VIJAY RAGHWAN

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v.

MOTOR CORPORATION OF FIJI

[COURT OF APPEAL—Gould V.P., Marsack J.A., Henry J.A.—23 March, 4 April
B 1981.]

Civil Jurisdiction

H. K. Nagin & Mrs A. Hoffman for Appellant
P. I. Knight for Respondent

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Contract—Sale of "new car"—meaning of "new"—capitalised interest—not a penalty but an essential part of the contract.

Appeal by Vijay Raghwan against sum awarded ($400) to him by the Supreme Court against Motor Corporation of Fiji (Respondent) in an action for damages wherein the plaintiff had claimed that a motor vehicle sold to him by the respondent
D was not a new car as contracted and was not of merchantable quality. An award on the counterclaim in favour of the respondent of $1040.30 being a sum said to be due and owing under a Bill of Sale over the motor vehicle was attacked as being not recoverable by the respondent, on the ground that was a penalty or so that equity would interfere to reduce it to the equivalent of a reasonable rate of interest.

E The finding of the Supreme Court not in dispute in the appeal was that the respondent advertised and sold the car as a new vehicle of which appellant was the first registered owner; that the car had been in bond in Fiji for about 17 months before it was sold to the appellant. Evidence was that the Customs had shifted the vehicle from time to time and the mileage on the speedometer was 190.

The learned judge found that for the purpose of the retail trade, the car was a new
F vehicle when purchased.

The sum awarded on the counterclaim ($1040.30) the learned judge found to be the balance owing, having regard to events which had happened after the proceedings commenced. An amount secured by the Bill of Sale had been $4,345 together with "a sum in lieu of interest thereon (hereinafter called "additional sum")
G fixed at $1305."

The grounds of appeal argued were as follows—

"1. That the learned trial judge erred in law in determining the quantum of damages for the appellant.
2. That having regard to the evidence adduced the learned trial judge erred in
H law and in fact when he declined to make the declaration sought by the appellant regarding the sum "the additional sum" by $1,303.00.

3. That having regard to the evidence adduced the learned trial judge erred in law and in fact in finding: A
(a) .....

(b) There was no unlawful detention of the motor vehicle after the alleged tender or otherwise."

On the counterclaim, Appellant's Counsel referred to a letter addressed to the plaintiff before the Bill of Sale as part of the negotiations laid up to it. It stated— B

"RE: INTEREST

Please be informed that you will be allowed rebate on interest if the Bill of Sale.....is paid off before the final date."

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The Court said that the letter was intended to apply to normal voluntary early repayment, not to the case of default and enforcement of the security. There was no submission that the letter operated as a defeasance.

It was argued that the "additional sum" was a penalty or otherwise so harsh that equity would interfere to reduce it to the equivalent of a reasonable rate of interest. D

The court referred to the words of Cockburn C.J. in The *Protector Endowment Society v. Grice* (1880) 49 L.J.Q.B.812 wherein the facts were very close to the instant case in that interest had clearly been absorbed into the total principal sum payable by instalments. The Chief Justice said—

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" ..... that which is sought to be treated as a penalty is really an essential part of the contract which both parties intended should be performed ..... I take it as clear that if a given sum is advanced, to be paid by instalments, with a stipulation that if one instalment is not paid the whole sum is to become payable, that stipulation is part of the contract and not within the rule as to penalties."

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In *Wanner v. Caruana* (1974) 2 N.S.W.L.R. 301 a case in which the facts were similar. Street C.J. indicated that the provision for future unaccrued interest for the next 5 years was void as a penalty. However. Street C.J. made observations which indicated that he did not regard the case as falling within the type of provision in the *Protector Endowment* case.

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Held: The fact that the car had run rather more miles than would normally be anticipated was not shown to be a source of damage; the mileage factor as a matter of degree was insufficient in the circumstances to disentitle the respondent company to offer the car for sale as a new one.

It had not been established that the representations were made fraudulently.

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As to the counterclaim the Bill of Sale as drawn fell within the principles enunciated in the *Protector Endowment* case (supra). The "additional sum" could be

assumed to be interest under another name but as Street C.J. said "an aggregate sum of interest at the outset to be paid by instalments". As such it was an essential part of the contract and not merely "minatory" (to use the word of Cockburn C.J.) It followed that the provision should not be regarded as a penalty. The third ground of appeal against a finding in the Supreme Court that there was no unlawful detention by the respondent of the car was dismissed.

Appeal dismissed.

Cases referred to:

Morris Motors v. Lilley (1959) 3 All E.R. 737
Protector Endowment Society v. Grice (1880) 49 L.J. Q.B. 812.
Wanner v. Caruana (1974)2 N.S.W. L.R. 301.
Central London Property Trust Ltd v. High Trees House Ltd. (1947) K.B. 130

GOULD Vice President:

Judgment

The appellant brought an action against the respondent company in the Supreme Court for damages claimed to arise out of a transaction in which the former purchased a Triumph 2000 T.C. motor car from the latter. The respondent company counterclaimed for the balance price owing upon the vehicle, secured by a Bill of Sale. The learned Judge in the Supreme Court rejected most of the heads under which damages were claimed and gave judgment for the appellant for $400 on the basis that the car was not in merchantable condition when sold. On the Counterclaim the learned Judge gave judgment in favour of the respondent company for $1.040.30 which he found to be the balance owing, having regard to events which had happened after the proceedings commenced. The present appeal seeks to enlarge the award of damages and to attack the award on the counterclaim.

In view of the limited nature of the argument on the appeal we will confine ourselves to the recital of facts relevant to each ground as we come to it. For the better understanding of the grounds, however, as expressed in the notice of appeal, it is necessary to say that the bill of sale securing the balance of the purchase price did not provide for payment of interest in the usual straightforward way. It might be mentioned that the balance purchase price was adjusted with reference to the allowance on a vehicle traded in.

The amount secured, then was $4,345, together with "a sum in lieu of interest thereon (hereinafter called "the additional sum") fixed at $1,305." We now set out the grounds of appeal, having deleted therefrom certain matters which were abandoned by Mr Nagin, counsel for the appellant.

"1. That the learned Trial Judge erred in law in determining the quantum of damages for the Appellant.
2. That having regard to the evidence adduced the Learned Trial Judge erred in law and in fact when he declined to make the declaration sought by the Appellant regarding the sum "the additional sum" of $1,303.00.
3. That having regard to the evidence adduced the Learned Trial Judge erred in law and in fact in finding:
   (a) .....
   (b) There was no unlawful detention of the motor vehicle after the alleged tender or otherwise."

The reference to the declaration sought is to prayer (e) of the amended statement of claim which seeks a declaration that the additional sum is "harsh, inequitable, void and unenforceable". A

As argued, Ground 1 was concerned only with an issue framed by the learned Judge in his judgment, thus:

> "1. Was the Triumph a new vehicle when sold to the plaintiff by the defendant on the 30th May, 1977."

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The learned Judge found that it was not in dispute that the respondent company advertised and sold the car as a new vehicle, nor that the appellant was the first registered owner of the car. He found also that the car had been in bond in Fiji for about 17 months before it was sold to the appellant, the mileage shown on the speedometer was 190, and there was evidence that the Customs had shifted the vehicle from time to time.

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The learned Judge had no doubt that for the purposes of the motor retail trade the car was a new vehicle when purchased. He relied on a passage from *Morris Motors Ltd. v. Lilley* (1959) 3 All E.R. 737 at 739, as follows:

> "I therefore prefer to take as the simple test of when a car is new simply this: that it remains new even when it leaves the manufacturers hands, until it is made the subject of a retail sale by a distributor or dealer, it is registered with the local county council, number plates are put on it and it is driven away by the purchaser."

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Mr Nagin submits that this case is distinguishable in that it was concerned with relations between manufacturers, dealers and distributors and also with the arrangements between such persons concerning the warranty which accompanies new cars. Hence the authority is limited to what is a new car "for the purposes of the motor retail trade", which is what the learned Judge found. Whether a purchaser is bound in all circumstances by the views of the trade may not necessarily follow.

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We do not need to decide that question. The car was sold as new and with the usual warranty for the usual period, which was incidently taken full advantage of. It had never been sold or registered before. The fact that it had run rather more miles than would be normally anticipated has not been shown to be a source of damage; even if the effect of the Morris Motors case is put on one side, we think that the mileage factor, as a matter of degree, would be insufficient in the circumstances to disentitle the respondent company to offer the car for the sale as a new one. Certainly the appellant did not establish paragraph 7 of his statement of claim, that the representations were made fraudulently. There is no merit in this ground.

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We proceed to Ground 2. It is a matter which caused the learned Judge considerable difficulty. He stated that he had "moral qualms" about it, but that legally it appeared to be in order; we interpret the moral qualms reference as meaning that (at least in the events that occurred) the provision resulted in an exorbitant rate of interest having been paid. The principal, together with the additional sum, was payable by monthly instalments of not less than $156.90, but if default were made in payment of any sum when due the full amount of the balance became due on demand. In the result, as the learned Judge points out, though, if the repayments continued over the full contemplated period, the rate of interest (under whatever guise) would be reasonable, default made earlier could result in an exorbitant rate.

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A The record of the appeal does not indicate that any detailed submissions were made to the learned Judge that there should be interference in the matter on equitable principles. The statement of claim lays no foundation for it, except to the extent that the declaration we have mentioned above is sought in the prayer.

There was reference in argument, however, to one document, a letter of 28th June, 1977, from the respondent company to "M/s. Raghwan Construction", which we were informed was one of the documents put in by consent. It reads:

B "28th June, 1977.

M/s. Raghwan Construction.
P.O. Box 3661,
SAMABULA.

Attention: Mr Vijay Raghwan.

C Dear Sir.

Re : Interest

Please be informed that you will be allowed a rebate on interest if the Bill of Sale on your car is paid off before the final date.

Yours faithfully,
Motor Corporation of Fiji Limited.

D S. S. REDDY
Accountant

The learned Judge said, considering this letter—"as I have mentioned, this letter was not addressed to the plaintiff and the express terms of the bill of sale indicate a sum agreed to be paid "in lieu of interest"." With respect we do not think that the fact that the letter was written to what is described as the appellant's company (this is not E denied) should make any difference. We were informed from the Bar that it was part of the negotiations leading up to the Bill of Sale. It was written two days before the Bill of Sale was signed and Mr Nagin now seeks to make it the basis of a promissory estoppel, within such principles as were laid down in the case of *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947) K.B. 130. There are at least two difficulties. One is that there is no such pleading. The second is that in our view the F proper construction of the letter is that it is intended to apply to a normal voluntary early repayment, not to a case of default and enforcement of the security. There was no submission before this Court that the letter operated as a defeasance and the ground of appeal that the Bill of Sale was void was abandoned.

In evidence the appellant merely said that he received the letter referring to an interest rebate. He had spoken to the defendant's accountant and the idea was to G obtain a rebate if paid off earlier. In the circumstances and in the absence of pleading we think this matter is altogether too vague to be a successful ground of appeal.

The matter of the "additional sum" was argued on the grounds that it was a penalty or was otherwise so harsh that equity would interfere to reduce it to the equivalent of a reasonable rate of interest. We will refer to two cases—one early and H the other comparatively recent—on this subject. The first is *The Protector Endowment Society v. Grice* (1880) 49 L.J.Q.B 812. The headnote reads:

Plaintiffs having advanced £501 to A., took from A. and the defendant their joint and several bond conditional for the payment for five years of quarterly

instalments of £31.10s., with a stipulation that if default should be made in payment of any instalment the whole amount of the unpaid instalments should be paid immediately. Default having ben made, the plaintiffs sued for the whole amount:—Held (reversing the judgment of Bowen, J.), that the stipulation was not by way of penalty, and, therefore, that the plaintiffs were entitled to recover." A

These simple facts are very close to the present case. Interest had clearly been absorbed into a total principal amount which was payable by instalments. Cockburn C.J. said at p.813 ".....that which is sought to be treated as a penalty is really an essential part of the contract which both parties intended should be performed.....I take it as clear that if a given sum is advanced, to be paid by instalments, with a stipulation that if one instalment is not paid the whole sum is to become payable, that stipulation is part of the contract and not within the rule as to penalties." He went on to say that the distinction was between the cases where the sum mentioned is obviously mentioned for the purpose of enforcing morally, but not legally, the primary obligation; then it is a penalty which cannot be enforced. He described the stipulation as "an alternative right on the part of the lender to enforce payment of the amount at once, the payment of which, if there had been no failure to pay the instalments, would have been spread over the agreed period". Brett L.J. at p. 815 said— B C D

"The contract is for certain consideration—as to the extent or meaning of which I do not enquire."

The second reference is to the case of *Wanner v. Caruana* (1974) 2 N.S.W.L.R. 301. The first part of the headnote reads:

"Pursuant to a contract for the sale of a farm, the purchasers gave the vendors a mortgage back over the land and a bill of sale over the stock to secure payment of part of the purchase money on deferred terms. Both mortgage and bill of sale contained a clause relating to payment of principal and interest with a proviso "that, in the event any monthly instalment being in default for fourteen days, the whole of the balance of the principal sum and any other moneys due hereunder with interest thereon at the rate of ten dollars per centum per annum shall in the case of such default immediately become due and payable for the balance of the term. E F

The purchasers made default in payments of amounts due by them under the mortgage and the bill of sale.

In proceedings by the vendors for specific performance of the contract, the vendors sought, inter alia, a declaration that the proviso did not constitute a penalty. G

Held: (1) The proviso was void as being a penalty, because it did not purport to quantify in an aggregate sum the amount of interest which would accrue during the agreed term of the loan. Instead, it purported, upon default by the mortgagors, to make them liable to pay interest unearned and unaccrued and referable to a period when the vendors would have, in consequence of the default, recovered the full amount of the balance of the purchase price." H

In essence the question was whether a provision which rendered future unaccrued interest for the next five years payable upon default of payment of an instalment was void as a penalty. Street C.J. said, at p. 303—

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> ".....it is relevant to bear in mind that the mortgage and bill of sale were given simply and solely to secure the outstanding balance of the purchase price of this farm. It is also relevant to note that neither the mortgage nor the bill of sale purported to quantify in an aggregate sum the amount of interest which would accrue during the agreed term of the loan."

Having referred to the *Protector Endowment* case and some intervening authorities Street C.J. said at pp. 305—6:

B C D

> "In the present case there was no commercial advantage to the mortgagees from the mortgage running a full six-year term as distinct from terminating, as it did, within one year of its inception. This mortgage was simply a document which provided for payment of the principal debt by instalments, and provided for future interest to accrue peridically throughout the six-year term. The falling in of the mortgage debt prior to the expiration of the six-year term might have occurred within a month, a year or five years of the initial date. The lumping together of unaccrued interest, and the imposition upon the mortgagors of the burden of making that payment, appears to me to bear no relationship whatever to the loss which the mortgagees might suffer by reason of the mortgage falling in and the mortgage debt being repaid to them prior to the expiration of the six-year term. There is a significant difference between the facts of this case and the facts in the two High Court cases I have referred to; the approach taken by the High Court in each of those cases shows the consequence in point of invalidity of that significant factual difference. The present mortgage has, in this respect, the hallmarks of a stipulation in terrorem designed to force the mortgagors to adhere to their bargain, and I do not see that this provision has any of the ingredients of a genuine pre-estimate."

However, Street C.J. went on to make two observations both pertinent in the present case. First he said that he did not regard the case as falling within the type of provision in the *Protector Endowment* case and said:

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> "If the mortgagees had stipulated for a single lump sum premium or an aggregation of interest at the outset to be paid by instalments throughout the term, then it might be that the mere form of such a document would render a challenge on the ground of penalty difficult. But that is not this case."

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The second comment by Street C.J. was a reference to section 93 of the Conveyancing Act, 1919, which he said had no parallel in England. It has, however, a parallel in Fiji in section 72(2) of the Property Law Act, 1971. The sections provide that in the case of a mortgage the mortgagor has a statutory right to pay off the principal before it is due for payment, but must pay interest on the principal for the unexpired term of the mortgage. Street C.J. said that the section apparently proceeded upon the basis that the obligation on a mortgagor to pay presently unaccured interest was regarded as acceptable by the legislature. He thought, however, that such an inference provided far too weak a basis for treating as valid a bargain which would otherwise be void as penalty.

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Having considered this matter with care, we incline to the view that the Bill of Sale, as drawn fell within the principles enunciated in the *Protector Endowment* case. The "additional sum" can be assumed to be interest under another name, but was, as Street C.J. said, "an aggregation of interest at the outset to be paid by instalments". As such it was an essential part of the contract and not merely minatory, to use the wording of Cockburn C.J. It follows that we do not regard the provision as a penalty.

If we are wrong in our approach to the question of construction we would still be of opinion that this Court should not interfere. Section 72(2) of the Property Law Act, 1971, at least supports the inference that it is not always to be regarded as harsh and unfair to require payment of interest for the unexpired protion of a term. No evidence has been brought as to where the commercial advantage lies and how such matters are regarded in the motor industry—whether in fact an agreement prima facie fair becomes the reverse by reason of a provision for accelerated payments on default. The matter was never properly or fully ventilated in the Court below. A B

The third and last ground of appeal challenges the finding of the learned Judge that there was no unlawful detention by the respondent company of the car. Again there was no proper pleading to this effect. The learned Judge considered the facts in relation to an allegation that there was an illegal seizure of the car. He came to the conclusion that the appellant never made a valid tender of the balance of the purchase price, which was easily calculable. Had that been done the learned Judge had no doubt that the payment would have been accepted—with, no doubt, the result that the car would have been returned. We agree with the learned Judge in his conclusions and do not deem it necessary to examine the matter further. C

For the reasons we have given the appeal is dismissed with costs.

Appeal dismissed.