IN THE HIGH COURT OF FIJI

At Suva

Civil Jurisdiction

CIVIL ACTION NO. 0052 OF 1996

Between :

NATIONAL MBf FINANCE (FIJI) LIMITED

Plaintiff

- and -

1. YICK LEE
2. SEREI MARAMA

Defendants

Mr. V. Kapadia for the Plaintiff
Mr. I. Tuberi for the Defendants

JUDGMENT

On the 7th of March, 1996 the plaintiff company issued a Writ out of the High Court registry claiming the sum of $15,136.89 being the outstanding balance on a Hire Purchase Agreement and personal Guarantee entered into between the plaintiff company and the defendants for the purchase of a commercial *`Bread Oven'* which was installed in the defendant's bakery shop at 189 Mead Road, Nabua.

The Writ was personally served on the second-named defendant on the 12th February 1996 and three weeks later, in the absence of any Notice of Intention to Defend, default judgment was entered against both defendants.

On the 11th September 1996 that is 6 months *after* default judgment had been entered, the defendants filed the present application to set aside the default judgment and for leave to defend the action. The application was supported by an affidavit deposed by the first-named defendant.

In his affidavit the first defendant deposed *how* he had been duped into purchasing the `bread oven' which had been installed in his premises on a ***`trial basis'*** only ; *How* he had not arranged with the plaintiff company to finance the purchase of the **`bread oven'** ; *How* he had merely signed without reading, the papers that were given to him ; *How* during the trial period, ***`... it was found out that the said oven was defective in that it would require about 7 to 8 hours before the oven is heated. This would consume a lot of gas and bread baked are not fully cooked ..."*** ; *What* steps he took with the suppliers of the oven to get the **`bread oven'** repaired and when that failed, to have it removed from his premises ; and *What* approaches he made to the plaintiff bank to obtain relief. Finally the first defendant deposed to his belief ***"... that I was a `guinea pig' in an adventure which did not work ..."***

The application was opposed in an affidavit deposed by the plaintiff company's **`Head of Recoveries'** and filed on the **26th of November 1996.**

In it there is deposed *inter alia* *that* the defendants approached and requested the plaintiff company ***`for***

financial accommodation' ; had signed the **Hire Purchase Agreement** and **Guarantee** *"... of their own free will and without any undue influence or pressure from the Plaintiff"* ; and accordingly, are *"... estopped from alleging that the oven was defective and use that as a reason to avoid making payments under the Hire Purchase Agreement"*.

It is not denied however that the first defendant was not given a copy of the **Hire Purchase Agreement** or that his letter of **20th September 1993** to the oven suppliers demanding the removal of the oven and foreshadowing the charging of a *`storage fee'* was **NOT** copied to or received by the plaintiff company ; nor is it deposed that the documents were either signed in the offices of the plaintiff company or were witnessed by an officer of the plaintiff company.

The above letter is significant in my view insofar as **Clause 10** of the plaintiff company's **Hire Purchase Agreement** enables :

> *"(the defendants) on giving seven days notice in writing to (the plaintiff bank) (to) determine the hiring ..."*

In this regard the majority judgments in **Financing Ltd. v. Stimson** *(1962) 3 ALL E.R. 386* plainly held that the dealer should amongst other things, be regarded as the agent of the finance company to receive, and accept, a notice by the hirer of revocation of his offer to buy.

Furthermore **Lord Wilberforce** in **Branwhite v. Worcester Works Finance** *(1968) 3 All E.R. 104* in referring to **Stimsons** case *`as authoritative'* said at **p.122** :

> *"The matters included within the* (agency relationship) *should be the fixing and receipt of the deposit, representations as to the goods, probably, ... delivery of the goods to the hirer. As to all these matters, the dealer should be treated as the finance company's agent and the finance company accordingly bound, irrespective of whether or not an effective hire-purchase transaction comes into existence."*
>
> (my underlining)

As for the *`defectiveness'* of the **`bread oven'** the plaintiff company's **`Head of Recoveries'** without denying it, merely refers to *`the terms and conditions'* of the **Hire Purchase Agreement**, in particular, to **Clause 6** and the provisions of the **DELIVERY RECEIPT** signed by the first defendant (*See* : **para.9(e)** of the affidavit).

In this regard bearing in mind the first defendant's own declaration of being *`not well-educated'*, I can do no better than to draw attention to the judgment of **Diplock L.J. in Lowe v. Lombank Ltd.** *(1960) 1 ALL E.R. 611* especially at **pp.615ff** and to the observations of **Denning M.R.** in **Stimsons** case *(op.cit)* when he said at **p.388** :

> *"I am aware, of course, that the finance companies often put clauses into their forms in which they say that the dealer is not their agent.* [See : Clause 15(9) of the plaintiff company's Hire Purchase Agreement] *But these clauses are not worth the paper they are written on. Nobody can make an assertion of that kind in an agreement so as to bind the courts if it is contrary to the facts of the case."*

Be that as it may no reference was made in the affidavit to the provisions of **Clause 7** which recognises that the conditions and warranties as to fitness and quality implied under the **Sale of Goods Act** *(Cap. 230)* applied to the plaintiff company's **Hire Purchase Agreement.**

In this latter regard **Section 16** of the **Sale of Goods Act** *(Cap. 230)* relevantly provides :

> *"(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, ... except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely on the seller's skill or judgment.*
>
> *(5) The foregoing provisions of this section apply to a sale by a person who, in the course of a business, is acting as agent for another ... ; and*
>
> *(6) In the application of subsection (3) to an agreement for the sale of goods under which the purchase price or part of it is payable in instalments, any reference to the seller shall include a reference to the person by whom any antecedent negotiations are conducted."*

In my considered view the effect of **subsection (6)** on the plaintiff company's **Hire Purchase Agreement** cannot, in the particular circumstances of this case, be so easily ignored or avoided by merely asserting an absence of any knowledge on the part of the plaintiff company.

Furthermore the term *`antecedent negotiations'* although undefined in the **Sale of Goods Act** would, in my considered opinion, include any negotiations conducted or arrangements made between the oven supplier and the first defendant whereby the latter was induced to enter into the **Hire Purchase Agreement** with the plaintiff company or which otherwise promoted the transaction to which the **Hire Purchase Agreement** relates.

In Slater v. Finning Ltd. *(1996) 3 W.L.R. 190* Lord Steyn in discussing the ambit of Section 14(3) of the Sale of Goods Act 1979 (U.K.) which is in identical terms to our Section 16(3), said at p.200 :

> *"... the old rule of caveat emptor has become the rule of caveat venditor in order to meet the requirements of modern commerce and trade ... (and) ... While the implied condition that the goods are reasonably fit is inherently a relative concept, it is well established that the liability under Section 14(3) is strict in the sense that the seller's liability does not depend on whether he exercised reasonable care."*

Furthermore and despite the plaintiff company's seemingly strict reliance upon the provisions of its **Hire Purchase Agreement**, there can be no doubting that the very nature of the `**bread oven**', the subject matter of the **Hire Purchase Agreement**, was such that no meaningful examination could have been carried out by the defendants prior to its installation in their premises and then only after it had been operated for sometime.

In this regard as long ago as **1831** *(prior to any `Sale of Goods' legislation)* **Lord Tenterden Ch. J.** said in Street v. Bray *(1831) 36 R.R. 626* at **p.631** :

> *"It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where the article, for instance, is ordered from a manufactuer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent is never completely accepted by the party ordering it. In this and in similar cases the latter may return it as soon as he discover the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial."*

I note however from the Statement of Claim dated **2nd February 1996** the averment in **paragraph 3** :

> *"... (that) the Plaintiff had taken possession of the items under the* (Hire Purchase) *Agreement and has sold the same to recover the amount owed by the First Defendant."*

This may be compared and contrasted with **paragraph 14** of the First Defendant's affidavit sworn on the **11th** of **September 1996** (i.e. 7 months after the **Statement of Claim**) in which he deposed :

> *"The oven was never removed from my premises and it is still occupying space at my bakery and contrary to the claim in paragraphs (3) and (4) of the Statement of Claim ... no one has taken possession of the said oven."*

Both assertions could not be correct but in any event **Clause 10** enables the defendants to *`return the goods'* to the plaintiff company and **Clause 12** empowers the plaintiff company *`without notice to retake possession of the goods'*.

In this case the failure of the defendants to invoke the provisions of **Clause 10** and their continuous insistence that the oven supplier should remove the `**bread oven**' from their premises tends to support their assertion that they were not given a copy of the **Hire Purchase Agreement** and confirms **Diplock J's** observations in the **Lombank Ltd**. case *(op. cit)* at **p.614** :

> *"(that) under modern conditions many transactions, particularly of hire purchase, are entered into by ignorant persons whose only choice is either not to enter into the transaction at all or to enter into it on the terms of a standard agreement, drafted by the hire purchase company, and containing numerous clauses printed in miniscule characters which the hirers do not in fact read and, if they did, would be incapable of understanding."*

In light of the foregoing I am satisfied that the defendants have an arguable defence to the plaintiff company's claim on the merits and accordingly I shall exercise my discretion in allowing their application.

The default judgment entered and sealed on the 7th of March 1996 is accordingly set aside and the defendants are ordered to file and serve a properly particularised **Statement of Defence** on the plaintiff company within 21 days of the date hereof. Costs to be in the cause.

(D.V. Fatiaki)
JUDGE

At Suva,
29th July, 1997.

C:\WPDOCS\RAHIMAN\HBC0052J.96S