Neutral Citation Number: [2006] IEHC 168

THE HIGH COURT

[1999 No. 6424 P]

BETWEEN

LOMBARD AND ULSTER BANKING LTD

PLAINTIFF

AND

MERCEDES-BENZ FINANCE LIMITED AND VINCENT HUGHES

DEFENDANT

Judgment delivered the 11th day of January, 2006 by Mr. Justice John MacMenamin

1. It might well have been thought in this era of mediation and alternative dispute resolution that an action between two substantial finance houses regarding the financing of a hire purchase transaction of three rather elderly second hand Mercedes tractor truck units would be more redolent of litigation of another era; the more so when the sum originally at stake was just in excess of the lower end of the High Court money jurisdiction. The fallacy of such a presumption is demonstrated by the instant case which was fought out with tenacity and vigour over three days in the High Court. The reasons therefor emerge in the course of this judgment. Put simply, each side firmly believed in the moral and legal correctness of their actions. (For ease of reference in this judgment Mercedes-Benz Finance Ltd will (save in the next paragraph) be hereafter be referred to as 'the defendant').

2. On one view, the relevant events in issue can be measured in a two month time-span. In or about August 1998 Vincent Hughes, the second named defendant (who is no longer concerned in these proceedings), approached the plaintiffs and stated that he wished to buy three second hand Mercedes trucks from the first named defendant in England and wished to obtain finance of STG £40,000 for this transaction. In the ordinary way the structure of the finance would be a series of three hire purchase agreements, one in respect of each of the three trucks.

3. The contract was made between the plaintiff and the defendant. The transaction was handled in the plaintiff company by Aidan Carolan. At the time of this transaction he was a Manager of the plaintiff company in its Cavan branch. He is now Area Manager in the same branch. He testified that in August 1998 he received a telephone call from a salesperson in Westwood Garage in Strokestown to the effect that the second named defendant was minded to purchase one single new Scania truck from that garage. Mr. Carolan went to meet Mr. Hughes. The nature of this transaction was to be a hire purchase agreement. It is unnecessary to deal any further with this transaction as it did not proceed.

4. Mr. Carolan testified that he personally had no previous experience of dealing with Mr. Hughes. Mr. Hughes had however engaged in transactions with Lake Leasing who are an associated company of the plaintiff. While the latter company carry on their own leasing business, Lombard and Ulster Finance collect funds on their behalf by way of direct debit. The plaintiffs do not share the same information and databanks as Lake Leasing.

5. A short period later Mr. Carolan received a further telephone call from a sales executive of Lombard and Ulster in Sligo. That executive was Gareth Heavey. Mr. Heavey informed Mr. Carolan that Mr. Hughes was then purchasing three second hand Mercedes trucks from Mercedes in England and that this information had come to him through Lake Leasing. Lake themselves were not in the business of financing trucks. Their main business related to the financing of cars. Mr. Carolan's understanding was that Lombard and Ulster would be dealing with Mercedes Benz Sales. He contacted Mr. Hughes and asked him about his intentions. He was informed that Mr. Hughes was purchasing three trucks from Mercedes Benz. As Mr. Carolan was going through Carrick-on-Shannon (where Mr. Hughes lives) he stated that he would call to see him. At that meeting Mr. Carolan was told that Mr. Hughes was purchasing three trucks for a total value of approximately STG £62,000 and that he required finance of STG £40,000 from the plaintiffs and that he wished to pay the deposit.

6. Mr. Carolan knew no more about the trucks at that stage. He put the proposal forward to his head office and the arrangement was approved in principle.

7. The next step in the transaction was to seek a pro forma invoice from the defendant. Mr. Carolan contacted a Mr. Kevin Segar in that company. He told Mr. Segar that Mr. Hughes was purchasing three trucks from the defendant and that he wished to obtain an invoice. The plaintiff was going to finance the purchase. Mr. Segar indicated that he would arrange for a draft invoice which he did. Mr. Carolan testified that he informed Mr. Segar that the plaintiffs were to finance STG £40,000. The total consideration for the three trucks was STG £62,667.56. In error Mr. Segar sent an invoice to Mr. Carolan dated 11th September for the sum of £64,667.56. It will be seen therefore that the error was in the sum of an additional sum of STG £2,000.

8. To avoid further confusion Mr. Carolan laid out a draft invoice as the plaintiffs would require it. He forwarded this to a Stuart Lowther in the defendant company to make up the invoice. Mr. Carolan stated that he was not surprised to find that the seller of the trucks was Mercedes Benz Finance Ltd (a UK Company) rather than Mercedes Benz Sales Ltd. This was attributable to the fact that the plaintiffs financed trucks and various pieces of equipment which might have been repossessed by finance companies such as the defendant. Equally the defendant could wish to sell contract hire vehicles which had been repossessed. Such a transaction therefore, even from the defendant which is a United Kingdom registered company would not be uncommon. Ultimately, on 14th September an invoice emanated from the defendants. The only distinction which can be seen on the face of the draft as opposed to the actual sales invoice of 14th September was the sequence in which the trucks were dealt with, and some lack of definition to the valuation figures which were attributable to each of the three trucks. Mr. Hughes signed the hire purchase contract on the requisite form for the transaction on 15th September. Mr. Carolan contacted a sales support person in the plaintiffs Dublin office to carry out a credit bureau check, known as an 'ICB check' to ascertain whether the goods were the subject of any hire purchase or loan agreement. Nothing adverse was disclosed. Thereafter Mr. Carolan instructed the plaintiff's head office to carry out the credit transfer of STG £40,000 to the defendant company.

9. No information was disclosed to the plaintiff, nor did any discussions take place between Mr. Carolan and the defendant as to the provenance or whereabouts of the trucks. Mr. Carolan said that he proceeded on the basis that they were in the possession of the defendants, and in storage in England.

10. The sales invoice relating to the three trucks from the defendants contained a number of terms which are of importance. The first of these was: "no warranty given or implied". The second: "any distance recorded on the above vehicle cannot be guaranteed in any way". The third: "as seen and approved by Mr. V. Hughes". Finally it was stipulated: "all goods remain the property of the vendor until cleared or received in full". The total consideration of STG £62,667.56 was set out. Below that there was recited: "less cash deposit due from Mr. Hughes STG £22,667.56", leaving a balance due of STG £40,000.

11. On its face then, this is a relatively straightforward hire purchase transaction conducted perhaps rather too speedily and certainly informally.

In order to obtain a fuller picture one must then turn to the history of the tractor truck units. Each of them had previously been registered in Northern Ireland. The oldest was previously registered OJI5287. It chassis number was WDB65592. It was the subject matter of a hire purchase agreement made between Mercedes-Benz Finance Ltd and Agnew Commercials, a Northern Ireland concern on 30th March, 1996. The cash price paid for the vehicle was STG £23,500. This was financed as to an initial payment of STG £5,000 by way of deposit and further finance to a total sum of STG £18,500 payable for 36 months at the sum of STG £606.65.

This vehicle was subsequently re-registered in this jurisdiction as 91 LM 674. The second vehicle was originally registered RJI4221. It too, had been the subject matter of a hire purchase agreement between the first named defendant and Agnew Commercials. This purchase was effected on 23rd October, 1996. The total cash price was £36,013.74, financed as to an initial deposit payment of STG £15,363.75 and additional finance of £20,650 repayable over 36 months at £684.24. The chassis number of this vehicle was WDB65593.

The third vehicle was registered MIL9639 in Northern Ireland. It was subsequently re-registered 96 LM 828. It chassis number was WDB655912. It had been the subject matter of a hire purchase agreement made between Mercedes-Benz Finance Ltd and Agnew Commercials for a total cash price of £69,795 structured as to an initial payment on deposit of £20,395 and financed as to a total sum of £49,400 payable over 60 months at £656.05 per month.

But the hire purchase agreements of each of these three vehicles had been terminated on the 18th June, 1998 by reason of failure on the part of the customer to effect repayments as stipulated. The first vehicle had been repossessed on 21st July, 1998. The second and third vehicles mentioned were still in the possession of the customer and remained so until the 6th July, 1999 and 9th April, 1999 respectively. However Mr. Carolan did not know (a) that the previous customer who had entered into this hire purchase agreement with Mercedes-Benz Finance Ltd was none other than Mr. Vincent Hughes. Mr. Carolan was not informed or aware that only one of the vehicles had been repossessed, and the other two remained in Mr. Hughes possession, and continued to be so for another year. Additionally Mr. Carolan states that he was entirely unaware that the transaction that he had entered into was a refinancing of an existing deal rather than a straightforward series of hire purchase transactions.

Mr. Carolan testified that ten days later he heard from a Mr. Ralph who was one of the credit controllers in the defendant company. Mr. Ralph telephoned Mr. Carolan to indicate that the deposit from Vincent Hughes had not been paid. Mr. Ralph then informed Mr. Carolan that the trucks in question had, at the time of the transaction in issue actually been on hire purchase from the defendant company by Mr. Vincent Hughes. Mr. Carolan was taken aback by this information as he said the plaintiffs would not re-finance goods for anybody, whether in the Republic of Ireland or from England. He testified that he said to Mr. Ralph that he was surprised that the defendants had the trucks "on finance" with Mr. Hughes. No discussion took place at that stage as to who had possession of the trucks. After this telephone call Mr. Carolan in turn contacted Mr. Hughes in order to persuade him to furnish the deposit to the defendant. In response to a query as to why Mr. Carolan felt it was his responsibility to contact Mr. Hughes rather than that of the defendant company, Mr. Carolan said that he did so in order to expedite the transaction. On a number of subsequent occasions in the year 1998 and 1999 Mr. Carolan contacted Mr. Hughes in an effort to persuade him to complete the deal.

12. On 26th November, 1998 the plaintiffs received a letter from the defendants in which it was asserted that three trucks were the property of Mercedes Benz Finance Limited and calling upon the plaintiffs to ensure that the totality of the payment of the transaction i.e. the STG £62,667.56 was payable.

13. Mr. Carolan denied that there was any overlap of information between the plaintiff and Lake Leasing. Consequently any information which might have been available to the latter company about transactions which they had entered into previously with Mr. Hughes would not have been available to the plaintiff. Further, when Mr. Hughes spoke to Mr. Carolan in early September he stated that he was buying the trucks from Mercedes. Mr. Carolan said that the only checks customarily carried out in this jurisdiction were those known as the 'ICB' check i.e. those carried out under the aegis of the Irish Credit Bureau. This is of some relevance in that the trucks in question were previously registered in the United Kingdom. Lombard and Ulster did not carry out a credit check in that jurisdiction prior to the hire purchase transaction until the 15th or 16th September at which point it emerged that the vehicles in question were registered with the defendant company. Mr. Carolan was insistent that if he had known that what was in issue was a refinancing transaction the plaintiffs would never have considered engaging in it at all. Furthermore he insisted that the contract that he entered into on behalf of the plaintiff was purely for the sum of STG £40,000 and was in no way as surety or guarantor for the totality of the purchase price of the three trucks. He stated that any arrangement made regarding the repayment of the STG £22,000 deposit was between Mr. Hughes and the defendant company.

14. Not the least unusual aspect of the transaction is that apparently, on the 30th September, the plaintiff credited Mr. Hughes account with a deposit on the transaction of IR £26,465.33. Mr. Carolan stated that he thought that that sum must be there for tax purposes so that when Mr. Hughes was carrying out his audited accounts he would be shown that this was part of the transaction which he had effected, and that he would be taking a capital allowance write off of 20% against his accounts from moneys having been paid out on a hire purchase agreement.

Mr. Carolan also said that he was unfamiliar with any credit check agencies known as Experian or Ecuifax which provide information on UK vehicles. They were not used by his company in Ireland.

15. One issue which arose which was never completely clarified was whether, on the 15th or 16th September the plaintiff contacted Mr. Segar in Mercedes Benz with a view to obtaining "clearance" either on Mr. Hughes and/or on the vehicles, and whether as he said, Mr. Segar refused point blank to give any such clearance unless the totality of the debt in question was paid. It was further suggested that this Lombard and Ulster representative, who was unidentified, ultimately was dissatisfied with Mr. Segar's response, and was put through to Ms. Kaye McDougall of the defendant company. Neither any representative from the plaintiff nor Ms. McDougall gave evidence.

A number of direct debits were presented to Mr. Hughes' bank in the month of October and November 1998 and went unpaid. Mr. Carolan stated however that the question of dealing with such matters would be for the collection department in Dublin.

16. Between November and March 1999 both Mr. Carolan and a Brian Carey, also senior official of the plaintiff, visited Mr. Hughes on a number of occasions seeking to persuade him to pay the deposit. . An elapse of time between November and the following April of 1999 occurred prior to any response emanating from the plaintiff. However this was considered unremarkable. Mr. Carolan specifically denied that any conversation had taken place between himself and Mr. Segar of the defendant wherein it was suggested that the transaction was for the *refinancing* of trucks on behalf of Mr. Hughes.

17. Second to testify on behalf of the plaintiff was Mr. Brian Carey, currently head of regulatory risk and compliance with the plaintiff company. He was formerly collections manager. Having reiterated the evidence as to the relationship between the plaintiff company and Lake Finance he stated that his understanding of the invoice in question was that having paid the sum of £40,000 the plaintiff company had acquitted itself of its responsibilities in the transactions. The core of the problem, as far as he was concerned was that Mr. Hughes had failed to pay his deposit to the dealer. He did not however consider that this matter was of direct consequence to the plaintiff in terms of the trucks. He was satisfied that having paid the invoice amount in full (referring to the sum of £40,000), the invoice made clear there was an amount due from Mr. Hughes which he said in the normal course would have been the responsibility of the defendant to collect. In January 1999 he had it in mind to commence proceedings by way of injunctive relief against Mr. Hughes. He was not concerned about the assertion of the claim made by the defendant company in their letter of 26th November, 1998 in that the defendant company had received the STG £40,000, had failed to collect the deposit, and at that stage he assumed that they had released possession of the goods without receiving their deposit. Ultimately therefore he considered that the problem lay with the defendant. In the light of the previously good relationship between the plaintiff and the defendant company he had suggested to Mr. Carolan that he might go to Mr. Hughes and see what he could do in order to see that Mr. Hughes fulfilled his side of the bargain. Mr. Carey added that the plaintiff company subsequently adopted a procedure of profiling accounts which gave further of information regarding the conduct and performance of each account with finance companies on a monthly basis. However in 1998 the breadth of information which is now obtainable was not available to the plaintiff. While 'ICB' and other checks were available in this jurisdiction such checks did not cover transactions in Northern Ireland, nor do they cover transactions in the United Kingdom. Mr. Carey testified that because Mr. Hughes had an Irish address he did not consider that it was either reasonable or necessary to carry out checks either in Northern Ireland or in England. No information was available to the plaintiff company to indicate that the plaintiff had a previous history of transacting business in Northern Ireland. This was so despite the fact that in a number of previous transactions with (reflected in discovered documents) Mr. Hughes apparently had furnished an address of his company at 25 Crumlin Park, Crumlin, Co. Antrim. Neither Mr. Carey nor anybody else within the plaintiff company had notice of Mr. Hughes having transacted business in Northern Ireland. He accepted that not alone had the plaintiff been misled by Mr. Hughes in relation to the nature of the transaction, but also it was profoundly mistaken in the view on which it had proceeded that the defendant company was actually in possession of the trucks at the time that the invoice was paid, and they would not have released the trucks until they received the deposit. Referring to a plaintiffs record of 17th September, 1998 known as a "document log" which stated

> "Terms of acceptance: Aidan Carolan.
>
> Booking Reference No: 1391
>
> Rate: 0.8565
>
> Transferred by financial control.
>
> Deposit paid to Mercedes."

He stated that this conveyed to him that it was Mr. Carolan's belief, and that of the plaintiff that the deposit had been paid. When asked why he did not seek thereafter to repossess the trucks, he responded that he considered that Mr. Hughes had the financial capacity to carry out repayments, that he was present in the jurisdiction and appeared to have a substantial house and car on which he was apparently carrying out payments. He had no reason to believe that he would not ultimately pay the deposit on the trucks.

19. The Defence Evidence

First to testify on behalf of the defendant was Mr. Raj Rajagoupal who was then an account controller. He said that the first contact that he had with Mr. Hughes was when he attended at the defendants offices in England seeking to induce them to reinstate the contracts which had by then been terminated. These discussions took place in the summer of 1998, but prior to any involvement of the plaintiff. Mr. Hughes discussed with Mr. Hughes methods of payment which he might adopt and how he was going to resolve each of the contracts. As soon as soon as the contract was terminated, no further direct debits were accepted through their bank system. However this would not prevent a customer sending in payments in the form of a cheque or paying into a bank. Any funds received after the termination of a contract would be put towards the account. After termination the truck was normally sold at auction in an effort to seek to mitigate the customers loss. The witness informed Mr. Hughes that the contracts had been terminated and that the defendants were actively seeking to repossess the vehicles. Each of the contracts relating to each of the trucks was terminated on 8th June, 1998. Prior to that date, in April 1998 he had considered the repossession of the trucks and had ordered keys for that purpose. He was in contact with repossession agents, named Anglo Irish Professional Repossession. This contact commenced on 20th April, 1998 where a Mr. Murphy of that firm indicated to the defendants that he had identified the trucks and could seize them if this was desired.

20. With regard to the 1991 truck the witness accepted that Mr. Hughes paid the payments promptly for six months after 30th March, 1996 with Mercedes Benz Finance. The latter two trucks, that is the 1993 and 1996 truck were both purchased on 23rd October, 1996. Mr. Rajagoupal testified that when a customer is two payments 'down' in relation to any one truck the contract is terminated. The 1991 truck was seized on 21st July, 1998. At the time of seizure it was accepted that the customer immediately became liable to pay all outstanding instalments. He quoted Mr. Hughes a settlement figure of £6,384.89 on the 1991 truck. This was made up of £5,384.89 for arrears and £1,000 added on for the cost of repossession.

It seems clear this total sum of £6,384.89 was paid by Mr. Hughes to the defendant on or about 7th August, 1998 by way of bank draft. Despite the fact that the outstanding sums on the 1991 truck were repaid, the defendant retained possession of that truck. It was ultimately sold on 16th January, 1999 at Garryduff Auctions in Northern Ireland for the sum of STG £4,935. Mr. Rajagoupal contended that despite the fact of £6,384.89 had been paid by Mr. Hughes in August 1998 it was still the property of the defendant. He stated that what was set out in the invoice of 14th September, 1998 were not truck sale prices but settlement figures. He accepted that the implication of the reservation of title clauses was that the defendants owned each of the three trucks. After the date of termination he accepted Mercedes Benz had a money claim against Mr. Hughes and also had ownership of the trucks entitling them to sell the trucks for a fair price. He further accepted that when the defendants received the STG £40,000 the plaintiffs appear to have thought they were buying the trucks. In the course of cross examination by Mr. Senan Allen S.C. on behalf of the plaintiff the following exchange took place from question 136, day three onwards:-

> "Q: So when you got the £40,000 it was plainly you could infer, that Lombard thought they were buying the trucks?
>
> A: An assumption could be made on that basis, yes.
>
> Q: No other assumption could be made I suggest to you?

A: You've got to understand here in this instance we were not party to any agreement between Mr. Hughes and Lombard, we were completely an innocent party. We had three trucks to sell. The three trucks owed us a certain amount of money. All we wanted to do was sell the trucks and get the money in.

Q: You are not prepared to sell them for £40,000?

A: We certainly would not be able to sell them for £40,000.

Q: Lombard was not prepared to pay any more than £40,000?

A: Then nothing would have happened Sir, we would not have passed title on the trucks at all.

Q: Exactly, so you give them their money back?

A: That is a decision which has to be made by the manager of the department at the end of the day.

Further at question 143:-

Q: If you pay money for something and do not get it, do you not get your money back?

A: Well, it's a decision which is not made by me, but by somebody senior above me who decides that."

The witness did not accept that the transaction between the plaintiff and the defendant resembled in all relevant particulars the earlier transactions which the defendant itself had carried out with Agnew Commercials again subject to retention of title clauses. Mr. Rajagoupal was unable satisfactorily to explain the full nature of the transaction relating to the 1991 truck, especially having regard to payment of the outstanding sum thereon as on 7th August, 1998. Nor was he in a position to explain why the cash deposit, stated to be due in the invoice of 14th September, of £22,667.56, made no allowance for the payment by Mr. Hughes on 7th August, of the sum of £6,384.89.

A further incongruity which appeared is that, in a memo from Kaye MacDougall of 17th September, 1998, relating to "chaps receipts" (a form of inter finance house bank payment) and sent by email, the sum of £40,000 received by the defendants from the plaintiff on 16th September was allocated to *two* accounts. The first of these was stated to be account no 9126885298. The second account was numbered 9146732700. The first of these account numbers was, curiously, the invoice number for the entirety of the three trucks as set out in the invoice of 14th September, 1998. The latter invoice number would appear to relate only to the 1991 truck which had been the subject matter of apparently full repayment made in August, 1998. Mr. Rajagoupal, having been on holiday was not in a position to deal with the manner in which the defendants chose to treat the £40,000 paid by the plaintiffs. The relevant witness on this issue would appear to have been Ms. MacDougal, who did not testify.

21. Mr. Kevin Segar also testified on behalf of the defendant company. At the time he was passenger car asset controller. However, in the absence of others on holidays he also had to involve himself in commercial vehicles transactions. On 11th September he was contacted by Mr. Hughes stating that he had managed to obtain finance from the plaintiffs and requesting that he produce an invoice based on a copy which would be sent over to him reciting the three vehicles, their chassis numbers, engine numbers and registration numbers in accordance with the template invoice to be sent by the plaintiffs. Mr. Segar accepted that the draft invoice sent over on 11th September, 1998, was incorrect. The corrected invoice was sent out on 14th September. On the following day he received a telephone call from a person whom he believed to be called Carolyn from the plaintiff company requesting clearance in the vehicles. To this he responded that he could not possibly give clearance, that the defendants had not received all the monies due on this account and therefore they would not be passing "clearance" or giving letters of "clearance". The witness stated that the reaction of the representative from Lombard & Ulster was "fairly muted", and that she then wanted to speak to a supervisor at which point she was passed over to Kaye MacDougall who was in a different part of the office. When the £40,000 came in from the plaintiffs he was surprised to see it arrive before the deposit came in. He did not accept that the first right of appropriation of a debt was that of the customer. The defendants' policy would be to appropriate the funds across all three transactions. Mr. Ralph was not disposed to accept that there was any analogy which might be drawn between the transactions which the defendant company effected with Agnew Commercial Motors in 1996. He was of the view that what was in question here was a refinancing deal rather than a simple hire purchase transaction. Mr. Ralph was insistent on the proposition that in order for the plaintiffs to obtain full title to the three trucks a total sum on foot of the contract must be paid. However, he denied that the sum of £40,000 which had been paid by the plaintiff had, been effectively treated as a deposit. At question 403 on day three he was asked by counsel for the plaintiffs in reference to the deposit:-

"Q: When the £22,000 failed to materialise you forfeited the £40,000?

A: In my view they paid £40,000 which is what the invoice that is requested from Lombard to raise, they paid and they kept their first part of the bargain in paying us the £40,000. The rest of the balance was due.

Q: What did they get from (sic) the £40,000?

A: I can't comment. They had a contact with Mr. Hughes which they wrote on the same day that I sent the fax or that the fax was sent over on 14th. They already had a hire purchase agreement with Mr. Hughes and they had three payments from Mr. Hughes as it turned out.

Q: That was later. Never mind about that. How can they hire the goods to Mr. Hughes if they do not own them?

A: On the documentation that they started on 14th, they'd already signed Mr. Hughes up. It was already entered into agreement surely before they sent us the money".

In Mr. Ralph's view the plaintiffs were engaging in a refinancing agreement which had nothing to do with straight forward hire purchase. In hindsight he considered that the plaintiff and the defendant did not have the same understanding as to the nature of the transaction at all.

22. Third to testify on behalf of the defendant company was David Ralph, again an employee of the defendant at the time. He stated that his recollection, was at a time that he could not remember, he had contact with the plaintiffs. The plaintiffs sought details as to Mr. Hughes history as a customer. In response to this the witness stated he indicated that the plaintiffs might want to carry out sufficient checks on Mr. Hughes to establish his credit worthiness. However, he did not say that his conversation went outside the standard industry norm that anyone would say to anyone else. He considered that Mr. Hughes was a very "slippery sort of character" with an unfortunate and chequered history with the defendant company. He confirmed having written the letter of 26th November demanding payment of the total sum of £62,667.56. He left the defendant company on 25th January, 1999. The witness was unable to account for the fact that the deposit stipulated in the contract of £22,667.56 did not apparently take into account the sum paid on 7th August, 1998, by Mr. Hughes of £6,384.89, which was a settlement on the 1991 truck.

23. When the witness was asked as to the meaning of his letter of 26th November, he accepted that it meant that in his view the plaintiffs were liable to pay the balance of the total sum outstanding that is that they were liable for the additional sum of £22,667.56. He contended it was a refinancing agreement.

I am unclear as to how this testimony could completely be reconciled with the description on the invoice of 14th September, 1998, as being a "Sales Invoice".

At question 616 Day 3 the witness was asked whether, in his view, the payment of the sum of STG £6,384 would have entitled Mr. Hughes to the ownership of the 1991 truck. His response was-

> "I must be honest, on the face of it, yes, it would look that way."

24. Consideration

The central case put forward (with much panache) by Mr. Michael Byrne S.C. on behalf of the defendants was that the plaintiffs took on the risk as to whether or not Mr. Hughes would pay the deposit. Further, that at all stages as owners the defendants were entitled to assert the reservation of title clause and that the defendants remained owners of the vehicles. The position did not alter by virtue of the fact that the plaintiffs "took on the risk of Mr. Hughes". The defendants did not owe any greater duty of disclosure as a consequence of this position. Mr. Byrne further submitted that if the plaintiffs failed to carry out sufficient checks in relation to the credit worthiness of Mr. Hughes that was a matter for them. There was no need to imply terms into the contract unless to give business efficacy thereto. Here there was a straight forward invoice contract between two finance houses containing a retention of title clause clear on its face which, states that if all monies were not paid no title passed. Why then Mr. Byrne asked rhetorically did the plaintiffs not respond to the letter of 26th November? Why did Mr. Carolan resort to Mr. Hughes, on occasion in the company of Mr. Carey, seeking to induce him to pay up the deposit? Counsel further submitted that even if there was a breach of a condition precedent, or a lack of consensus ad idem there was approbation or adoption of the contract by the conduct of the plaintiff in November or thereafter. The arrangement entered into between the plaintiff and Mr. Hughes was one collateral to the contract in issue in these proceedings regarding the payment. Regarding the payment of £6,384 in August, 1998, counsel submitted that such payment, although undoubtedly intended to discharge the indebtedness relating to the 1991 truck, did not have that effect. It was a matter for the defendants to allocate that payment along with other payments in discharge of the general indebtedness owed on foot of the three trucks.

In his succinct submission on behalf of the plaintiff, Mr. Senan Allen S.C. submitted that, on any objective basis, what was in contemplation between the parties was sale of three trucks. The prices for such vehicles were set out in the sales invoice. In its substance and execution the transaction entered into between the plaintiff and the defendant was not different from those entered into by the defendant with Agnew Commercials who supplied the vehicles to the defendant in 1996. Mr. Allen pointed to the acceptance by Mr. Rajagoupal that the payment of a deposit was a matter between the dealer and the customer, not a matter for the finance house. He submitted that whether the transaction was a finance or refinancing transaction, the title to ownership of the trucks by the plaintiff was a condition precedent. Absent the fulfilment of any such condition there could have been no contract. Here the defendants did not have possession of two of the trucks. This was not disclosed. Mr. Allen S.C. rejected any contention to the effect that the mention of the "deposit" sum of £22,667.56 in the invoice meant that the plaintiffs already had possession thereof. On its face it clearly meant that it was the contractual duty of Mr. Hughes to pay the deposit. Mr. Allen specifically pointed out that there was evidence from the defendants side that they were surprised to see the sum of £40,000 arriving from the plaintiffs in the absence of the payment of the deposit. Counsel pointed to what he contended were three fundamental difficulties in relation to the case advanced by the defendant.

These were:

> (a) the status of the payment of the £40,000 in the absence of the deposit
>
> (b) the mistaken belief on the part of the plaintiff that the defendant had possession of all three trucks it was purporting to sell
>
> (c) the fact that the defendant did not at the time own the 1991 truck by reason of the payment of £6,384, which consisted not only of the redemption figure but also seizure costs. The failure to respond to the letter of 26th November was not a relevant or material consideration in the interpretation of the contract. As of the 14th September, 1998 the defendant had two trucks (or possibly three) and their personal claim against Mr. Hughes. As of 15th September they had the same trucks, the same liabilities against Mr. Hughes, but in addition the sum of £40,000 received from the plaintiff which was unlawfully appropriated by the defendant as a deposit between all three trucks.

In relation to the three trucks Mr. Allen pointed to the fact that the defendants found themselves in a position where it was they who had by dint of resale made additional profits of STG £3,800 in relation to the 1991 truck; £5,924 the 1993 truck, and STG £10,331 the 1996 truck. It was inconsistent for the defendants to assert continuing ownership over the trucks on the one hand and on the other to assert that they are entitled to retain the sum of £40,000 paid over to them by the plaintiffs.

26. The Law

Where one contracting party has not received any part of that contracted for there has been a total failure of consideration. Here 'consideration' acquires a narrower meaning than that imputed for the purpose of determining whether a contract has been formed. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Limited* [1943] A.C. 32 Lord Simon summarised the legal position thus:

> "In the law relating to the formation of contract the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi contractual right to recover money on that ground, it is

generally speaking not the promise which is referred to but the performance of the promise."

27. Thus if there is defective performance by one contracting party in circumstances entitling the other party to rescind the contract (for example breach of an express or implied condition) the injured party may pursue whatever contractual remedies are available, or elect instead to claim restitution. If, however, there has not been a total failure of consideration, the quasi contractual remedy will not be available. If the defendant has a valid defence in contract to the plaintiffs action the plaintiff may not have any financial remedy at all. If a plaintiff receives some tangible benefit it does not follow that a court will be constrained to hold that there was no total failure of consideration. (See the leading English on this issue, *Rowland v. Divall* [1923].

The Irish case of *Chartered Trust Ireland Limited v. Healy and Commins* (Barron J. Unreported, High Court, 10 December, 1995) equally illustrates this point. In that case the first named defendant hired a truck on hire purchase terms. The transaction was financed by the plaintiff finance company. It later transpired that the truck was illegally brought into the State and was not in fact the vehicle it was represented to be. Barron J. held that the contract was null and void and awarded the first named defendant the return of all moneys paid by way of hire purchase instalments and all other payments made in pursuance of the agreement. The fact that Healy had used the truck for over a year did not mean that he had received any part of the consideration; in contracts of sale title to the property and in hire purchase cases the option to purchase are seen are the consideration.

28. Similar considerations informed the decision of the Supreme Court in the case *of United Dominions Trust (Ireland) Limited v. Shannon Caravans Limited* [1976] I.R. 225. In that case a third party wished to obtain approximately £3,300 in order to pay for a mobile caravan which he had bought and which had been delivered to him. The third party approached a junior employee of the plaintiff, a hire purchase company, and the employees suggested that the defendant, a dealer in caravans should purport to sell the mobile caravan to the plaintiff for £3,300 and that the third party should then purport to purchase the caravan from the plaintiff under a hire purchase agreement between the plaintiff and the third party. The scheme was put into operation and the plaintiff paid the defendant £3,300 as the purchase price of the caravan and then executed a hire purchase agreement with the third party. The defendant who did not profit by the transaction immediately paid £3,300 to the third party. When the third party had paid the plaintiff 8 of the 36 monthly instalments under the hire purchase agreement the third party became insolvent and the plaintiff's senior executive became aware of the true facts. The plaintiff's junior employee was the only employee of the plaintiff who knew of the scheme. He was not authorised to accept hire purchase business for the plaintiff and the plaintiff's executive officer who authorised the payment of £3,300 by the plaintiff and the execution of the hire purchase agreement was not then aware of the true facts. In an action in the High Court for money paid to the defendant for consideration which it wholly failed the plaintiff recovered judgment for £3,300 less the amount of the hire purchase instalments received from the third party. It was held by the Supreme Court (O'Higgins C.J., Henchy J. and Griffin J.) in disallowing the appeal:

> 1. That as the plaintiff's junior employee was privy to an act of deceit against the plaintiff the knowledge that the employee could not be imputed to the plaintiff
>
> 2. There had been a total failure of the consideration for the sum of £3,300.

In the course of his judgment (at p. 232) Griffin J. relied on *Rowland v. Divall* [1923] 2 KB 500 and quoted Lord Justice Atkin at p. 506 of the report to this effect

> "It seems to me that in this case there has been a total failure of consideration, that is to say the buyer has not got any part of that for which he paid the purchase money. He paid the money in order that he might get the property, and he has not got it. It is true that the seller delivered to him the *de facto* possession but the seller had not got the right to possession and consequently could not give it to the property … There can be no sale at all of goods which the seller has no right to sell. The whole object of a sale is to transfer property from one person to another … can it make any difference that the buyer had used the car before he found out that there was a breach of the condition? To my mind it makes no difference at all. The buyer accepted the car in the representation of the seller that he had a right to sell it, and in as much as the seller had no such right he is not entitled to say that the buyer has enjoyed a benefit under the contract. In fact the buyer has not received any part of that which he contracted to receive, namely the property and right to possession – and that being so there has been a total failure of consideration.

30. The principles thus set out so clearly by Irish authority and otherwise are applicable in the instant case. Here I find the plaintiffs were entitled to assume that the defendants were owners of each of the three trucks. I do not accept on the facts as found that the defendants were the rightful owners of the 1991 truck.

The plaintiffs were entitled to assume that the defendants had the three trucks in their possession. As it transpired the only truck in their possession that was the 1991 truck to which they had no title. The other two trucks were actually held in the possession of Mr. Vincent Hughes. Those two trucks were later repossessed only on the 18th June, 1998.

There is yet a further paradox in the position adopted by the defendant. It is entirely unclear, having regard to the circumstances, as to why the sum of £6,384.89 was not deducted from the sum of £22,667.56 identified as being the 'deposit' payable.

I further accept that the plaintiffs were unaware of the fact that the trucks in question had been previously purchased by the defendants in March and October 1996 from Agnew Commercials in Northern Ireland.

In common with the authorities cited there must be a strong suggestion, and I will put it no further, that there were intentional failures of disclosure which may well be tantamount to deceit on the part of Mr. Hughes in relation to the transaction as a whole.

While it may have been that the plaintiffs could have taken further steps to check Mr. Hughes history this in my view does not affect the fundamental legal issue which arises in this case: that is the clear failure of disclosure of material facts, and further breach of material conditions as identified. For the reasons set out above I consider this is a contract where the consideration has wholly failed. The plaintiffs are entitled to recession thereof.

Even if I am wrong on this finding it seems to me that the contract made between the plaintiff and the defendant is one where the background history of the relationship between Vincent Hughes and the defendant should have been disclosed by Mercedes-Benz Finance. Even if the defendants were correct in their argument, the plaintiffs were effectively placed in the position of a surety on behalf of Mr. Hughes. In the circumstances therefore the defendants were in possession of particular information which made the risk to which the plaintiffs were exposed an unusual one or a risk materially different in nature to that which the plaintiff would normally expect. In *Levitt v. Barclays Bank* [1995] 2 All E.R. p. 615 a contract was set aside where the plaintiff who had put up treasury stock as security, was not told of arrangements between the debtor and the bank whereby the security would be used to repay the loan.

Here, the defendants were in possession of particular information regarding Mr. Hughes's credit record, the previous transactions in relation to the trucks, the fact that two of them were in Mr. Hughes's possession that only the third had been repossessed from him which truck was lawfully the property of Mr. Hughes. All of these facts should, in the circumstances, have been disclosed in the making of this agreement.

Alternatively even a court were to hold that if the contract was conditional, it is clear that a condition precedent was the payment of the sum due by way of deposit (*CF Lowis v. Wilson* [1949] I.R. 347]. This condition was unfulfilled.

In either instance it seems to me the plaintiffs are entitled to rescind the contract.

On the basis of these findings I consider that the plaintiff is entitled to recession of the contract. I will hear counsel on the issue of damages and costs.