T JAMES
Plaintiff

A N D FIRST PACIFIC INSURANCES LIMITED
Defendant

Hearing: 16 October 1990

Counsel: Mr Sinclair for the Plaintiff
Mr Kimpton for the Defendant

Judgment: 29 OCT 1990

RESERVED JUDGMENT OF MASTER TOWLE

This was an application for summary judgment brought by the Plaintiff seeking an amount of $53,709.19 for insurance cover arranged by him in connection with the purchase of a motor vehicle under a conditional purchase agreement. It arises in the following circumstances.

The Plaintiff is a well known public entertainer. On the 13th September 1986 he entered into a conditional purchase agreement with a firm of motor vehicle dealers called Royal Oak Motor Company Limited for the purchase of a 1986 Toyota Supra car. The total amount payable in terms of the

agreement was $119,357.75 expressed as being payable over a period of three years by way of 35 monthly instalments of $1981.65 followed by a final monthly instalment of $50,000. The first payment was due on the 13th October 1986 and the final one on the 13th October 1989. Included in the purchase price was an amount of $5,000 as a premium paid to obtain the benefit of a consumer credit insurance policy offered by the Defendant as part of the transaction through the motor dealers. At the same time as completing the conditional purchase agreement the Plaintiff also signed a proposal with a declaration relating to the intended cover under a payment protection plan run by the Defendant. No medical report was required at that stage although the Plaintiff did sign a personal statement in November 1986 that he was in good health and was unaware of any special factors which might affect the risk of insurance on his life. In accordance with the cover accepted by the Defendant it agreed, subject to the terms exceptions and conditions of the policy, in the event of a specific event as defined in the schedule occurring during the period of insurance, to pay on behalf of the Plaintiff to the owner the benefit specified in the schedule. The schedule prescribed inter alia that in the event of the Plaintiff sustaining any illness (unless specifically excluded) which caused his total disablement from attending to his usual business or occupation for not less than seven consecutive days from the commencement of medical attention, the

Defendant was obliged to pay to the owner all instalments under the conditional purchase agreement (excluding arrears) for the period of such total disablement calculated on a daily basis. Various conditions and exceptions were set out in the policy but clause 4 of the conditions is relevant and read:

> "If any goods forming whole or part of the subject of the hire purchase agreement are repossessed by the owner, the policy thereupon shall be null and void."

The conditional purchase agreement itself at clause 17 recorded that delivery of possession of the goods to the purchaser was made on the express condition that the property was not to pass to the purchaser until all monies owing by him under the provisions of the agreement had been paid. The benefit of the agreement was assigned by the Vendor motor dealer to NZI Finance Limited on the 18th September 1986. The Plaintiff took delivery of the car and started making the regular monthly payments which he did without interruption until November 1988.

The evidence is that he was temporarily disabled by having to undergo a gall bladder operation in November 1986 soon after the agreement started to run and that he received from the Defendant a benefit in terms of the insurance cover at that time. In passing it may be noted that the amount received by him was calculated over a period of 25

days when he was unable to attend to his normal business and was actually calculated on a monthly instalment basis of $3,315.49 which the Defendant at that time apparently believed was the correct monthly instalment figure. That amount is reached by dividing the total amount payable in terms of the conditional purchase agreement of $119,357.75 by 36 and the calculation does not of course take account the true monthly instalment figure or the intended final instalment of $50,000 which was due to be paid on the 13th October 1989.

On the 21st August 1988 the Plaintiff suffered a heart attack. Initially he was off work for a short period only until the 20th September. He was able to resume employment from the 21st September to the 5th November when he had another severe cardiac episode and was admitted to Greenlane Hospital. He was totally unable to return to his normal duties as an entertainer until well into 1990 and eventually underwent a heart transplant operation in November 1989 from which he now appears to have made a miraculous recovery. The evidence satisfies me that he was totally unable to attend to his normal calling after the 5th November 1988 until well after the time when the last instalments under the conditional purchase agreement had fallen due.

A term of the insurance cover was that any claim by the insured should be lodged within 30 days of the occurrence. of the event relied upon. As already recorded the Plaintiff had met the instalments due up to the 13th November 1988 which was just after he suffered his major illness. It is not clear when he first sought legal advice but a claim was delivered to the Defendant on the Plaintiff's behalf by his then solicitor, Miss Anderson on the 10th February 1989. That letter enclosed a claim form together with a medical report dated 31st January 1989 from Dr Hillebrand who was the Plaintiff's general practitioner which recorded the illness and contained a statement that he had no previous history of angina or ischaemic heart disease. The covering letter asked that the "loan" (obviously a mistake for "claim") should be processed as quickly as possible. The Defendant acknowledged this letter on the 20th February. Because Dr Hillebrand had only treated the Plaintiff for the past twelve months the Defendant insisted upon a five year medical history being provided with the details of all consultations and medications prescribed during that period. The letter also acknowledged that the Defendant was holding a copy of the hire purchase agreement and noted that the agreement provided for repayments by 35 instalments of $1981.65 and one instalment of $50,000. The letter ended with an observation in these terms:

> "Therefore, in the event of a claim other than for death the monthly instalments payable in respect of this policy will be $1981.65. In the event of a death claim, however the full balance outstanding on the hire purchase agreement, less any arrears, would be payable."

Quite what was the purpose of the reference to a death claim is not clear except that the cover afforded did provide that in the event of death the benefit available was for all outstanding hire purchase instalments as at the date of death but excluding any arrears. Fortunately the Plaintiff who is obviously a man of no little determination, survived. The Defendant produced a copy of its letter of the 20th February which requested the five year medical history which contained a notification by hand to this effect:

> "Adam K, NZI phoned re PP. Car is very close to repossession."

That notation is initialled and dated the 10th March but it makes it clear that the Defendant was already in touch with the finance company about the arrears which were starting to build up under the conditional purchase agreement and knew that the vehicle was likely to be repossessed. Dispite this and the certification that the Plaintiff had no pre-existing history of heart disease, the Defendant insisted on obtaining a five year history. On the 30th March the Defendant wrote to the Plaintiff's solicitors confirming

that they had been contacted by the finance company regarding a decision on the claim but repeating that this was "not possible" until the information requested over the five year medical history had been provided. The finance company decided to wait no longer and repossessed the vehicle on the 31st March 1989. The evidence showed that there was continuing correspondence between the Plaintiff's solicitors and the Defendant to obtain the additional information and to clarify the earlier period when the Plaintiff was off work briefly. It was not until the 20th July 1989 that the Defendant wrote to the Plaintiff's solicitors to say it was now in a position to offer settlement in respect of his illness. That was calculated as covering a period of 31 days from the 21st August 1988 to the 20th September 1988 and then a continuous period from the 6th November 1988 until the 31st March 1989. It advised that this termination date was the one on which the vehicle had been repossessed and claimed that because of condition 4 of the master policy previously quoted the Defendant's liability beyond that date ceased after the vehicle had been repossessed. A calculation based upon the monthly instalments of $1981.64 followed together with a claim that this should be reduced by an amount of $1096.25 allegedly overpaid during the gall bladder episode in 1986 when the insurance company was proceeding upon the higher monthly instalment figure of $3,315.49. That letter offered a total payment of $10,435.30 and enclosed a

discharge which the Plaintiff was asked to sign acknowledging that by that payment he accepted it in full and final settlement of his claim under the insurance cover resulting from his myocardial infarction commencing on the 21st August 1988.

It is to be noted that the Defendant has not made any further payments to the finance company as was envisaged by the wording of the insurance cover under which the Defendant undertook to pay on behalf of the insured the instalments due to the owner. In addition the Defendant sought to introduce as a condition before any payment be made that the Plaintiff should give a full discharge of any further claim under the policy. The letter of the 20th July was not written without prejudice and may be taken a waiver of any right that the Defendant might have had to decline liabililty in terms of the late notification of the claim.

The Plaintiff changed his solicitors about this time but about 10th August 1989 the new solicitor wrote to the Defendant and further correspondence followed between the parties. No agreement was reached as to the extent of the cover being offered by the Defendant and the Plaintiff was unwilling to sign the discharge. The lack of progress is understandable since the Plaintiff underwent the heart transplant operation in November 1989 and must have been

unfit to attend to any sort of business for many months.

He deposed that on the 21st May 1990 he received a formal demand from a firm called Team Corp Holdings Limited which appears to be the successor in title of the original car dealing firm, for an amount of $53,709.19 representing the alleged deficiency after the motor vehicle had been sold as recently as the 15th May 1990, which was well over a year after it had been repossessed by the finance company. I was advised that there had been reassignment of the conditional purchase agreement between the finance company and the dealer but no explanation has been offered as to why so long a period went by after repossession before the car was sold. No affidavit has been filed by the finance company but it is to be noted that the claim for the short fall after the sale includes amounts approaching $10,000 for the expenses of possession, resale and storage and a further substantial claim for penalty interest. The amount received by the finance company on the sale of the car was only $33,500. The Plaintiff claimed that he had been quite unable to meet the remaining instalments under the original conditional purchase agreement because of his illness and that as a result of the Defendant insurance company's failure to protect him under the insurance cover he claimed he had sustained a loss equivalent to the sum demanded of him by the dealer of $53,709.19 and had lost all rights to the car.

The statement of claim has been presented in this way and for a figure which obviously includes certain items which the Plaintiff claims as damages in consequence of the failure by the Defendant to indemnify him in terms of the insurance cover. At the hearing however the claim was argued on the evidence that the insurance company had failed to meet the regular monthly instalments from November 1988 until the end of the period covered by the conditional purchase agreement on the 13th October 1989. This would have amounted to some 10 monthly payments of $1981.65 each plus the further final instalment of $50,000 or a total of $69,816.50 as against the actual amount claimed of $53,709.19. In other words the Plaintiff was appearing to present his claim as being one for damages for breach of contract whereas he is really seeking to be paid the benefits he claims are due in terms of the contractual documents. In a summary judgment context this creates the position that the Plaintiff has deposed to his belief that the Defendant has no defence based upon a claim for damages for breach of contract, whereas what he is really contending for is a declaration that he be paid all sums that are properly due to him in terms of the contract of insurance together with a further claim for consequential loss as the result of the Defendant's failure to pay the finance company.

Had the claim been made promptly when the Plaintiff was first taken seriously ill, any further legitimate enquiries by the Defendant as to his medical history over the previous five years would have been dealt with long before the finance company became concerned about the build up of arrears and that on being satisfied on this the Defendant would have been obliged to have kept the monthly payments going, which of course would have prevented the finance company from being able to exercise its right to repossess the vehicle. Although the Defendant had no formal notification of the claim until February 1989, it chose not to accept the statement from the medical practitioner that he had no previous history of angina or ischaemic heart disease, but still insisted upon further medical evidence being provided before it made its mind up whether to accept liability at all. It is perhaps worthy of note that not until its letter of the 20th July 1989 was any mention made that it intended to rely upon clause 4 or the fact of repossession of the vehicle as a means of limiting its liability for instalments due up until the 31st March 1989. Were this to be a claim by the Plaintiff for a declaration of liability by the Defendant to indemnify the Plaintiff for the outstanding instalments during the whole period of his total disability the Plaintiff would have come close to satisfying me that there was no reasonably arguable defence. The claim is however presented as being one for

damages including claims for consequential losses sustained by the Plaintiff up to the amount that he may ultimately have to pay to extinguish his liability under the conditional finance agreement. In this particular instance I do not believe that I can properly deal with the question of liability in isolation from what is actually claimed and therefore, and with some reluctance I come to the view that this application for summary judgment must be declined.

It is not a situation where I believe I could at this late stage permit an amended statement of claim to be filed as the Plaintiff has simply not clarified the basis on which he seeks to hold the Defendant liable.

The application for summary judgment therefore must be dismissed and the matter be resolved by ordinary procedure. The Plaintiff will undoubtedly wish to file an amended statement of claim and should do so within 14 days of the date of this judgment. The Defendant should file its statement of defence within a further period of 14 days and leave may be sought by either party to seek further directional or timetable orders as may be required to ensure that the claim is brought to a hearing with the least possible delay.

As to costs, I fix these in relation to the hearing in an amount of $1400 but the incidence is to be determined by

the eventual outcome of the proceedings.

MASTER R P TOWLE

Solicitors

Sinclair Frankovich, Auckland, for the Plaintiff
Rudd Watts & Stone, Auckland, for the Defendant

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