IN THE DISPUTES TRIBUNAL **[2014] NZDT 589**

BETWEEN	**AB Ltd** APPLICANT
AND	**ZY** RESPONDENT
Date of Order:	4 March 2014
Referee:	Referee Reuvecamp

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the respondent, ZY, pay the amount of $384.87 to the applicant finance company, AB Limited, on or before 21 March 2014 or in such other manner as the parties may agree in writing.

Facts

[1] The matter relates to a loan entered into on 10 April 2013 between the parties in relation to the purchase of a Mazda MPV 1995 for the amount of $4,995.00. The total payments payable under the financing contract were stated as $8,589.99. A security interest was taken over the car by the lender. It claims that the debtor defaulted on the contract on 4 August 2013 and states that it issued a pre-repossession notice dated 11 August 2013 for the amount of $5,650.48. The debtor then returned the car on the same day since as she felt she could not afford to continue with the contract. She did not make any further payments under the contract after 27 July. The finance company claims $1,797.86 in compensation of its loss after having repaired and sold the car and having credited $1,000.00 as a refund of a proportionate part of the extended warranty cost.

Issue

[2] Is the finance company entitled to $1,797.86 in compensation of its loss after having repaired and sold the car and having credited $1,000.00 as a refund of a proportionate part of the extended warranty cost.

Law

[3] The following legislation applies in the consideration of this matter: Law of Contract, Contractual Remedies Act 1979, Credit Contracts and Consumer Finance Act 2003 (CCCFA) and Credit (Repossession) Act 1997 (C(R)A).

Decision

[4] I find that the car was returned to the motor vehicle trader who acted as agent for the finance company in arranging the credit contract. This happened on 11 August 2013 and was done in close consultation with the finance company which proceeded to make the necessary arrangements for the sale of the car over which it had security.

[5] The burden of proving its claim lies with the finance company. It claims that in preparation for the sale of the car, it was repaired and groomed at a cost of $1,785.10. The

sale price, after that work was done, reached the amount of $4,995.00 (which happens to be the original purchase price of the car). The finance company claims those additional costs of 1,785.10 but off-sets that amount in part against a refund of $1,000.00 for part of the cost of the warranty. The net proceeds of the sale as calculated by it are then $4,209.90.

[6] The finance company claims that the amount to settle the Balance of the Credit Contract as at 30 September 2013 is $6,006.76. The difference is therefore $1,797.86 which it claims from the respondent.

[7] The relevant credit was provided for the purchase of the car referred to. A car, as purchased, is a consumer good and therefore the financing contract is a credit sale and consumer credit contract and is governed by the Acts referred to above. The C(R)A applies where a consumer good is repossessed and prescribes strict rules that will need to be followed before and after the relevant item is repossessed.

[8] Sections 20 and 21 of that Act read:

> **20 Notice to be given to debtor and guarantor after taking possession of consumer goods**
> A creditor must serve a post-possession notice on the debtor, and on every guarantor of the debtor, within 21 days of taking possession of consumer goods.
>
> **21 Form of post-possession notice**
> Every post-possession notice must be in writing in the form set out in Schedule 2.

[9] These sections aim to ensure that the debtor is advised of a number of important rights and to give it an opportunity to retrieve the goods, should it wish to do so in view of escalating cost. The form of post-possession notice therefore provides the debtor with notice of the amounts payable (and what other defaults need to be remedied) and its rights of reinstatement and settlement. The creditor is also required to provide an estimate of the value of the repossessed item, which becomes important if the debtor introduces a buyer under section 30, as the creditor is obliged to sell to such a buyer for that estimated value so long as he or she is willing to pay this in cash.

[10] The requirements of the C(R)A are there to protect consumers. Lenders providing finance to private consumers who take security for the loan over consumer goods are required to be fully aware of and comply with its requirements relating to repossession and the necessary disclosures. If they do not, they may have to face the consequences which may not only deprive them of the cost of repossession but also of the opportunity to recover any other costs except the advance (sections 22 and 24).

[11] I find that in this case the finance company did not comply with the requirements of sections 20 and 21 because it felt that the car had been returned to it and had not been actively repossessed by it. It is clear therefore that it did not incur repossession costs and therefore cannot and did not claim those.

[12] The law is strict on the requirements applicable to repossession. Lenders are required to ensure that they are aware of those requirements if they are to avoid adverse consequences affecting their claim. However, it is possible to read section 20 as applying only to the active involvement of the lender in repossessing the car, rather than where it is the passive receiver of a car returned without its prior agreement because the purchaser/debtor finds that it is no longer able or willing to continue with the sale and purchase agreement and/or the finance contract. This does not, however, appear to be the view taken in Master William's decision in *UDC Finance Ltd v Bullen* (1992) 4 NBLC 102,625.

[13] I find that in those circumstances the lender is entitled to see this as a repudiation of the contract by the debtor (other than in terms of sections 36A and 36B where there is such an agreement to a voluntary return) and an instruction to sell the vehicle on its behalf, which instruction it may accept thereby terminating the contract. That then would create an obligation to deduct the proceeds of sale from the amount owing under the contract and the reasonable cost incurred by it in respect of the sale in its capacity as agent of the debtor. This, I find would be consistent with the creditor's right referred to in section 31 to charge cost in preparation of the sale of the consumer good, if the debtor, after possession has been taken by the creditor, changed its mind and offered to settle the agreement in terms of that section; i.e. to pay off the contract before the secured item (here: the car) was sold.

[14] Part of the amount claimed to settle the agreement relates to the cost of grooming and repairing the car in preparation for the sale which, the finance company says, resulted in the original purchase price paid by the debtor being achieved on resale. It did account for the proceeds and provided a statement of account to the purchaser as required by section 31 and presented in evidence at the hearing. The respondent denies having received that statement of account except at the hearing.

[15] A complication arises in this case in that the finance company did not give a post-possession notice once the car was returned to it as required by section 20 of the C(R)A referred to above. In not doing this it deprived the debtor of the opportunity to re-assess its decision to terminate the contract, which Master Williams considered important in *UDC*

Finance Ltd v Bullen, even if the car was voluntarily returned. The result was that the debtor in the case before me was not made aware of the exact value of its outstanding obligations in relation to arrears and interest at the time it returned the car, the estimated value of the car (presumably the amount of $4,995.00 achieved less the repair and grooming cost of $1,785.10 = $3,209.90) at that time, and the additional cost of $1,785.10 it would be facing as a consequence of the need for the car to be resold and prepared for that purpose.

[16] The debtor further disagrees with the need for repairs to the body work of the car as claimed by the finance company. To a considerable extent the claim of the finance company may therefore have come as a surprise to the respondent, although mitigated to a not inconsiderable extent by the voluntary repayment by the finance company of part of the cost of the warranty. The debtor had indicated that she could not, or no longer, afford the car and therefore wished to return it. That is, of course, not a sufficient reason to terminate a binding contract. I find that it shows that it is unlikely that she would have changed her mind and taken up the opportunity to continue or settle the contract, although she might have been able to introduce another buyer for the lower price thereby reducing her liability to the balance of the amount claimed by the finance company.

[17] I note that no evidence was provided of the basis of the additional cost of $1,785.10 charged for repairs and grooming other than the statement of account showing that the car, after around four months of use, had reached the original sale price of $4,995.00 thanks to those costs. In the absence of such evidence, and the fact that the debtor was not given prior notice of this additional charge, and therefore was deprived of her right to reconsider her position in that regard, I am unable to accept the charge for the repair costs.

[18] With regard to the other costs claimed by the finance company, I find that the expectations which the debtor reasonably may have had if a post-repossession notice had been given, were in fact not unduly compromised now she also received a refund of the majority of the warranty cost. I find that by returning the car she must have intended for the car to be resold and must reasonably have expected that this would bring further costs with it. I therefore find that an allowance for preparing the car for resale and the resale itself (but not for the unproven repairs) is appropriate. I allow $650.00 for that purpose.

[19] I further find that the contract was terminated on 11 August by the return of the car. I accept the ledger balance of $5,670.48 as at 11 August 2013, provided by the finance company in evidence, as correctly reflecting the amount outstanding as at that date, rather than the $6,006.76 as at 30 September which included $336.28 interest accruing after that

date. Instead, I add interest for 11 days, for the period from the last interest payment to 11 August, i.e. $59.39. I add to this the $650.00 sale related costs allowed by me = $6,379.87 and deduct the amount of $1,000.00 of the warranty credit and the $4,995.00 gross proceeds of the sale. The amount payable by the debtor is then $384.87. I order accordingly.