IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV04430

BETWEEN	**LIYASU M. KANDEKORE**	**CLAIMANT**
A N D	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**1ST DEFENDANT**
AND	**DEIDRE DALEY**	**2ND DEFENDANT**
AND	**DONNOVON WARD**	**3RD DEFENDANT**

Mr. Liyasu M. Kandekore, Claimant in Person

Mrs. G. Gibson-Henlin instructed by Henlin Gibson Henlin for the Defendants

October 9 & 10, and November 24, 2014

Application for Interim Order for return of seized car which was security for a loan – Order sought would contain both mandatory and prohibitory aspects – Construction of Loan Agreement and Bill of Sale – Factors to be taken into account in determining whether or not to grant order

D. FRASER J

THE APPLICATION

[1] These are the written reasons for judgment delivered on October 10, 2014. On September 9, 2014 the Claimant filed a claim against the Defendants for:

(a) unlawful seizure of the Claimant's motor car;

(b) unlawful entry of the Claimant's home and unlawfully preventing the Claimant from leaving or entering his home;

(c) damage to the Claimant's electronic gate;

(d) aggravated damages;

(e) an account and the return of the said motor car;

[2] By Notice of Application dated September 19, 2014 the Claimant sought an interim order pursuant to Civil Procedure Rules (CPR) Rule 17.1 that the 1st Defendant forthwith deliver up to the Claimant the motor car licensed no. FA7979 seized from the Claimant pending the determination of the action herein.

[3] The grounds of the application were that:

(a) The Claimant has initiated a claim against the Defendants alleging the unlawful seizure of the motor car and damage to his gate and seeking damages and aggravated damages;

(b) The 1st Defendant's demand against the Claimant a blatantly false, inaccurate and otherwise grossly excessive;

(c) The Claimant freely and voluntarily surrender the title to his aforesaid motor car to the 1st Defendant as a security for a loan that the title is still in the possession of the 1st Defendant thereby securing the integrity of the security;

(d) The Claimant also surrendered cash in the form of shares in the Credit Union valued at $82,000.00;

(e) Further the Claimant has executed a Bill of Sale in favour of the 1st Defendant in respect of the said car and also the Claimant's personal property such as household furniture and office furniture;

(f) The 1st Defendant is unreasonably and unlawfully depriving the Claimant of the use of his motor car while such continued possession of the motor car by the 1st Defendant in no way advances the legitimate interest of the 1st Defendant;

(g) While the vehicle remains in the possession of the Defendants they and each of them continue to make exorbitant and excessive financial claims against the Claimant rendering compliance impossible;

(h) The continued possession of the said motor car by the 1st Defendant is motivated by spite and malice and ill will and is designed to insult, embarrass and humiliate the Claimant and otherwise cannot be supported by rational need.

[4] The application is supported by an affidavit also filed on September 19, 2014. The numbering in that affidavit is somewhat askew. However on the first page in the second of the paragraphs numbered 1 the Claimant speaks to having obtained the loan facility of $750,000 at an interest of 22% per annum for 36 months.

[5] In paragraphs 2- 6 he speaks to the security for the loan. In paragraphs 7 – 9 he outlines that he was not in arrears at the time of the seizure and spoke to the fact that the payments that he was making were instalments of $28,642.84 per month. The significance of that figure will be addressed later on.

[6] In paragraph 10 he averred that the seizure was unlawful and in paragraph 11 that the 1st Defendant has failed to return the car despite requests and keeps sending bills for exorbitant sums for expenses which he did not incur, while the car is in their possession, effectively making it impossible for the Claimant to comply.

[7] He spoke further in his affidavit of undertaking to make monthly payments of $28,642.84 until the action is determined. He averred that the loan was in effect over secured and on the basis of this evidence he sought an interim order that the car be returned, that the Defendants be prohibited from activating the Bill of Sale until the outcome of the action and that they

also be prohibited from transferring the car pending the outcome of the action.

[8] I will at this point comment that in respect of ground number (e) where the Claimant mentioned that the security for the loan included personal property such as household furniture and office furniture, I have not seen any such indication in relation to the documents executed. Those documents speak to shares, promissory note and the motor car.

THE SUBMISSIONS IN RESPONSE

[9] The submissions of Mrs. Gibson Henlin in response relied on the affidavit of Roshene Betton legal counsel for the 1st Defendant. In paragraph 7 of her affidavit which was filed on October 7, 2014, she pointed out that the monthly repayments the Claimant should make were in fact $31,507.15 and not $28,642.84. This was based on the offer letter which indicated that the total monthly payment was to include both the loan repayment as well as 10% of that loan re payment as share contribution.

[10] The affidavit also goes on to make the point that at the time of the seizure the calculation of the 1st Defendant was that the Claimant was 3.3 months in arrears and the purpose of the seizure was to recover the car and sell it to clear the indebtedness. She also spoke to the fact that the loan was secured by the Bill of Sale, and that the claimant also executed a power of attorney in favour of the 1st Defendant. The affidavit also goes on to speak to the fact that the Claimant was made aware of his balance after the seizure and at paragraph 15 that the Claimant had the opportunity to pay off his indebtedness in full instead of giving his undertaking to do so on this application.

[11] Counsel asked the court to consider two things with respect to the exercise of the court's discretion.

(a) The nature of the relationship between the Claimant and the 1st Defendant — the fact that there is a Bill of Sale which effectively made the 1st Defendant the owner of the motor vehicle, entitled to possession.

(b) That the Claimant is asking for mandatory injunction in a context where he is in arrears. He is asking the court to order the return of the vehicle to him on the basis that the seizure was unlawful. The court would have to consider whether at trial there would be a higher degree of likelihood that the court would find that the car was in fact unlawfully seized.

[12] In addition, counsel submitted the court should bear in mind that a mandatory injunction is likely to cause more irremediable prejudice than a prohibitory one. Against that background counsel asked the court to consider the context of this case where the 1st Defendant was alleging that at the time of seizure the Claimant was in arrears and that the Claimant had been given statements of account as to the amounts due which had still not be paid to date. The Claimant had only given an undertaking to continue to pay a lesser sum than what is due and there was nothing to say that he would be in a position to honor even that undertaking.

[13] Counsel further submitted that prima facie the seizure was lawful, as on his own admission, the Claimant had been short paying all of these months. Whilst counsel conceded that the $82,000.00 in shares could be pledged against the debt, on the face of it that was not enough.

[14] The issue of the insurance of the car counsel submitted did not affect the loan itself as it only sought to protect against third party loss and that it wouldn't enure to the benefit of the lender unless it was a situation where the motor vehicle was stolen. She submitted that contingent liability would not pay the loan, if the loan was not paid, but it was to protect against the loss of the vehicle. It was pointed out that at the time of the loan the

market value of the vehicle was $1,050,000.00 and it had a forced sale value of $892,500.00. Counsel submitted that the risk was that if the car was returned to the Claimant there was no guarantee that the payments would continue.

[15] Counsel also highlighted the fact that in her submissions there should be no legitimate dispute as to the monthly payments based on the documents executed between the Claimant and the 1st Defendant and in respect of the loan agreement she highlighted conditions "**o"** which deals with seizure; the right to seize and "**p"** which deals with the right to enter to seize as being significant for the disposition of this matter. I will have more to say on those conditions during my analysis.

[16] Counsel pointed out that the Claimant was given notice of the fact that the loan was in arrears on June 6, 2014 and was invited on June 18, 2014 to make suitable arrangements to deal with the issue of the debt within 14 days but he never did. At July 3, 2014 when a letter was sent to Mr. Kandekore it pointed out that his indebtedness was over $111,000.00. By August 22, 2014 this figure had increased to $218,403.48. Counsel also pointed to a letter of September, 2014 where the claimant made an offer to pay off the entire loan but highlighted that the offer now was not to pay off the loan but to make payments of $28,642.84 per month.

[17] Counsel submitted that if the claimant paid the amount in full he could have back the car. She relied on the case of ***National Commercial Bank and Owen Campbell v Toushane Green*** [2014] JMCA Civ 19 in respect of the effect of a Bill of Sale. Counsel highlighted that claimant was not saying that he didn't transfer the ownership but that the agreement was that he would keep the car. She said this agreement was however was subject to conditions "**o"** and "**p"** of the loan agreement and that the car was seized when the loan was in default triggering the terms of the Bill of Sale.

[18] In her concluding submissions counsel pointed out that if the court made the order sought by the Claimant it would affect the 1st Defendant's continuing rights to possession if the loan were once again to go into default in the face of a court order. Counsel also highlighted the fact that when one compares the total amount due on the loan with the forced sale value there is not much difference between the two sums and hence the only proper outcome of the application was or the court to refuse the order sought by the Claimant or alternatively to bind the claimant to pay off the full loan in exchange for the car.

ANALYSIS

[19] The security for the loan as stated in the loan agreement comprises the shares of $75,000.00, the promissory note for $750,000.00 and the motor car with an assigned value in the loan agreement of $892,500.00. The offer letter and loan agreement read together indicate that the sum of $31,507.12 is to be paid monthly which includes 10% of the loan repayment that goes to shares. The Claimant also signed a Bill of Sale and a Power of Attorney in favour of the 1st Defendant. The loan agreement and the Bill of Sale it was submitted, gave the 1st Defendant the power to seize as long as any money was owing on the security not withstanding that the same may not have yet become payable.

[20] The 1st Defendant alleged that not only have particular sums become payable but that the Claimant was in arrears of 3.3 month at the time of the seizure on July 9, 2014. The Claimant had been given notice, of the intention of the 1st Defendant to seize the car and invited to come in to make arrangements to clear the debt. Now the centre of the contention is that the Claimant maintains that the 1st Defendant had no right to seize the car as he was more than paid up at the time of the seizure. Whereas the 1st Defendant maintains this was not the case. The 1st Defendant acknowledges receiving all the sums the Claimant said he paid as outlined in his affidavit but insists that he was still in arrears. Further that he would

have been in arrears at the time of seizure even if he was only required to pay the sum of $28,642.84 which he maintains is the correct monthly figure. Since the seizure the claimant has not made any payments as he indicates there should be no need to pay if he does not have the use of the car.

[21] In the affidavit of Deidre Daley the 2nd Defendant who is the Asset Management Clerk at the 1st Defendant's organisation it was explained that sums paid by the defaulting members are apportioned to default interest payments, principal, share account and bailiff collection expenses. Therefore, the sums listed by the Claimant have not all gone directly to loan repayments. That would explain the disparity between the computation of the claimant and that of the 1st Defendant.

[22] The applicant objected to the courts reference to this affidavit on the basis that the court had made an order that all affidavits should have been filed by October 7, 2014. Indeed such an order had been made. However on October 9, 2014 when the matter was being heard the court requested an explanation of the loan account statements that were exhibited to the affidavit of Ms. Roshene Betton. In satisfaction of this request the unsigned and unfiled affidavit of Ms. Daley was sent to the Claimant and to the court by email on the evening of October 9, 2014 and was filed on October 10, 2014. In the circumstances where the applicant was aware that based on the court's request an explanation was going to be provided after the hearing on October 9, 2014, the court found it appropriate to refer to the affidavit. However after judgment was delivered, by email on October 10, 2014 to the court and the defendants counsel, Mr. Kandekore indicated as follows: *"I observe that the Defendants' affidavit was sent by email on the 9th October at 6:07 pm but the registrar's date stamp is 10th October and it was served on me on the 10th October at 9:46 a.m."*

[23] I note that at the date of repossession the sum outstanding as calculated by the 1st Defendant was $111,556.83 comprised of $97,576.83 loan

arrears and $13,980.00 bailiff fee. Since repossession the amount has ballooned due to further non payment of the loan, default penalties, storage fees, release fees from the pound and wrecking fee. These sums are all indicated in exhibits to the affidavits of Ms. Roshene Betton.

[24] This application's outcome turns on the legal effect of the loan agreement and the Bill of Sale signed by the parties. The case of ***National Commercial Bank and Owen Campbell v Toushane Green*** to which the court has already referred, has settled the point that the execution on a Bill of Sale by the owner of the goods results in a transfer of title to those goods to the grantee of the Bill of Sale. The Bill of Sale is supplemental to the loan agreement in which it is provided at paragraph "**o**":

> That so long as any money shall be owing on the security of these presents not withstanding that the same may not as yet have become payable, the Credit Union, its servants or agents may, without previous notice to the Guarantor, seize and take possession of the said chattels in whatever place or places they may happen to be.

[25] In light of the case of ***National Commercial Bank and Owen Campbell v Toushane Green,*** the effect of that provision is that even if the Claimant was not in arrears in payments, which on the evidence I find that he is, the 1st Defendant would have been entitled to effect seizure as they have done. It is significant that what the claimant is in effect seeking is an injunction with both mandatory and prohibitory components. Mandating the return of the car and then prohibiting any further action under the Bill of Sale until the outcome of the action.

[26] It is generally the case that a mandatory injunction by its very nature is more likely to cause irremediable prejudice than a prohibitory injunction. In this case both the mandatory and prohibitory aspects of the injunction would unfairly prejudice the interests of the 1st Defendant. The parties have entered a contractual agreement and the Claimant has agreed to the

terms. On the face of the evidence before the court the Claimant is in arrears but in any event even if I am wrong in that finding I have found from a construction of the agreement that even if he was not in arrears once money was outstanding on the loan the security could be seized. It is of course the case that it would generally not be expected that the power of seizure would be exercised in that fashion.

[27] The situation is that if the 1st Defendant is subsequently shown to have acted wrongfully the Claimant I find can be adequately compensated in damages. If on the other hand, the car has been lawfully seized under the Bill of Sale, as I have found, but the court orders its return the court would be intervening to prevent the 1st Defendant from exercising its contractual rights under the agreement and would undermine the security of their loan. If the Claimant were to fall in arrears or in further arrears there would be a court order in place preventing the 1st Defendant from exercising any rights under the Bill of Sale. The 1st Defendant might in those circumstances never be able to recover its loan.

[28] The Claimant made overtures to the 1st Defendant indicating that he wanted to pay off the loan. He has not done so. Even now the 1st Defendant is willing to return the car if the claimant pays the sums now owed. However the only offer is to make payments in the sum of $28,642.84 per month. A car is a depreciating asset. It is now 10 years old. Already the evidence is that the forced sale value is only slightly higher than the current total indebtedness of the Claimant under the loan, including collection expenses. Therefore, I find that all the circumstances considered, the balance of convenience points firmly away from the court granting the interim order sought which is in the nature of both mandatory and prohibitory injunctions.

[29] If the Claimant is ultimately successful I find that damages will suffice. The court therefore refuses the application with costs to the Defendants, (excluding costs for October 1, 2014), to be agreed or taxed.