

**IN THE DISTRICT COURT
AT TAURANGA**

**CIV-2017-069-000113
[2018] NZDC 11829**

BETWEEN	BRETT RAYMOND IRWIN Plaintiff
AND	PHILLIPA JANE MULES First Defendant
AND	ROSS FITCHES Second Defendant

Hearing: 13 June 2018

Appearances: R Mark for the Plaintiff
D Hayes for the Defendants

Decision: 20 July 2018

RESERVED DECISION OF JUDGE I D R CAMERON

[1] The plaintiff Brett Irwin claims damages for the alleged wrongful conversion of a motor vehicle purchased by him. The first defendant Mrs Mules, previously owned the motor vehicle and arranged for her agent, Ross Fitches, the second defendant, to repossess the vehicle.

[2] The facts establish that Mr Irwin purchased the motor vehicle from a Mr Bradley on 13 February 2009. It is accepted that he was a bona fide purchaser for value. The vehicle concerned was a classic car, being a 1974 Ford Falcon GT motor vehicle. Mr Irwin then spent considerable money stripping and rebuilding the vehicle, ultimately selling it to a Mr Dean Alexander on 14 August 2015. Dean Alexander was also a bona fide purchaser for value.

[3] Then on 19 September 2016 Ross Fitches, on the instructions of Mrs Mules, repossessed the vehicle from Dean Alexander. The reason for this was that Mrs Mules contended that she was the rightful owner of the motor vehicle, and that her estranged husband Mr Mules had wrongly and without her authority sold the motor vehicle to a Mr King on 7 February 2006. An ownership history of the vehicle established that subsequently Mr King sold the vehicle to a Mr Thomas, who later onsold it to Mr Bradley. Mr Bradley is the person from whom Brett Irwin, the plaintiff, purchased the motor vehicle on 13 February 2009.

[4] Mrs Mules gave evidence at the defended hearing. The material before the Court included an order of the Family Court dated 20 June 2003 vesting the ownership of the motor vehicle in Mrs Mules. Mrs Mules' evidence was that this order came about as a result of a relationship property case, and that following the order her ex-husband Mr Mules hid the vehicle from her and told her he had already sold it to one of his friends. Her evidence was that she had no knowledge of its whereabouts until 2016, at which time she instructed Ross Fitches to repossess the vehicle.

[5] The evidence before the Court also established that on 31 March 2018 the vehicle was repossessed by New Zealand Forestry and Asset Investments Limited, which held a registered security interest in the vehicle. It is not known what happened to the vehicle after that, although it is assumed that such company sold the motor vehicle to defray the debt owed to it.

[6] The plaintiff basis is claim on an alleged wrongful conversion. While the plaintiff accepts that Mrs Mules was the rightful owner of the motor vehicle when it was first sold by her ex-husband on 7 February 2006, the plaintiff's case is that her claim to the vehicle was statute barred at the time she repossessed it. Accordingly, all rights to ownership of the vehicle had been extinguished.

[7] The plaintiff relies on s 5 of the Limitation Act 1950. Section 2A of that Act provides that it continues to apply to causes of action based on acts before 1 January 2011, when the Limitation Act 2010 came into force.

[8] Under s 5(1), where a cause of action for conversion or wrongful detention has accrued to any person and then a further conversion or wrongful detention takes place, then no action can be brought in respect of that further conversion or detention after the expiration of six years from the original conversion or detention.

[9] Based on Mrs Mules' evidence, her ex-husband Mr Mules hid the car from her following the possession order of the Family Court dated 20 June 2003 vesting possession in her favour. I find that that amounted to a wrongful detention of the motor vehicle, and that a cause of action in wrongful detention therefore accrued to Mrs Mules at that time. The unauthorised sale of this vehicle by Mr Mules on 7 February 2006 constituted a conversion of the vehicle in respect of Mrs Mules. Accordingly, the six year limitation period runs from the date of the initial wrongful detention of the vehicle by her ex-husband. That date is not precisely identified, but clearly occurred sometime between 20 June 2003 (the date of the Court possession order) and the date of sale by him of the vehicle (7 February 2006).

[10] I consider that 7 February 2006, the date of subsequent sale, is the date upon which the cause of action against her husband for both the wrongful detention and the conversion of the vehicle commenced.

[11] Section 4 of the Limitation Act 1950 would also apply, providing that no action founded on tort can be brought after the expiration of six years from the date of the cause of action. In this case the accrual of the cause of action is 7 February 2006 as identified.

[12] There is an exception for fraud contained in s 28 of the Limitation Act 1950, providing that the limitation period will not run until any fraud on the part of the defendant or his agent is discovered or could with reasonable diligence have been discovered. This exception does not apply in this case. While Mr Mules may have committed a fraud against Mrs Mules by selling a motor vehicle then belonging to her, and it is not known when she discovered that fact, the proviso to s 28 makes it clear that the fraud exception does not apply when property has been purchased for valuable consideration by a party who was not a party to the fraud, and was acting in a bona fide manner.

[13] I conclude that under s 5(2) Limitation Act 1950 Mrs Mules' rights to the vehicle would have been extinguished 6 years from 7 February 2006 (namely on 7 February 2012) but for her bankruptcy in June 2006.

[14] There was evidence that Mrs Mules was bankrupted in 2006, and then discharged from bankruptcy in 2009. Apparently the date of her bankruptcy was June 2006. This was after the date of sale of the motor vehicle by her ex-husband Mr Mules (that being 7 February 2006). Upon her bankruptcy, all her rights in respect of property would have automatically vested in the Assignee, including her right at that time to recover the motor vehicle. However, the Assignee can be in no better position than the bankrupt and so his rights to sue for possession were extinguished on 7 February 2012.

[15] As stated, following the repossession of the vehicle from Dean Alexander, the plaintiff entered into discussions with him resulting in Dean Alexander assigning to him all rights to the vehicle, including rights to any causes of action arising from such rights.

[16] The defence submit that any rights Dean Alexander had against Mrs Mules for conversion of the motor vehicle were rights personal to him and not capable of being assigned to the plaintiff. This is based on an interpretation of ss 48 and 50 of the Property Law Act. Section 48 of the Property Law Act defines a "thing in action" as meaning a right to receive payment of a debt. The submission is that a right to sue for

a conversion is not a right to receive payment of a debt, and so falls outside s 50 of the Property Law Act.

[17] The difficulty with this submission as it relates to Mrs Mules is that the plaintiff having regained the rights to ownership of the vehicle was then entitled to immediate possession of the motor vehicle. Once he gained the rights to immediate possession, then the failure to return the vehicle to him despite demand (the evidence establishes demand was made) constitutes wrongful detention of the motor vehicle by Mrs Mules. As stated, her rights to the motor vehicle were extinguished on her bankruptcy in June 2006.

[18] Whether the right to sue for conversion is assignable is, though, a live issue in respect of the second defendant Ross Fitches, because the claim against him is based on his alleged conversion of the motor vehicle while it was in the ownership of Dean Alexander.

[19] The defence argue that any loss by the plaintiff stems from his arrangement with Dean Alexander to refund him the purchase price of the motor vehicle, rather than from any conversion of it. I do not accept that. Once the plaintiff had reacquired title to the vehicle through the deed of assignment, any conversion of it by Mrs Mules entitles him to claim for the value of the vehicle. Also, I find no contributory negligence on the part of the plaintiff, who made reasonable enquiry about whether the vehicle was unencumbered when he purchased it.

[20] There is a security interest in favour of National Mortgage Company Limited, registered on 23 August 2012. That security interest was re-registered on 17 August 2017. The debtor as described is Mrs Mules ex-husband Mr Mules. It would appear that the rights of National Mortgage Company Limited were acquired by New Zealand Forestry and Asset Investments Limited on some date prior to 6 April 2018. Annexed to the affidavit of Mr Irwin (exhibit BI-21) is a post-possession notice detailing the date of repossession of the motor vehicle as 31 March 2018. That post-possession notice refers to an original credit contract agreement dated 21 August 2002. No further information was before the Court in relation to that credit contract agreement. It was not annexed but all parties in Court recognised the

possibility that New Zealand Forestry and Asset Investments Limited (and prior to that National Mortgage Company Limited) may have had a legitimate charge over that vehicle since 2002. If so, then it would have been entitled to repossess the vehicle and ultimately sell it. The amount outstanding under that financing agreement as at the date of the post-possession notice is stated to be some \$417,629.55, which is far in excess of the value of the motor vehicle.

[21] If that is in fact the case, then necessarily the plaintiff's claim would fail, as no loss would have been suffered as a result of its repossession by Mrs Mules.

[22] There is a second security over the vehicle in favour of Beta Taxation Limited. This was registered on 16 January 2018 and the stated debtor is Mr Mules.

[23] The defence position is that the plaintiff ought to have either joined the purported charge holders as parties to this proceeding, or applied for the cancellation of their security interests under the Personal Property Security Act prior to the defended hearing.

[24] Mr Mark for the plaintiff pointed out that the security in relation to Beta Taxation Limited was not registered until after this proceeding had been set down for hearing. In any event, in the interests of justice the validity or otherwise of the alleged charges needs to be established, to determine in particular whether there was a legitimate charge against the motor vehicle created while Mr Mules was the owner of the vehicle. Only once that is known can the quantum of the plaintiff's loss, if any, be determined. Mr Mark has indicated that the plaintiff would be willing to make the necessary applications if given the opportunity to do so.

[25] For the reasons stated I find that Mrs Mules is liable to the plaintiff for converting the motor vehicle by refusing to return it to him. I now adjourn the proceeding to allow the plaintiff to take the necessary steps under the Personal Property Securities Act 1999 in respect of any charge holders so that whether there is any loss flowing from the conversion can be determined.

[26] I make no findings of liability against the second defendant Ross Fitches at this point. If there is any equity in the vehicle, then his position will need to be considered in more detail, and further submissions will be required in relation to the issue of whether a right to sue in conversion is capable of valid assignment.

I D R Cameron
District Court Judge