19/12; [2012] VSC 201

SUPREME COURT OF VICTORIA

WERNER MOTORING GROUP PTY LTD v NMX PTY LTD

McMillan J

3, 18 May 2012

CIVIL PROCEEDINGS – CONTRACT – CLAIM FOR DAMAGES FOR BREACH OF – AGREEMENT TO SUPPLY VEHICLES – BEFORE DELIVERY VEHICLES ON-SOLD – VEHICLES NOT DELIVERED – REFUSAL BY DEALER TO ACCEPT AN AMOUNT TO RESCIND CONTRACTS – WHETHER DEALER SHOULD HAVE TAKEN STEPS TO MITIGATE ITS LOSS – FINDING BY MAGISTRATE IN FAVOUR OF DEALER'S CLAIM – WHETHER MAGISTRATE IN ERROR – WHETHER THE MAGISTRATE FAILED TO PROVIDE ADEQUATE REASONS – WHETHER THE MAGISTRATE CORRECTLY APPLIED THE PRINCIPLES OF LAW RELATING TO MITIGATION – WHETHER THERE WAS A BREACH OF CONTRACT OR A FAILURE TO MITIGATE.

WMG. agreed with NMX to deliver eight hail-damaged vehicles to NMX for a certain amount. NMX then on-sold the vehicles; however, WMG failed to deliver the vehicles on the basis that on-road costs had to be paid prior to delivery. WMG then offered to pay a sum to rescind the contracts but the offer was not accepted by NMX. The vehicles were subsequently sold to other persons and NMX brought a claim against WMG for damages for breach of contract for loss of profits in the sum of $80,600. The Magistrate upheld the claim and rejected submissions by WMG that NMX ought to have taken steps to mitigate its loss. Upon appeal—

HELD: Appeal allowed but for reasons given, the Magistrate's judgment and orders upheld.

1. In relation to the submission that the Magistrate did not provide adequate reasons for the decision that NMX did not have a duty to mitigate its loss, the Magistrate failed to provide a path of reasoning which formed the basis upon which the issue of mitigation was decided. Whilst the Magistrate made findings of fact throughout her reasons, she did not provide a connection between the findings of fact that she made and the conclusion that she ultimately reached. As a result, the Magistrate did not provide the reader with an understanding of the basis upon which she concluded that there was no duty to mitigate on the part of NMX and accordingly, was in error.

2. In relation to the submission that the Magistrate failed to correctly apply the legal principles in that the Magistrate did not consider or determine when the breach of the contracts occurred, for how long the offer for the new contracts was open and whether the offer was a reasonable one in the circumstances, it was open to conclude that the Magistrate failed to identify and apply the legal principles with respect to mitigation and this failure constituted an error of law.

3. The delivery date as specified in the contracts was "as soon as possible" which meant that the vehicles should have been provided to NMX upon presentation of the cheques by NMX for the balance of the purchase price. By refusing the cheques, WMG breached the contracts and this breach occurred prior to the offer being made. However, it is a long standing principle that the duty to mitigate does not arise until a contract has been repudiated.

4. The offer was not reasonable as it required NMX to pay a higher purchase price for the vehicles than that to which it had already agreed under the contracts and it would have resulted in NMX having to enter into costly and complex litigation to recover its loss. Additionally, it could not be said that NMX acted unreasonably or failed to mitigate its loss by insisting that WMG honour the contracts. NMX's insistence merely demonstrated its desire to receive the vehicles that were promised to it under the contracts.

***Payzu Ltd v Saunders* (1919) 2 KB 581, distinguished.**

5. Accordingly, the appeal was allowed but for the above reasons, the Magistrate's judgment and orders were upheld.

McMILLAN J:

Introduction

1. This is an appeal on two questions of law pursuant to s109 of the *Magistrates' Court Act* 1989 ("the Act"). The appeal arises out of a proceeding in the Magistrates' Court, brought by a Notice of Complaint that alleged a breach of contract by the appellant, Werner Motoring Group Pty Ltd ("WMG"), in failing to deliver eight vehicles to the respondent, NMX Pty Ltd ("NMX"), pursuant to contracts of sale entered into on 11 March 2010.

2. The trial was heard on 15 and 16 August 2011. In her judgment delivered on 9 September 2011, the Magistrate held that WMG was liable for damages in the amount of the profit that NMX was to realise by on-selling the eight vehicles. The Magistrate rejected the submissions of WMG that NMX ought to have taken steps to mitigate its loss. She held that the contracts of sale were valid and enforceable and that NMX was under no duty to mitigate its loss.

3. In this appeal, the appellant raised two question of law on the issue of mitigation only:
a) whether the Magistrate failed to provide proper (adequate) reasons for her decision; and
b) whether the Magistrate correctly applied the principles of law relating to the obligation of a successful plaintiff to mitigate its loss.

The Relevant Findings of Fact at Trial

4. The appellant and respondent were both motor car traders. As a result of a severe hail storm, the appellant held a sale of hail damaged vehicles at its business premises on 11 March 2010. Mr Reno Xerri, the manager of NMX, attended the sale on behalf of NMX and, on that day, he entered into contracts of sale with WMG for the purchase of eight vehicles ("the Contracts") and paid a $1000 deposit on the purchase price of $391,400.

5. Mr Xerri's evidence was that at the time he entered into the Contracts, NMX had entered into third-party contracts to on-sell the vehicles to Western Australian dealers.

6. Prior to entering into the Contracts, Mr Xerri informed WMG's salesman, Mr Dean Greg, its sales manager, Mr Brant Thompson, its director, Mr Gavin Werner, and another employee of WMG, Mr Mark Issa, that he was a licensed motor car trader. As a result, the Contracts did not include an additional sum for on-road costs. That night, Mr Xerri invoiced the respective buyers in Western Australia to whom he had on-sold the vehicles at a price of $472,000, making a profit of $80,600.

7. Mr Xerri attended WMG's premises the following day with cheques for the balance of the purchase price of the vehicles – a total of $390,400. At this time, Mr Werner told Mr Xerri that unless NMX paid the on-road costs, WMG would not complete the Contracts ("the Offer"). Mr Werner informed Mr Xerri that the on-road costs were $24,000, which costs NMX would have to pay if the Contracts were to proceed.[1] Mr Xerri told Mr Werner that as he was a licensed motor car trader, he did not have to pay the on-road costs. Mr Werner then offered Mr Xerri $5,000 to rescind the Contracts. Mr Xerri rejected this offer. Mr Xerri pointed out to Mr Werner that he had already entered into contracts with the Western Australian dealers and had already received payment for the vehicles. Mr Werner explained to Mr Xerri that WMG would have problems with Toyota if the cars were sold without stamp duty, and that it may lose its franchise with Toyota.

8. WMG put the eight vehicles back on the market and the vehicles were then sold for more than Mr Xerri had contracted to pay for them. As a result, NMX brought proceedings against WMG in the Magistrates' Court for breach of contract claiming damages for loss of profits in the sum of $80,600.

Failure to Provide Adequate Reasons

9. WMG submitted that the Magistrate erred in law by failing to provide adequate reasons on the issue of mitigation and that failure to provide adequate reasons is a category of appeal upon a question of law under s109 of the Act.

10. WMG and NMX agreed that the relevant legal principles when determining whether adequate reasons have been provided can be drawn from the case of *Brown v Tabro Meat Pty Ltd.*[2] In that case, Kaye J observed that the requirement to provide adequate reasons is based upon two principal considerations:[3]

> First, a failure by a judge or Magistrate to provide adequate reasons for decision can give rise to a legitimate sense of grievance on the part of the losing party, which is left in ignorance as to why the decision, adverse to its interest, has been made. That consideration is closely related to the public interest in maintaining the community's acceptance of judicial decisions, and in maintaining the perception of the integrity of the judicial process. The second consideration is that, in cases in which an appeal lies, the provision of adequate reasons for judgment identifies to the appellate court the reasoning and basis upon which the decision, under appeal, is made. The provision of such reasons is thus important in ensuring that the losing party maintain its rights of appeal.

11. His Honour referred to the authority of *Beale v Government Insurance Office of New South Wales*,[4] where Meagher JA referred to the three fundamental elements of an adequate statement of reasons. Justice Kaye summarised these elements as follows:[5]

> ... the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions, or ultimate findings, of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions), and reasons in applying the law to the fact so found.

12. Finally, Kaye J made reference to the decision of Nettle JA in *Hunter v Transport Accident Commission*,[6] in which his Honour held that the scope of the duty to provide reasons will depend upon the circumstances of the case. Justice of Appeal Nettle stated:[7]

> Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law.

13. The appellant submitted that the Magistrate's reasons are inadequate in that they:

> a) Fail to expose the Magistrate's path of reasoning, leaving WGM unsure as to the basis upon which the issue of mitigation was decided; and
> b) Fail to state the Magistrate's conclusions as to questions of fact relevant to the determination of the issue of mitigation.

14. The reasons provided by the Magistrate were as follows:[8]

> 23. I find that the defendant company's employees made a mistake about the contracts, but nevertheless knew that Xerri was a licensed motor car trader. The second lot of contracts support this as they were printed up without the on road costs consistent with Xerri's status as a dealer. His status was known to the defendant company's employees. Unfortunately for Werner the contracts put his franchise agreement with Toyota in jeopardy. I accept his evidence on that point.
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> 24. Rather than absorb the cost himself, or waive the extra cost he chose to repudiate the contracts having first offered Xerri $5,000 to release him from his obligations. As Xerri had recently pointed out he had already entered into new contracts with the West Australian dealers, and stood to lose his profits of $80,000 if he backed away. He was not prepared to do so, and Werner said he would rather be sued by Xerri than jeopardise his profitable Toyota franchise.
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> 25. The contracts I find were valid and enforceable, and I do not accept the submissions that the plaintiff company had a duty to mitigate its losses in this case. It was not required to forego its profits, so that the defendant company could continue its franchise agreement.

15. To demonstrate that the Magistrate failed to provide adequate reasons, the appellant referred to their submissions and the respondent's oral submissions as recorded on the transcript of the trial.

16. At the trial, WMG submitted that it would have been reasonable for NMX to enter into new contracts under which it agreed to pay the on-road costs and that if it had done so, WMG would have delivered the vehicles to it. It was submitted that this would have been sufficient for NMX to fulfil its obligations to on-sell the vehicles for a profit. WMG submitted that this was the "commercially expedient" option, and that after making its profit by on-selling the vehicles, NMX could have demanded or sued for the on-road costs it was required to pay under the new contracts.

17. Against these submissions, at trial, counsel for NMX observed that the burden of proof in respect of mitigation was borne by WMG as it is the party in breach of the Contracts. Further, NMX submitted that the Offer placed NMX in a situation where it had to decide on the "spur of the moment", being circumstances equivalent to an emergency. In making this submission, counsel for NMX relied on the evidence of Mr Xerri, given at trial, that he believed the vehicles were put back on the market on the day that the Offer was made, thereby not giving NMX sufficient time to consider the Offer. Further, NMX submitted that taking reasonable steps in mitigation does not require a party to take steps which injure its commercial reputation or require it to enter into expensive and complicated litigation. Finally, NMX contended that it was uncertain whether NMX could have recovered from WMG any of the on-road costs that it would have been obliged to pay under the Offer.

18. The appellant submitted that the reasons of the Magistrate leave WMG wondering why WMG's submissions as to mitigation were rejected and that the judgment does not make a determination of the issue of mitigation raised by both WMG and NMX at trial.

19. The appellant conceded that a magistrate's reasons should not be read in a manner that is overly sensitive to error, and that the scope of the duty to provide reasons will depend upon the facts and circumstances of the case. The appellant further submitted that in some instances it may be that merely stating a conclusion reached in respect of an issue will be sufficient. However, the appellant submitted that mitigation was a significant issue at trial as it impacted on nearly 80% of the quantum claimed.

20. Against this, the respondent contended that the Magistrate's findings, as set out above, and, in particular, in paragraph 25 of the judgment, were findings on the facts and circumstances of the case and those facts and circumstances were comprehensively stated by the Magistrate. The respondent submitted that the Magistrate dealt directly with and made a clear decision with respect to the appellant's submissions at trial. Specifically that had NMX acted reasonably it would have agreed to pay the on-road costs, as it would still have realised a healthy profit from the on sale of the cars.

21. The respondent submitted that having made a finding that it was not unreasonable for NMX to refuse to pay the on-road costs, as it would have resulted in a loss of profits for NMX, it was not necessary for the Magistrate to deal with WMG's submission that if the NMX had paid the on-road costs it could have sold the vehicles and then demanded from or litigated against the defendant for the recovery of those on-road costs.

22. In my view, the Magistrate has not provided adequate reasons to support her finding that NMX did not have a duty to mitigate its loss. The Magistrate fails to provide a path of reasoning which forms the basis upon which the issue of mitigation was decided. In my opinion, the respondent is correct in that the Magistrate makes findings of fact throughout her reasons. However, the Magistrate does not provide a connection between the findings of fact that she makes and the conclusion that she ultimately reaches. As a result, the Magistrate does not provide the reader with an understanding of the basis upon which she concluded that there was no duty to mitigate on the part of NMX.

Failure to Correctly Apply Legal Principles Relating to Mitigation of Loss

23. The appellant submitted that the Magistrate failed to apply the correct test under the common law, as the Magistrate failed to consider whether the respondent took all reasonable steps to mitigate the loss caused by the breach. The appellant contended that the Magistrate wrongly applied the law by making a decision on mitigation based on the enforceability of the Contracts rather than focusing on the question of breach and the damages that flow from the breach.

24. The appellant submitted that the question of validity and enforceability of a contract is irrelevant to the question of whether there were damages and whether or not there was a burden placed upon the respondent to mitigate those damages. It was contended that once there has been a breach of contract and damages flow as a consequence of that breach, the question is simply one of damages and not the enforceability of the Contracts.

25. Against this, the respondent submitted that the Magistrate was required to determine the question of the validity and enforceability of the Contracts because the appellant submitted at trial that the Contracts were unenforceable and invalid.

26. The respondent further submitted that the Magistrate made no error of law in the manner in which she dealt with the issue of mitigation. The Magistrate found on the facts and circumstances of the case that the respondent was not required to forego its profits by paying the on-road costs, which WMG had demanded NMX pay if it wished WMG to complete the Contracts.

27. Against this, the appellant submitted that Her Honour does not make reference to the "facts and circumstances of the case" when coming to a determination about the duty to mitigate and does not make any findings or even mention the word reasonableness when making her findings, which is pertinent to the question of mitigation.

28. Finally, the appellant submitted that the Magistrate failed to correctly apply the legal principles as the Magistrate did not consider or determine when the breach of the Contracts occurred, for how long the Offer for the new contracts was open and whether the Offer was a reasonable offer in the circumstances.

29. In my opinion, the Magistrate has failed to identify and apply the legal principles with respect to mitigation and this failure constitutes an error of law.

Mitigation of Loss

30. As I have found that the Magistrate's reasons were inadequate and that the Magistrate failed to identify and apply the legal principles relating to mitigation, pursuant to s109(6) of the Act I am able to "make such order as [I] think appropriate, including an order remitting the case for re-hearing to the [Magistrates' Court] with or without any direction in law".

31. In the circumstances, due to the fact that there are few contested issues of fact between the parties and these events took place in early 2011, I consider that I should now determine the issue on the question of mitigation.

32. In determining the issue of mitigation, the appellant submitted that it is necessary to determine when the breach occurred and whether the Offer was reasonable.[9]

33. In relation to the issue of breach, the appellant submitted that the breach occurred when the appellant refused to give the vehicles to the respondent. The respondent submitted that the Contracts were breached by WMG when it sold a number of the vehicles to third parties rendering itself unable to deliver the vehicles to NMX. This was after the Offer was made and, as a result, there was no breach at the time that the Offer was made and therefore no duty on the respondent to mitigate.

34. On the question of when a breach of contract occurs, Cheshire & Fifoot's *The Law of Contract* states:[10]

> The law recognises two basic forms of breach:
> Actual failure to perform. The first and most obvious form of breach is actual failure to perform the contract as and when agreed. The law assumes that every obligation has both a substantive and temporal dimension. A contract prescribes what must be done or not, and when or in what time. If no time for performance is stipulated the law imposes the duty to perform in 'a reasonable time'. Breach occurs if what was prescribed has not been done within a specified or reasonable time.
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> Unwillingness or inability. The law also recognises another form of breach, conduct that manifests unwillingness or inability to perform. The focus here is on the attitude and capacity of the parties. A 'manifestation' of unwillingness or inability to perform a contractual obligation is in itself a breach, whether it accompanies an actual failure to perform or occurs before performance is due. If it rises to the level of a 'repudiation' of the contract it entitles the other party to terminate the contract.

35. The delivery date as specified in the Contracts was "as soon as possible" which, in my opinion, means that the vehicles should have been provided to the respondent upon presentation of the cheques by NMX for the balance of the purchase price. By refusing the cheques, the appellant breached the Contracts. Consequently, in my opinion, the breach by the appellant occurred prior to the Offer being made.

36. However, it is a long standing principle that the duty to mitigate does not arise until a contract has been repudiated. With respect to this principle, McGregor in *McGregor on Damages* states:[11]

> A claimant need take no steps in mitigation until a wrong has been committed against him. Thus the attempt, which is often made, to use the 'duty' to mitigate damage to force upon a party to a contract an acceptance of a repudiation of the contract by the defendant, is misconceived. Where a party to a contract repudiates it, the other party has an option to accept or not accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contact in respect of which suit can be brought at once for damages, and, although the measure of damages is still *prima facie* assessed as from the date when

> the defendant ought to have performed the contract, this amount is subject to being cut down if the claimant fails to mitigate after his acceptance of the repudiation.

37. In my view, even though the appellant repudiated the Contracts by refusing to deliver the goods, the respondent did not accept the repudiation. This is evidenced by Mr Xerri telling Mr Werner that, as he is a licensed motor car trader, he does not have to pay the on-road costs and rejecting Mr Werner's offer of $5,000 to rescind the Contracts. As the respondent did not accept the repudiation, there was no obligation on the respondent to mitigate its loss. However, once the cars were put back on the market and sold to third parties, the respondent had no choice but to accept the repudiation and bring a claim against the appellant for loss of profits. Therefore, in my opinion, the duty to mitigate only arose once the vehicles were sold by WMG to third parties.

38. Although the parties submitted that the Offer was an offer for new contracts, in my view, the Offer could also be characterised as a demand by WMG to vary the Contracts. In this regard, I note that the appellant describes the Offer in its defence as follows:

> ...[WMG] admits that it refused to deliver the vehicles ... and that it insisted that the plaintiff additionally pay registration fees and stamp duty fees in respect of each ... vehicle and the plaintiff declined to do so...

39. If the Offer is so characterised, in my view, no duty to mitigate arises in any event.

40. Although I have determined that the respondent had no duty to mitigate when the Offer was made, I note that the parties have made substantial submissions on the question of the reasonableness of the Offer. In those circumstances, I will set out my view as to the reasonableness of the Offer made by WMG to NMX.

41. The general principle with respect to mitigation in respect of a failure to deliver goods under a contract of sale is that the plaintiff ought to take reasonable steps to obtain substitute performance elsewhere.[12] However, "the injured party is obliged to take only such steps as are reasonable, and need not resort to measures that are costly, complex or extravagant, or likely to impair its position or reputation".[13]

42. The appellant submitted that the present case concerned goods not readily available on the market, as they were uniquely priced due to hail damage. As a result, the appellant contended that the Offer was reasonable as, had the respondent accepted the Offer, it would have retained its profit, been in a position to honour its contracts with the Western Australian dealers and it could then either have demanded or sued for the on-road costs. Further, the appellant submitted that, in light of the respondent's clear ability to pay the on-road costs and that payment of the on-road costs would not have impacted on the contracts it had with the Western Australian dealers, the respondent acted unreasonably by rejecting the Offer.

43. As authority for this submission, the appellant referred to the principle that "the door to mitigation may be opened by the party in breach",[14] which allows for mitigation through a new offer by the breaching party. In support of this principle, the appellant referred to the decision of *Payzu Ltd v Saunders*.[15] That case concerned a contract for the sale of silk by the defendant to the plaintiffs, which provided that delivery should be as required during a period of nine months and that payment should be made for each instalment within one month of delivery. The plaintiffs failed to make punctual payment for the first instalment. The defendant, in bona fide error, assumed that the plaintiffs were insolvent and refused to deliver any more goods under the contract, but offered to deliver the goods at the contract price if the plaintiffs agreed to pay cash at the time of the orders. The plaintiffs did not accept the offer and, the market price of the goods having risen, brought an action for breach of contract claiming as damages the difference between the market price and the contract price. Justice McCardie held:[16]

> Business often gives rise to certain asperities. But I agree that the plaintiffs in deciding whether to accept the defendant's offer were fully entitled to consider the terms in which the offer was made, its bona fides or otherwise, its relation to their own business methods and financial position, and all the circumstances of the case; and it must be remembered that an acceptance of the offer would not preclude an action for damages for the actual loss sustained. Many illustrations might be given of the extraordinary results which would follow if the plaintiffs were entitled to reject the defendant's offer and incur a substantial measure of loss which would have been avoided by their acceptance of the offer. The plaintiffs were in fact in a position to pay cash for the goods, but instead of accepting

> the defendant's offer, which was made perfectly bona fide, the plaintiffs permitted themselves to sustain a large measure of loss which as prudent and reasonable people they ought to have avoided.

44. The appellant submitted that the present circumstances are similar to that case, as had the respondent accepted the offer, its loss would have been limited to recovery of the on-road costs rather than the full contract price and, further, in this case, the respondent was in a position to pay the on-road costs.

45. In my view, *Payzu's case* can be distinguished from the present case. In *Payzu*, the plaintiffs had breached the contract by failing to make payment on time and the defendant honestly assumed that the plaintiffs were unable to fulfil the contract because of insolvency. Further, the defendant made an offer that the plaintiffs pay for each delivery by cash, rather than by cheque. The defendant did not, as in the present case, demand that the plaintiffs pay more as a result of a breach. It did not, as in the present case, threaten to dishonour the Contracts, or force the innocent party to enter into new contracts at a higher price.

46. Further, the decision in *Payzu's case* does not sit well with the general principle of mitigation, that the aggrieved party is required to take reasonable steps to mitigate its loss. The learned authors, Greig and Davis, in *The Law of Contract* state that *Payzu's case* should be treated with caution, as in *Payzu's case*:[17]

> ... the original contract had properly come to an end, but the courts required [an] innocent party, on pain of being penalised by his inability to recover damages, to enter into a contract with the defaulting party ... on specified terms. It is consequently suggested that [it] ought not be followed in this country.

47. In my opinion, the Offer was not reasonable as it required NMX to pay a higher purchase price for the vehicles than that to which it had already agreed under the Contracts and it would have resulted in NMX having to enter into costly and complex litigation to recover its loss. Additionally, it cannot be said that NMX acted unreasonably or failed to mitigate its loss by insisting that WMG honour the Contracts. NMX's insistence merely demonstrates its desire to receive the vehicles that were promised to it under the Contracts.

48. Finally, the respondent submitted that the Offer was not reasonable as it placed NMX in a position where it had to decide "on the spur of the moment" whether to accept the Offer. This raises the issue of how long the Offer was open for and when the vehicles were put back on the market and sold. In view of my decision that the Offer was not reasonable, it is not necessary for me to determine this issue.

Conclusion

49. Accordingly, I allow the appeal. However, for the above reasons, I will uphold the Magistrate's judgment and orders. I will hear the parties as to the question of costs.

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[1] There was a discrepancy at the trial before the Magistrate about whether the on-road costs were $24,000 or $20,000, but at the time that the proposal was put to Mr Xerri the on-road costs were estimated to be $24,000.
[2] [2011] VSC 221.
[3] [2011] VSC 221, [18] (citations omitted).
[4] (1997) 48 NSWLR 430, 443; (1997) 25 MVR 373.
[5] [2011] VSC 221, [20].
[6] [2005] VSCA 1; (1997) 25 MVR 373.
[7] [2005] VSCA 1, [21] (Batt JA and Vincent JA agreeing) (appellant's emphasis added); (1997) 25 MVR 373.
[8] Transcript, *NMX v Werner*, Magistrates' Court (9/9/11), 218.
[9] I note that the issue of breach was not the subject of any substantial submissions by either the appellant or respondent at trial.
[10] NC Seddon and MP Ellinghaus, *Cheshire & Fifoot's Law of Contract*, (Butterworths LexisNexis, 9th ed, 2008), [9.2] 387-388 (citations omitted).
[11] Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell Limited, 17th ed, 2003), 224.
[12] NC Seddon and MP Ellinghaus, above n 10, [23.42] 1121.
[13] Ibid, [23.43] 1122-1123 (citations omitted).
[14] McGregor, above n 10, 322-323.
[15] [1919] 2 K.B. 581, CA.
[16] *Payzu Ltd v Saunders* [1919] 2 KB 581, CA, 586.
[17] DW Greig and JLR Davis, *The Law of Contract* (The Law Book Company, 1987), 1396.

APPEARANCES: For the appellant Werner Motoring Group Pty Ltd: JAF Twigg and BW Jellis, counsel. Vadarlis & Associates, solicitors. For the respondent NMX Pty Ltd: D Baker, counsel. Xerri Rubinstein & Co, solicitors.