

THE HIGH COURT

Record No. 2012 2944 P

Between/

FRIENDS FIRST FINANCE LIMITED

PLAINTIFF

AND

JOHN WRAFTER

DEFENDANT

Judgment of Ms. Justice Iseult O'Malley delivered the 2nd May, 2014**Introduction**

1. These proceedings originally concerned two motor cars which were the subject matter of hire-purchase agreements. In respect of both, the plaintiff seeks to enforce the terms of the agreements. At the end of the hearing before this court an *ex tempore* judgment was given in respect of one car and an order was made that the defendant pay to the plaintiff the sum outstanding on foot of the relevant agreement.

2. The situation in relation to the second car is more complicated. The rights of the parties depend on the legal effect of two separate agreements entered into by, firstly, the defendant's wife and secondly, the defendant.

Preliminary issue

3. By order of the High Court (Peart J.) made some days before the hearing, the interest of Friends First Finance Limited in this and several hundred other cases was assigned to a company called Emberton. This was done under the Rules of the Superior Courts and in accordance with those rules, was made on an *ex parte* basis.

4. The defendant (who has represented himself in these proceedings) was subsequently notified that the order had been made. He has taken objection to the fact that he was not put on notice of the application and was not served with the grounding affidavit.

5. I am satisfied that there is no basis upon which to consider looking behind the order. The defendant is not in any way prejudiced by it and his rights in respect of this litigation are precisely the same as they had been beforehand.

The facts

6. In September, 2007 the defendant's wife entered into a consumer hire purchase agreement with the plaintiff for the purchase of a Porsche. This vehicle was purchased from a car dealership called Sport & Classic. According to the contract document, the total cash price was €216,000, less €86,000 for the part exchange of another car. The credit to be financed was, therefore, €130,000. This was payable by way of 60 monthly instalments of €2,639 making a total hire purchase price (including documentation and purchase fees) of €244,453.09. The so-called "half price" was €122,226.06.

7. In 2008 the defendant's marriage fell into difficulty and he left the family home.

8. The account in relation to the Porsche fell briefly into arrears in January, 2009 when a direct debit was rejected. Thereafter, payments were made by the defendant who on a regular basis attended personally at the offices of the plaintiff (to the knowledge of the plaintiff) until October, 2009 to make the necessary lodgements. However, these payments then stopped although it is apparent that he was in frequent contact with the plaintiff.

9. The defendant's evidence is that he made the payments because he did not want to lose the equity he had put into the car. He therefore wished to take over the account in order to eventually take ownership of the car. This is supported by notes to this effect on the plaintiffs file in relation to the account, from November, 2009 onwards. He was advised that he would have to get his wife's consent to a transfer and that a new account would have to be set up.

10. A further file note dated the 9th February, 2010 records

"Husband john taking over payments, new ale to be set up. "

11. On the same date the defendant signed a "No advice declaration". This document reads as follows:

"I/we declare that I/we have chosen not to provide any information to Friends First Finance for the purpose of receiving advice. I/we understand that Friends First Finance will not therefore recommend any specific product to me/us but will act in accordance with my/our instructions. I/we confirm that I/we have contacted Friends First Finance directly and advised them of the finance product that I/we wish to effect. I/we believe that I/we do not require any financial advice in order to choose a product to suit my/our financial needs at this time and I/we understand the nature of the commitment that I/we am/are entering into and //we believe it to be suitable to my/our requirements. "

The defendant's signature is witnessed by the then managing director of Friends First. There is no description in the document of the "finance product" chosen by the defendant, nor of the commitment that he was entering into.

12. The defendant contends that on the same day he signed, on a number of pages, a document which transpired to be a hire-purchase agreement but which he at the time believed to be an assignment of his wife's interest in the account. He says that he understood that all that was outstanding at that stage was a formal consent from his wife.

13. The plaintiff says that the "No advice declaration" was the only document signed on that day, but it is accepted that this did

relate to the proposed transfer.

14. There follows a number of entries in the file relating to contact between the plaintiff and the defendant, with the latter asking for information as to his application to take over the account and as to the status of the account. He was concerned that proceedings might be taken in relation to it because of the build-up of arrears. He was not given information on that matter because the account was still in Mrs. Wrafter's name.

15. In the event, a letter of consent from Mrs. Wrafter was not forthcoming until the 26th July, 2010 when she wrote as follows:

"Re Account 111919/102

Dear Sir/Madam,

I hereby consent to assign my rights and obligations under this agreement to Mr. John Wrafter.

Thanking you in advance for your cooperation in this matter. "

16. The defendant's evidence is that an official from the plaintiff suggested the wording for this letter. However, Mr. Gordon Hill, who gave evidence on behalf of the plaintiff, does not accept that it was ever intended by the plaintiff that the transaction should be an assignment. Rather, he describes it as "a continuation of the old agreement under a new agreement".

17. In a notice for particulars in these proceedings, the defendant asked, *inter alia*, the following questions:

- *Please state whether this agreement was connected to or formed part of a series of transactions with any other agreement.*
- *Please state specifically whether it is asserted that this agreement is connected to the agreement of 131h September 2007.*

18. In reply, the plaintiff stated that the agreement was not connected to any other agreement and did not form part of a series of transactions with any other agreement; and that it was not asserted that it was connected to the agreement of the 13th September, 2007.

The agreement

19. The document on foot of which these proceedings are brought is a consumer hire-purchase agreement and is so described at the top of two of the three pages. The agreement itself and the signatures of the parties are dated the 20th August, 2010. The direct debit instruction is dated the 16th August. The declaration by the hirer that he is aware of the cash price of the goods, which must be completed before the agreement is signed, is dated simply "August 2010".

20. Under the heading "Terms", both the cash price of the Porsche and the credit to be financed are stated to be €87,274.62. The evidence on behalf of the plaintiff is that this represents the amount left outstanding from the agreement with Mrs. Wrafter, less the outstanding interest. It is stated to be payable by 35 monthly instalments of €2,639, to commence on the 28th August, 2010. Including a documentation fee, but not a purchase fee, the total hire purchase price is given as €92,403.09. The plaintiff says that this figure does include the future interest referable to the original agreement. The "half price" is €46,201.55.

21. In his notice for particulars the defendant asked for details as to how the cash price as set out in the agreement was calculated. The reply was that the cash price was charged by the supplier of the goods, Sport & Classic.

22. The defendant also asked what the consideration passing under the agreement was. The plaintiff's response was as follows:

"The consideration passing under the agreement was the issue by the plaintiff of an advance of £87,274.62 to enable the defendant acquire the goods referred to in the said agreement."

23. The defendant says that he never received a copy of the agreement. Mr. Hill is not in a position to say that it was given to him but he asserts that it would be normal practice to hand over the copy at the time. He also says that the only copy on the plaintiffs file is the carbon. There is no copy covering letter on the file, suggesting that it was not posted to the defendant.

24. The defendant continued to make payments throughout the rest of 2010. They became more erratic in the course of 2011 and no payments were made after November, 2011. According to the defendant this was because of business difficulties. The plaintiff terminated the agreement by letter dated the 27th February, 2012, at which point the balance payable stood at €58,154. The plaintiff demanded the return of the vehicle and the payment of the balance which, obviously, was considerably more than the "half price" stated in the agreement.

25. The defendant did not comply with either demand. There has, however, been some level of communication between the parties and the plaintiff has been given what it considers to be satisfactory assurances as to the location and condition of the vehicle.

26. In these proceedings the plaintiff claims an entitlement to the return of the car, payment of the outstanding balance and damages for the wrongful detention of goods.

Relevant legislation

27. Hire-purchase agreements are governed by Part VI of the Consumer Credit Act, 1995.

28. A hire-purchase agreement is defined in s.2 of the Act as

"an agreement for the bailment of goods under which the hirer may buy the goods or under which the property in the goods will, if the terms of the agreement are complied with, pass to the hirer in return for periodical payments ... "

29. Section 57 of the Act provides as follows:

57(1) Before any hire-purchase agreement is entered into in respect of any goods, the owner shall state in writing the cash price to the prospective hirer, other than in the agreement.

(2) Subsection (1) shall be deemed to have been complied with-

(a) if the hirer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached to or displayed with the goods clearly stating the cash price ...

30. By virtue of s.2, the "cash price" means the money consideration for a transaction for the purchase of goods which is not financed by credit.

31. Section 58 provides that a hire-purchase agreement must be in writing and signed by the hirer. Subsection (1)(a) provides that

"A copy of the agreement shall be -

(i) handed personally to the hirer upon the making of the agreement, or

(ii) delivered or sent to the hirer by the owner within 10 days of the making of the agreement. "

32. Subsection (2) lists various matters that must be included in the agreement, including

"(a) the hire-purchase price

(b) the cash price of the goods to which the agreement relates."

33. Section 59 deals with the consequences of non-compliance with these provisions as follows

"An owner shall not be entitled to enforce a hire-purchase agreement or any contract of guarantee relating thereto or any right to recover the goods from the hirer, and no security given by the hirer in respect of money payable under the hire-purchase agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the hirer or guarantor by any holder thereof, unless the requirements of sections 57 and 58 have been complied with.

Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 58(1), was not deliberate and has not prejudiced the hirer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable".

34. Section 63 sets out what has come to be known as the "half rule". A hirer may at any time terminate a hire-purchase agreement by giving notice in writing to the owner provided one half of the total hire-purchase price is paid off, thus relieving himself or herself from the obligation to pay the full price.

35. Section 66 sets out the powers of the court in actions for recovery of possession of goods as follows

"(1) Where legal proceedings by virtue of section 64 have been commenced the owner shall not enforce or attempt to enforce payment other than in those proceedings or any negotiations connected with those proceedings.

(2) Omitted

(3) On hearing the action, the court may, without prejudice to any other power-

(a) order the delivery of the goods to the owner,

(b) order such delivery but postpone its operation subject to such conditions as the court thinks fit, or

(c) order-

(i) the transfer to the hirer of title to part of the goods, and

(ii) delivery of the remainder to the owner, subject to such conditions as the court thinks fit.

(4) Where the operation of an order is postponed under subsection (3) (b) the agreement shall continue to operate except that-

(a) no further sum shall become payable on account of the unpaid balance except as provided for in the order, and

(b) the court may modify the terms of the agreement as it thinks fit.

(5) Omitted"

Discussion and conclusions

36. In my view it was at all times clear that it was the intention of the defendant to take over the car and for that purpose to effect a transfer or assignment of his wife's interest under the original hire-purchase agreement. The plaintiffs file makes it equally clear that this was understood by the persons dealing with the account. Quite properly, he was informed that it was necessary to get his wife's consent, since she was the hirer.

37. Whether or not an officer of the plaintiff actually drafted or dictated the terms of the letter of consent, I think it is reasonable to

accept that the defendant was advised as to what such a letter should contain. The letter as written by Mrs. Wrafter, referring as it does to an assignment of rights and obligations, was accepted by the plaintiff without demur. There does not appear to have been any suggestion that she should formally terminate the agreement and surrender the car to the plaintiff.

38. The agreement entered into does not reflect what the defendant had asked for and his wife had consented to, in that the rights and liabilities of the hirer are not the same as the rights and liabilities of Mrs. Wrafter at the relevant time. Specifically, a sum well in excess of the original "half price" had been paid under the original agreement, but the second agreement effectively sets the meter running again from the beginning.

39. The plaintiff makes the case that whatever the defendant may have originally wished for, he signed what was very clearly a hire-purchase agreement, having previously signed a "No Advice" declaration.

40. The defendant says that he signed the agreement in blank, thinking that it was an assignment. I would not be inclined to accept this as a defence. The defendant's evidence has shown that he is a man accustomed to the world of business and fully aware of the consequences of signing business documents. This particular document was, in accordance with the Act and in identical form to at least one other signed by him previously, headed "Hire-Purchase Agreement" on two of its three pages. Nor am I inclined to accept his evidence that he did not receive a copy of it. There is no reference to this in any of the correspondence or in the notice for particulars.

41. However, in my view the agreement is in itself defective.

42. The "cash price" as stated in the agreement does not comply with the Act- it is not the price for which the car could be purchased in a non-credit finance context, but is simply the amount left outstanding under Mrs. Wrafter's agreement. In these circumstances it would have been more accurate to state the cash price as it was in the original agreement and make allowance for the payments already made. There is no suggestion, let alone evidence, that the cash price actually stated bore any relationship to the actual value of the car at that time. Contrary to the replies to particulars, it was not set by the car dealership.

43. Counsel for the plaintiff has relied on s.57(2) of the Act, on the basis that the evidence is that the defendant was at all material times driving the car himself and therefore could be said to have "inspected" it. This is not, in my view, what the Act envisages by "inspection", which clearly relates to inspection in a retail premises where the cash price is on display.

44. The consideration passing from the plaintiff was not, as stated in the replies to particulars, the issue of an advance of €87, 274.62 to the defendant to enable him to purchase the goods - no new advance was made. The dealer had, obviously, already been paid in full.

45. The result, therefore, is that without any fresh consideration and on foot of a purely notional "cash price" the plaintiff created a situation relating to this particular car whereby the application of the "half rule" set out in s. 63 was deferred from the point where €122,226.06 had to be paid to a point where a sum significantly in excess of that would have to be paid. So far, €186,299.09 has been paid, but under the terms of the agreement the defendant still falls short of the newly-set "half price". In my view, this amounts to a failure to comply properly with the Act.

46. Counsel for the plaintiff relies on the proviso in s. 59 and says that if there was an error in this regard it was not deliberate and did not prejudice the defendant.

47. I consider that it must be held to have been deliberate, in the sense that it was not a clerical error, oversight or inadvertent omission. As far as prejudice is concerned, it might be said to be found in the fact that the defendant was misled as to his legal rights. Demand was made for payment of the full price and the return of the car at a time when, in fact, the defendant should have been able to relieve himself of further financial liability by simply returning it and terminating the agreement. Instead he has had to deal with proceedings seeking the return of the car, the payment of the balance and damages.

48. I think, however, that it is necessary in considering this issue to take into account the fact that the defendant has now had the use of the car for a considerable period of time without paying any instalments under the terms he undoubtedly did agree to.

49. I will therefore refuse the reliefs as sought by the plaintiff at this stage. I propose to invite the parties to make realistic submissions as to the exercise of the court's powers under s.66 of the Act in terms of modification of the agreement. This proposal is, obviously, without prejudice to the right of the plaintiff to appeal this decision.