IN THE SUPREME COURT OF TONGA (CONDITIONAL SALE AGREEMENT)
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 37 of 2010

BETWEEN : 1. PAAME UHI
2. SELA UHI

- Plaintiffs

AND : 1. MELEANE & VA'A TOLOKE
2. TOLOKE ENTERPRISES

- Defendants

K. Piukala for the Plaintiffs
L.M. Niu for the Defendant

JUDGMENT

[1] The Defendants who are dealers in motor vehicle entered into a conditional sale agreement with the Plaintiffs in respect of a Toyota Hiace (Registration number L13053) on 11 September 2008. The purchase price of the vehicle was T$20,000. The First Plaintiff paid T$7000 towards the purchase price on 11 September while sums of T$1300 specified to be "10% interest" and T$1400 specified to be "insurance payment" were added to the sum owed. The balance remaining to be paid was therefore T$14,300.00.

[2] On 16 March 2010 the Defendants repossessed the vehicle on the grounds that the Plaintiffs had failed to make all repayments as

required by the agreement. It is accepted that on the date of repossession a balance of T$4800 remained to be paid.

[3] On about 17 March 2010 the Defendants re-sold the vehicle for T$9000. After deductions for the cost of the repossession, cleaning and servicing the vehicle and the balance of the debt, the Defendants pleaded in the Statement of Defence that they held the sum of T$2476.00 which they admitted owing to the Plaintiffs.

[4] The Plaintiffs claim for damages is not very clearly pleaded however, it is sufficiently clear that they claim the value of the repossessed vehicle plus general damages for "anguish and loss".

[5] The central question before the Court is what were the exact terms of the conditional sale agreement?

[6] The Plaintiff told me that the agreement which he signed was a two page agreement, a copy of which he produced as Exhibit P-1. A translation of that agreement was produced by the Defendants as Exhibit D-3/4. The first page shows that the details of a purchaser named "Soakai/Tatau Teaupa of Malapo telephone number 31-108/48-630" have been deleted and replaced by the First Plaintiffs' name and details. Further down the page the words "Mitsubishi Pajero" have been deleted together with the purchase price, deposit, interest, insurance and balance and have been replaced with "Toyota Hiace" and the details of cost, balance etc. already referred to in paragraph [1] above.

[7] The second page of the agreement contains the signatures of the First Plaintiff and First Defendant. Beneath the date the following endorsement appears, signed by the First Defendant:

> "This vehicle $200.00 per month will be paid but he will travel overseas and will bring a substantial sum to pay the vehicle in December".

[8] The First Defendant told me that these two pages were only the first and fourth pages of a four page agreement, the second and third pages of which have been misplaced. It was pointed out that paragraph 3 of the agreement, commencing on the first page is obviously not complete. The First Defendant produced Exhibits D-4, 5, 6 & 7 (English translation D-9, 10, 11 & 12] which, although copies of another agreement with another person not connected with this case were said to be copies of the standard form of conditional sale agreement used by the Defendants. All that was required, the First Defendant explained, was for the name of the individual purchaser and the terms of the purchase to be entered into the blank form.

[9] Relying on this form of agreement, the First Defendant referred me to paragraphs 8, 16 and 19.

[10] Paragraph 8 of the Form makes it clear that the total amount owed by the purchaser is to be repaid by 12 monthly equal installments over the course of one year. Paragraph 16 provides that if the purchaser breaches any clause of the agreement then the Second Defendant "will contact him to return the vehicle ... without question or dispute and without any need for a Court order". Paragraph19 provides that

following the return of the vehicle pursuant to paragraph 16 the purchaser will have seven days to repay the outstanding balance. In the event of failure to repay within this period "the purchaser will then no longer have any right to the vehicle and it shall be allowed for the [Second Defendant] to please itself with its vehicle to re-sell or do any other thing as [the Second Defendant] may decide".

[11] The first question for decision is whether the contract actually entered into between the parties was the two page version or whether it was a four page version following the form of Exhibit D-5, 6, 7 & 8. It has been noted that the First Plaintiff's case was that he only signed the two page version. The First Defendant told me that the four page version was the one that he signed in her presence. She explained that the deletions were the result of adapting a form which had already been used once. This had been done because the printer which printed out the blank forms had broken down on the day that the agreement was reached. When the Defendants looked for their copy of the agreement after the legal proceedings were commenced, they could only find the two pages D1 and D2 [P1 or P2]. The First Defendant did not know why the other two pages of the agreement were missing.

[12] Part of an explanation for the disappearance of pages 2 and 3 was offered by the Defendant's first witness Simaima Afungia who told me that she was working for the Defendants in 2008 when the agreement was signed. As she remembered it, it had four pages. She did not know what had happened to the two missing pages, however, since the Defendants only used paper clips to clip the four pages of the agreements together, perhaps pages 2 and 3 had become detached.

This witness also explained that the Defendants sometimes had to use forms which had already been used once when the forms "ran out".

[13] In my view the Defendants' assertion that the agreement was contained in a four page version faces two fundamental difficulties. The first is that the endorsement on D2 would be inconsistent with the figure of $1191.67 which Mr Niu told me would have been the figure inserted in paragraph 8(a) of the four page agreement. The First Defendant told me that the First Plaintiff agreed to repay the whole sum in twelve months by twelve equal monthly payments (i.e. of T$1191.67) however shortly after signing the agreement he returned to the Defendant's office and explained that he could only in fact pay T$200 per month until he would be able to pay a lump sum in December. This account of what occurred was never put to the First Plaintiff and I do not accept it. I find it inconceivable that the Plaintiff, who struck me as an honest straightforward witness, would have agreed to pay a sum six times greater than he realised shortly afterwards he could in fact afford.

[14] The First Defendant appeared unsure whether the endorsement meant that the whole sum owed was to be paid off by the end of December 2008 however we know, as a fact, that it was not. Document P2, a record of repayments made by the Plaintiffs to the Defendants shows that as a 12th December 2008, the balance owed was T$13,900 while by February 2009 it had only reduced by a further sum of T$200.

[15] The second difficulty is the fact that, with only four exceptions, the First Plaintiff only ever repaid sums of T$200, T$300 or T$350 and not even once repaid the sum (T$1191.67) which on the Defendant's case he was supposed to repay according to the alleged written terms of the agreement. This, coupled with the fact that these payments continued to be accepted by the Defendants for well over a year after the date that the full amount was supposedly to have been repaid, suggests either that the contract did not in fact specify that the whole amount was to be repaid within 12 months (which is consistent with the endorsement) or that a variation of the contract was agreed to by the Defendants.

[16] The First Defendant's evidence on this point was that she allowed the First Plaintiff to pay only T$200 or so each month because he was from the same village as she was and she felt sorry for him. I accept that this may well have been the case but do not accept that once the Defendants had allowed the contract to be varied it was open to them unilaterally and without notice or, at the very least, reasonable notice to revert to the original terms.

[17] The First Defendant told me that she spoke to the First Plaintiff by telephone seven days before the vehicle was repossessed and warned him that unless the full amount was repaid within seven days it would be repossessed. This was not put to the First Plaintiff who told me that the first he knew of the seizure was on 16 March when his wife telephoned him to tell him what had happened. He then rushed back to Tonga. It was not disputed that the repossession took place on or about 16 March and that a final payment of T$600 was received from the Plaintiffs and accepted by the Defendants only the

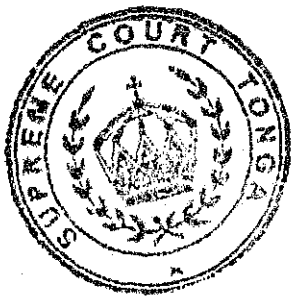
day before (see Exhibit P2). Even had the First Defendant given the First Plaintiff seven days notice to repay the whole amount failing which repossession would occur, that is not consistent with the procedure specified in the alleged Clause 8 of the agreement upon which the Defendants rely. Under that clause, the seven days notice runs *from* the repossession, not *before* it, thereby allowing the debtor a final opportunity to redeem. In the present case, the First Plaintiff came to the Defendants the day after the vehicle was seized and offered the whole amount owing, $4800 in cash. By that time, however, the vehicle had already been sold.

[18] Put very simply, it is now accepted that out of a total sum of T$21,300 owing on the vehicle, only T$4800 remained to be repaid and that sum was offered to the Defendants at most two days after the vehicle was repossessed and resold. The Defendants suggested that they were within their contractual rights to act as they did. In my opinion there is a real doubt as to the precise terms of the conditional sale agreement between the parties, whether as originally agreed or as subsequently varied. In these circumstances the rule is that the contract is constructed against the grantor. Adopting this approach to the facts before me as I find them, I am not satisfied that the Defendants acted as was permitted by the agreement, either in the two page or the four page version. In my view, the sale of the vehicle without allowing the Plaintiffs a reasonable opportunity to redeem was not provided for in the agreement and as a result caused the Plaintiffs loss.

[19] The First Defendant told me that the vehicle (which had been worth T$20,000 in September 2008) was resold for only T$9000 in March

2010, 18 months later, after it had been cleaned and serviced. There was no claim by the Defendants that the vehicle had suffered any damage or significant deterioration after the time of its purchase. The First Defendant admitted that when she offered the vehicle for sale and successfully concluded a sale not more than two days after the repossession, her first concern had been to recover the amount still owed. In all the circumstances it is plain to me that the vehicle was sold at a substantial under value. In the absence of any evidence on the point I find no reasons to discount the value of the vehicle at all.

[20] The result is that I find that by reason of the Defendants' activities the Plaintiffs have lost a vehicle for which they had paid $16,500. There will be judgment for the Plaintiffs in that amount. Although these events were undoubtedly distressing to the Plaintiffs, applying established principles for the award of damages, I decline to award any damages for anxiety and suffering. I will hear counsel as to costs.



M.D. Scott

DATED: 22 June 2012. **CHIEF JUSTICE**

N. Tu'uholoaki
22/6/2012