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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2007 HCV 03525

BETWEEN

DELROY HAYLES

CLAIMANT

AND

MACK D'S AUTO SALES &
RENTAL LTD

DEFENDANT

Miss Georgette Scott, Attorney-at-Law for the Claimant

Miss Elizabeth Salmon, Attorney-at-Law for the Defendant

Hire-Purchase Act Sections 24 & 25 – Recovery of Possession of Motor Car

whether Unlawful – Unregistered Bill of Sale

Heard on the 2nd & 31st July 2008

Thompson-James J, (Ag.)

Introduction

By way of fixed date claim form dated the 31st August 2007 and filed on the 4th September 2007; the Claimant Delroy Hayles, (herein after referred to as the Claimant) seeks against the Defendant Mack D's Auto Sales and Rentals Ltd. (hereinafter referred to as the Defendant) the following orders:

- (1) A declaration that the Claimant be released from all liability to the Defendant.

- (2) An order that the Defendant do repay the Claimant the sum of five hundred and forty-four thousand, six hundred dollars (\$544,600.00) being money had and received from the Claimant or such sum as the court may think just.
- (3) An order that the Defendant pays the Claimant the sum of three hundred and fifty-six thousand, two hundred and fifty dollars (\$356,250.00) representing loss of income for fifteen (15) weeks and continuing.

Accompanying the fixed date claim is a Particulars of Claim outlining the terms of agreement and the arrangements between the parties in respect to the purchase of a first motor vehicle, the difficulties experienced by the Claimant in renewing or obtaining a Certificate of Fitness in relation to this vehicle and the subsequent replacement of the vehicle.

The Claimant and Defendant filed affidavits.

The Background to the Claim

On or about the 17th August 2003 the Claimant purchased a used motor vehicle from the Defendant. There seems to be a dispute as to whether it was a Nissan or a Mazda motor vehicle. The motor vehicle was purchased at a cost of about \$400,000.00. The parties agreed that the Claimant would make a deposit of \$70,000.00 and monthly payments thereafter.

After being in possession of this vehicle for about one (1) year the Claimant had difficulties renewing a Certificate of Fitness that had expired. He could not obtain one as there was a discrepancy between the engine and chassis number of the vehicle. This probably explains the dispute as to the make of the vehicle.

When the Claimant brought this to the attention of the Defendant he was told to select another motor vehicle. He selected a 1998 Toyota Caldina motor car priced at four hundred thousand dollars (\$400,000.00). The seventy thousand dollars (\$70,000.00) deposited on the first car was applied to the Caldina motor car making the purchase price in fact three hundred and thirty thousand dollars (\$330,000.00). A consumer bill of sale signed by both parties exhibited as DM'1' in relation to the Caldina was stamped but not registered.

A commitment letter under a finance facility signed by both parties as well is exhibited as DM'4'.

This exhibit indicates that the loan was three hundred and thirty thousand dollars (\$330,000.00) and the interest rate was 23% calculated at an amount of \$215,424.00 making a grand total hire purchase price of five hundred and forty-five thousand four hundred and twenty-four dollars (\$545,424.00).

Exhibit DM'4' specified the terms and conditions of a loan to finance the purchase of the Toyota Caldina Motor-car.

According to the Defendant the Claimant defaulted on his payments and as a result the Caldina was repossessed and sold. The Claimant vehemently denies this.

The Claimant's Submission

Counsel for the Claimant Miss Georgette Scott in essence submits that there are three (3) grounds on which the assertion that the Recovery of Possession of the Claimant's 1998 Toyota Caldina Station Wagon was unlawful is buttressed.

- (1) The recovery was conducted in contravention of Sections 24 and 25 of the Hire-Purchase Act.
- (2) The Defendant's Consumer Bill of Sale dated October 24, 2004 is void for non-registration.
- (3) The Claimant's receipts reveal that payments exceeding the value of four hundred thousand dollars (\$400,000.00) for the motor vehicle were paid to the Defendant.

In relation to ground one (1) that is, that the recovery was conducted in contravention of Sections 24 and 25 of the Hire-Purchase Act, the applicable sections, Miss Scott submitted that by section 24 (1) a vendor under a Hire-purchase agreement is not permitted to enforce otherwise than by action any right to recover possession of goods pursuant to any provision of the agreement and by sub-section (2), contravention of sub-section (1) should terminate the agreement if not previously terminated.

Section 25, Miss Scott proposed refers to a vendor enforcing otherwise than by action any right to recover goods.

Miss Scott further proposed that contrary to section 24 of the Hire-purchase Act the Defendant never obtained a court order to enforce their right to possession and that the Defendant has not satisfied the court that the requirements under section 25 of the Act had been adhered to.

Counsel for the Claimant Miss Scott further submitted that the Defendant alleges that 12 reminder notices were sent to the Claimant but none was exhibited. Further, before the Defendant can pursue the remedy available under section

25(1a) of the Act they must show that the installments remain unpaid for the prescribed period as stated by section 25 1(a) and by section 25 2(a). Three (3) months during which installments had not been paid would have to elapse and 75% of the value of the motor car paid (If I understand correctly the act speaks to two-third (2/3) which is actually 66.6%). She submits that 80% of the value of the Toyota Caldina motor car had been paid.

Miss Scott proposed that there is nothing before the court to indicate that the three (3) months requirement had been adhered to and what had been sent to the Claimant were reminder notices and not prescribed notices. Prescribed notices comprise of:

- (a) a notice of default,
- (b) notice of repossession.

The registered slips exhibited as DM'2' confirms nothing more than that items have been forwarded by registered post and there is nothing to confirm the nature of these correspondences.

In relation to ground two (2) Miss Scott pointed out that Section 3 of the Bill of Sales Act had not been complied with, as the Bill of Sale was unregistered. This made it void for non-registration.

In relation to ground three (3) Miss Scott submitted that the Claimant's receipts revealed that he had paid in excess of the value of the Cadlina motor car.

The Claimant is therefore requesting the relief sought in the fixed date claim form.

The Defendant's Submission

Counsel for the Defendant Miss Elizabeth Salmon on the other hand submitted that in relation to the Consumer Bill of Sale although stamped but not registered, by virtue of section 3 of the Bill of Sales Act, named persons or classes of persons have been cited therefore an unrecorded Bill of Sale would be invalid or void against those persons but not as against the parties to the claim.

This Miss Salmon proposed is based on the fact that a failure to recover would mean that the classes of persons cited would not have notice of the charges. This would be different from the position of the signatories to the documents creating the charge. Hence the Bill of Sale is not void for all intent and purposes. In any event Miss Salmon further proposed, section 7 of the Record of Deed Wills and Patents Acts contains a saving clause which makes provision for deeds that are not recorded.

Miss Salmon made reference to the Provisions of Sections 24 and 25 of the Hire-Purchase Act and that Miss Scott's submission that the Defendant ought to have sought repossession of the said vehicle by court action is incorrect.

She further submitted that the Claimant defaulted in his payments and that the Defendant duly served by registered post on 12 occasions the requisite prescribed notice pursuant to section 25 (1)(a) of the Hire-purchase Act. The Defendant recovered possession of the vehicle and sold it to recover outstanding monies and costs incidental to the seizure.

In the circumstances the Defendant is not in breach of sections 24 and 25 of the Hire-purchase Act and the Claimant ought not to be relieved from liability.

Miss Salmon further proposed that the Claimant's claim for loss of income ought not to be granted.

In support of this proposal Miss Salmon cited the following authorities,

(1) Hadley vs. Baxendale 1854 1 AER page 145

(2) Victoria Laundry Windsor Ltd vs. Newman Industries Ltd 1949 KB 528

Reference was also made to the provisions of Halsbury Laws of England 4th Edition at paragraph 714 – dealing with the time limit for registration of the Bill of Sale.

The areas that I find that are not in issue are as follows:

- (i) That initially the Claimant purchased a motor vehicle from the Defendant and that one (1) year later there was a difficulty in relation to the obtaining or renewing of a Certificate of Fitness in relation to this vehicle as there was a discrepancy between the engine and chassis number of the vehicle resulting in the Claimant obtaining a replacement vehicle from the Defendant. This replacement vehicle was a 1998 Caldina motor car.
- (ii) The deposit of \$70,000.00 paid on the first vehicle was applied to this Caldina motor car.
- (iii) The amount of money that the Defendant (Claimant) was expected to pay in relation the Caldina motor car was \$330,000.00.
- (iv) The Consumer Bill of Sale DM'1' is stamped but unregistered.

The main area in issue I find is as follows:

The Defendant is contending that the value of the motor car is \$545,424.00 whilst the Claimant is adamant that the value is \$330,000.00.

Finding of Facts

I find as a fact that the Hire-purchase cost of the Caldina motor car is \$545,424.00 as evidenced by exhibit DM'4'. The document of the finance facility signed by both parties arrived at thus, cost of the vehicle \$330,000.00 plus interest of \$215,424.00 payable over a period of 34 months.

I find that as deponed to in paragraph 10 of the Defendant's affidavit filed on the 30th November 2007, the original loan period was 48 months and as the Mazda that is the first car purchased, account was active for 14 months, interest on the Toyota Caldina was applied for the remaining 34 months.

It means therefore that there is a continuing agreement between the parties and that clearly it is one (1) contract between the parties and all payments including the \$170,000.00 paid on the first car must be applied to the Toyota Caldina motor car.

I find that the Consumer Bill of Sale DM'1' is unregistered and there is no evidence before the court that it has been registered.

I find that receipts dated as follows:

- (1) 5th May 2006 in the amount of \$6,000.00
- (2) 23rd June 2006 in the amount of \$6,000.00
- (3) Repayment of \$12,000.00 bailiff fees
- (4) 15th February 2006 in the amount of \$6,000.00

(5) 1st March 2006 in the amount of \$6,000.00 are all on a balance of probability payments made by the Claimant in relation to Bailiff and seizure fees.

That the total amount paid on the Caldina motor car is \$469,000.00.

I find that, in relation to the Defendant's exhibiting 12 receipts DM'2' indicating that these were reminder notices and later referring to them as prescribed notices, I have to agree with Counsel for the Claimant who submitted that it cannot be inferred that these correspondences in fact confirms that these were prescribed notices sent to the Claimant. They could be anything.

The twelve (12) registered notices were purportedly sent to the Claimant and the contents of none of these correspondences were ever exhibited to the court.

I find that the contents of these registered correspondences could be of any nature, hence on a balance of probability I am not satisfied that the Claimant was served the prescribed notices under section 25(1)(a) of the Hire-purchase Act.

The Applicable Law

By Section 24 of the Hire-purchase Act

"Save as permitted by this Part, a vendor, under a hire-purchase agreement or a conditional sale agreement, shall not enforce otherwise than by action any right to recover possession of goods pursuant to any provision of the agreement".

By Section 25 of the Hire-purchase Act

Nothing in this Part shall prevent a vendor from enforcing otherwise than by action any right to recover possession of goods where –

- (a) any installment or other sum due and payable under a hire-purchase agreement or a conditional sale agreement remains unpaid for the prescribed period and, after the expiry of that period, the vendor, by registered post, or in such other manner as may be prescribed, serves on the purchaser the prescribed notices; or
- (b) there is any disposal, or attempted disposal, of the goods, the subject matter of a hire-purchase agreement or conditional sale agreement, or any part thereof by the purchaser contrary to the hire-purchase agreement or the conditional sale agreement or contrary to law; or
- (c) the purchaser terminates the agreement pursuant to section 18.

(2) In this section -

“prescribed period”, in relation to any agreement, means –

- (a) where not less than two-thirds of the purchase price has been paid, three months or such longer period as may be stipulated in the agreement; and
- (b) in any other case, two months or such longer period as may be stipulated in the agreement:

Provided that –

- (i) if, in relation to any agreement, proceedings are taken against a purchaser under this section the prescribed period in relation to that agreement in any subsequent proceedings under this section shall be one month;

(ii) if the purchaser dies, notwithstanding the expiry of the prescribed period no repossession of goods shall take place during the period of thirty days after the date of death;

"prescribed notices", in relation to any agreement, means the following –

(a) notice of default; and

(b) notice of repossession,

in such terms, and subject to such provisions as may be prescribed.

(3) Where a vendor serves on a purchaser a notice of default and within the time specified in the notice that purchaser pays or tenders to the vendor not less than one-half of the sum stated in the notice, the vendor shall accept such sum and shall grant an extension of time not less than one-half of the prescribed period for payment of the balance of the sum stated in the notice."

By section 3 of the Bill of Sales Act

"Every bill of sale, of personal chattels, made either absolutely or conditionally, or subject, or not subject to any trust, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of the said bill of sale, or at any future time, to take possession of any property and effects comprised in, or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed, or therein

referred to, and every attestation of the execution thereof, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person giving the same, and of every attesting witness thereto, or in case the same shall be made or given by any person under, or in execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness, shall be recorded at length in the Record Office within thirty days after the making or giving of such bill of sale (in like manner as deeds relating to real property in this Island are recorded), otherwise such bill of sale, as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against the bailiff of the court and his deputies, and assistants and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity, authorizing the seizure of the goods of the person by whom, or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, shall be null and void to all intents and purposes whatsoever, so far as regards the property in, or right to the possession of any personal chattels

comprised in such bill of sale, which, at or after the time of such bankruptcy or declaration of insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of thirty days shall be in the possession, or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under, or in the execution of which such bill of sale shall have been made or given, as the case may be”.

By section 7 of the Record of Deeds will and Patent Act

“If any vendee or mortgagee of any land, tenements or hereditaments shall hereafter omit to prove and record his deed within the time, and pursuant to the form, prescribed by this Act, but shall at any time afterwards do the same, no second sale or mortgage being made by the first vendor or mortgagor, his heirs, or assigns, the same shall nevertheless be good to the said vendee or mortgagee, his heirs or executors, and a perpetual bar against the first vendor or mortgagor and his heirs, anything in this Act, or any other enactment, to the contrary notwithstanding.”

Application of the Law to the Finding of Facts.

I have to disagree with Miss Salmon’s submission that the savings clause in section 7 of the Record of Deeds, Wills and Patents Act applies to a motor

vehicle as the provision clearly speaks to lands, tenement and hereditaments. It does not apply to a Consumer Bill of Sales in relation to a motor vehicle.

The Defendant is not precluded from recovering the motor vehicle otherwise than by action. He can enforce his right to recover possession of the Toyota Caldina motor vehicle otherwise than by action but certain statutory requirements have to be fulfilled.

(1) The Claimant must be served with the following prescribed notices pursuant to section 25(2)(b) of the Hire-purchase Act.

(a) a notice of default; and

(b) notice of repossession

(2) By section 25(2) (a) of the Hire-purchase Act where not less than two-third (2/3) of the purchase price has been paid and three (3) months or such longer period as maybe stipulated in the agreement.

Having found that the \$170,000.00 paid on the Mazda must be applied to the Toyota Caldina and I do not believe I am wrong in so finding, it means that the Claimant has paid a total \$469,000.00 from my calculation of the payment receipts exhibit. This is in excess of two-third (2/3) of the purchase price.

The agreement is not a rental agreement. It is not a user's agreement. It is a Hire-purchase agreement. I find that it is not the fault of the Claimant why the first car purchased had to be replaced.

By paragraph 13 of Deron McDonald's affidavit on behalf of the Defendant filed on the 30th November 2007, the Claimant has not paid the installments for the period July 28, 2005 to April 2006 however a perusal of the payments receipts

reveals that up to the 25th of January 2007 payments were made (exhibits DM'1')
The last two payments prior to this being made in November and December 2006. On a balance of probability the Defendant has not shown that the installments were in arrears for over three (3) months.

The fact that the Defendant has not shown that installments were in arrears for three (3) months coupled with the fact that the Defendant has not shown on a balance of probability that the contents of the registered notice were in fact prescribed notices, as well as the fact that more than two-third (2/3) of the Hire-purchase cost of the Caldina motor car has been paid by the Claimant have led me to find that the recovery of the Caldina motor car was unlawful and not in accordance with the provisions of the Hire-purchase act.

A Bill of Sale, according to the text book Hire-Purchase Law and Practise by R.M. Goode, 2nd Edition at page 64, is designed for transactions in which the seller or donor is to remain in possession of the goods after disposing of the property given since the transferee is not given possession, it is plainly necessary for his protection that he should have some document evidencing his title to the goods.

Since the Claimant is not seeking to recover the Caldina motor car then the import of the unregistered Bill of Sale seems to me to be not significant in relation to the Claimant's claim.

According to R.M. Goodes Hire-purchase Law and Practise (Supra) at page 769

“Where goods let under a hire purchase agreement are wrongfully removed from the possession of the hirer the person effecting the

removal is liable to the hirer in trespass for the full value of the goods notwithstanding that the hirer has only a limited interest in them. In addition the hirer may claim any special damages directly resulting from the seizure.

The Claimant, were it not for the seizure would have had in his possession a motor car valued at \$545,424.00. He has paid by my calculation of the receipts excluding bailiff and seizure fees, \$469,000.00

I find therefore that he is entitled to recover that amount.

The claim for special damages must fail as the Claimant has not proven that he suffered the losses claimed. Special damages must be specifically pleaded and strictly proven. The Claimant has submitted nothing on which the court can rely in proof of his special damages.

In **Strom Bruks Aktie Bolag vs. Hutchinson** 1905 AC 512 Lord McNaghten pointed out:

Special damages on the other hand are such as the law will not infer from the nature of the Act. They do not follow in ordinary course. They are exceptional in their character and therefore they must be claimed specifically and proved strictly.

Conclusion

The fact that the \$70,000.00 was applied to the Caldina motor car and the period of payment reduced to 34 months meant that the Claimant and Defendant had one contract. The Defendant merely substituted a car for the deficiency of the

Certificate of Fitness of the first car. Therefore all payments must be applied to the Caldina motor car.

The Claimant ought not to suffer as a result of the deficiency. The motor car belongs to him with the Defendant holding a Bill of Sale in relation to it.

The Defendant's removal of the motor car is unlawful

The Claimant is entitled to recover the sum of \$469,000.00 from the Defendant

Order

1. Order in terms of paragraphs 1 & 2 as amended to read \$469,000.00, of the fixed date claim form dated the 31st August 2007 and filed on the 4th September 2007 with interest @ 3% until the debt is discharged.
2. Costs to the Claimant to be agreed or taxed.