

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2018-004-001934
[2019] NZDC 14059**

BETWEEN

SPOT ONE LIMITED
Appellant

AND

THE REGISTRAR OF MOTOR
VEHICLES
Respondent

Hearing: 16 July 2019

Appearances: A M Swann for the Appellant
B Tantrum and D Dow for the Respondent

Judgment: 23 July 2019

JUDGMENT OF JUDGE B A GIBSON

[1] Spot One Limited ('Spot One') is a motor vehicle trader licensed under the Motor Vehicle Sales Act 2003 ('the Act'). It is a business that has been in existence for over 32 years and is the employer of a number of staff relying on it for their livelihoods.

[2] Spot One's ability to trade has, however, been ended by the respondent by virtue of a notice given on 11 September 2018, as the Registrar was satisfied Spot One had on two occasions within 10 years had breached more than one order of the Motor Vehicle Disputes Tribunal. Section 68 of the Act provides that a person who has done so is automatically banned from the business of motor vehicle trading. Section 29 of the Interpretation Act 1999 means the appellant company is deemed to be a person and so falls within the ambit of the Act.

[3] Banning under s 68 of the enforcement provisions of the Act follows automatically once a person has more than once within a period of 10 consecutive years failed to comply with an order of the Disputes Tribunal. In this present matter the appellant had in 2015 failed to comply with an order of the Tribunal to repay money to a complainant, Lee Kara Withrington. That breach was accepted by the appellant. The second occasion was a result of a complaint lodged with the Disputes Tribunal by Rebecca Mildren with respect to defects in a 2009 Mazda Axela motor vehicle she purchased from Spot One on 6 August 2017. Ms Mildren alleged the vehicle had a number of defects and her complaint was upheld by the Tribunal in its decision of 25 January 2018 with the following orders made:

- (a) Rebecca Mildren's application to reject the vehicle is upheld.
- (b) Spot One Limited shall, within 10 working days of this decision, pay \$11,424.90 to Rebecca Mildren.
- (c) Rebecca Mildren must make the vehicle available to be uplifted by Spot One Limited.

[4] It was common ground that the last date for complying with the Tribunal's order for payment after allowing for statutory holidays was 10 February 2018. It was also common ground that the Tribunal order was not complied with as the monies were not paid until 28 March 2018. The vehicle itself, which had been in Tauranga where Ms Mildren lives, was returned to the appellant's premises at Penrose in Auckland on 5 April 2018 with the assistance of employees of TVNZ, *Fair Go* having been contacted by Ms Mildren on 23 March 2018.

[5] The appellant argued that Ms Mildren had thwarted compliance with the Tribunal's orders by declining to accept a bank cheque payable to her as payment when the same was offered on 12 March 2018 and failing to come to a satisfactory arrangement which would enable the car to be collected. It seems clear the appellant, by that point, was reluctant to part with the monies until it had recovered the car. Ms Mildren's position was that she wanted the monies paid and would make the car available for collection at times convenient to her, she being a nurse and working shifts. Notification of Fair Go's involvement seems to have crystallized resolution of

the issues with payment being quickly made and with Fair Go arranging the return of the vehicle to Auckland.

[6] While I accept Ms Mildren misunderstood the nature of a bank cheque and treated it as if it were a personal cheque of the appellant, there is no doubt that the appellant was in serious delay in complying with the Tribunal's orders. Payment of the money was not conditional on the return of the vehicle. There was no doubt, as Mr Swann accepted, that there was a failure to comply with the Tribunal's order of 25 January 2018.

[7] The appellant's position was that the banning order under s 68 of the Act was properly made by the Registrar but the Court, on appeal, could exercise a discretion not available to the Registrar. It was contended the appellant was always ready and willing and able to make payment according to the orders of the Tribunal but it was the unreasonable actions and conduct of Ms Mildren that caused the delay in complying with the second order.

Appeals to the District Court

[8] An appeal from a Registrar's decision under s 68 of the Act is brought under s 67 which provides that in determining an appeal a District Court may confirm or reverse the decision of the Registrar and that the District Court's determination is final. A banning order can also be made by the District Court under s 69 of the Act where a person is convicted of a specified offence set out in s 68(1)(a) but is not banned from participating in the business of motor vehicle trading under s 68 but the Court considers the person is not a fit and proper person to participate in that business. In that case any appeal rises to the High Court, with the High Court's powers on appeal under s 72(3) being wider than those available to the District Court on an appeal from a Registrar's decision to ban, which appeal is governed by s 67 of the Act.

[9] Consequently there are two issues to be determined, firstly, is there a discretion to take into account mitigating circumstances as described and contended for by Mr Swann on behalf of the appellant and, secondly, if such a discretion exists ought it to be exercised in favour of the appellant?

[10] Mr Swann submitted the Court had a discretion to reach a different conclusion from the Registrar as otherwise there would be little point in a right of appeal. Rule 18.19 of the District Courts Rules 2014 provides that appeals are by way of rehearing and rule 18.24 mirrors rule 20.19 of the High Court Rules by setting out the powers of the Court on appeal, including the power to make any decision it thinks should have been made; 18.24(1)(a). The onus is on the appellant to satisfy the Court it should differ from the decision under appeal; *Austin, Nichols & Co Inc v Stichting Lodestar*¹. The appellant's difficulty is it accepts the Registrar's decision was correct. Reversing a decision on appeal which is plainly correct is inappropriate. The Registrar, as the parties concede, made the only decision he could have made. I do not accept it is open to the Court, in the purported exercise of a discretion, to reverse a decision that was correctly made.

[11] The appellant contended that the decision of this Court given in *Moto Limited v Registrar of Motor Vehicles*² supported the proposition that the District Court could take into account mitigating circumstances. In that case, it was submitted, the Court exercised its discretion to reverse a decision of the Registrar. In *Moto* the appellant was unaware of the Tribunal's order and the timetable for payment imposed as the proceedings before the Tribunal and the subsequent order had been concealed from it by an employee clearly acting dishonestly and outside the scope of his employment so that the Court was not satisfied there had been a failure to comply with the orders of the Tribunal.

[12] That was not, in any event, the exercise of a discretion. As Mr Tantrum submitted, the decision of the Registrar was reversed as a result of a legal conclusion following from the finding that the appellant had not failed to comply with orders of which it was unaware. This case, however, does not involve correcting a decision of the Registrar. Here the appellant accepts the Registrar has no discretion in applying the provisions of s 68 once it is satisfied that, for a second time within 10 years, the appellant had failed to comply with a Tribunal order. In *Moto* the appellant was unaware of the order and so could not comply with the 10 day time limit imposed by

¹ [2008] 2 NZLR 141 (SC)

² [2019] NZDC 5079

the Tribunal. In this case the appellant was well aware of its obligation to pay within 10 days of the order. It simply did not do so.

[13] Even if I had a discretion as contended for by the appellant, it would not seem appropriate to me to exercise it in the appellant's favour, hard no doubt, as the consequences of a banning order may be. As an experienced motor vehicle trader the appellant was well aware of the importance of complying with the requirement of payment within 10 working days and of the consequences of not doing so. There is no satisfactory evidence before me that the appellant attempted to comply by making payment on or before 10 February 2018.

[14] Ms Tweedie, a director of the appellant company, said she phoned Ms Mildren on a number of occasions from 2 February 2019 to see if arrangements could be made to collect the car and make payment, which she intended to do at the same time. The order of the Tribunal was never conditional on the car being returned in exchange for a cheque. I accept the appellant did offer to pay by bank cheque on 12 March 2018 but that was rejected by Ms Mildren because she erroneously believed the cheque could be cancelled by the appellant. A bank cheque is not a cheque of the customer, but rather a cheque of the bank itself and cannot be refused unless the intended recipient has reasonable grounds for believing that because of the issuing bank's insolvency it might not be honoured; *Yan v Post Office Bank Limited*³; *Williams v Gibbons*⁴. A bank will not issue a bank cheque unless it has funds from its client to support it.

[15] I accept the offer to pay by bank cheque by Ms Tweedie was genuine and that had Ms Mildren understood what was involved the appellant would have been able to obtain one and settlement of the payment order could have been made at about that time. However that does not assist the appellant as payment on 12 or 13 March 2018 would still have been well outside 10 days from the date of the Tribunal order. Accordingly, there was a failure to comply with the order.

³ [1994] 1 NZLR 154 (CA)

⁴ [1994]1 NZLR 273 (CA)

[16] It is regrettable the parties found themselves in the situation they did. Payment was delayed, and then was sought to be made conditional on the contemporaneous exchange of the monies ordered by the Tribunal and the return of the car which was not how the Tribunal order reads. The consequences of a banning order are harsh for the trader but the Court cannot allow an appeal from a decision correctly made.

[17] Overall therefore I am not satisfied the appellant has established that the Registrar's banning order should be reversed and so it is confirmed with the appeal dismissed.

[18] The respondent is entitled to costs at scale 2B of the District Courts Rules 2014.

.....
B A Gibson DCJ