IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1076
[2016] NZHC 1896

BETWEEN	MERCEDES-BENZ FINANCIAL SERVICES NEW ZEALAND LIMITED Plaintiff
AND	DESMOND JAMES ALBERT CONWAY Defendant

Hearing: 1, 2 and 3 August 2016

Appearances: P M Hunter and S E O'Grady for Plaintiff
J P Dallas for Defendant

Judgment: 16 August 2016

JUDGMENT OF FOGARTY J

This judgment was delivered by Justice Fogarty on
16 August 2016 at 11.30 a.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Simpson Western, Auckland
Copy to:
J D Dallas, Wellington

Introduction

[1] Mercedes-Benz exports a range of its vehicles to New Zealand for sale. This case concerns three vehicles which were placed in the sale yards of Wellington Star. By the terms of the "floor plan" the vehicles were owned by the plaintiff, which I refer to as Mercedes-Benz, when discussing Mercedes-Benz policy and practices, and as Mercedes-Benz Financial Services New Zealand Ltd (MBFS) when referring to the specific transactions.

[2] The defendant, Mr Conway, acquired possession of three Mercedes-Benz vehicles. He signed a number of documents. There is a dispute between the parties as to the effect of the agreements he executed. It is common ground that, as a result of entering into these agreements, he acquired the possession and use of each vehicle and became obligated under terms of finance provided by MBFS. It is also common ground that he fell behind in the payments and that in respect of two vehicles, he got notice that he was behind and was advised that the vehicles would be repossessed. In the course of an agent of Mercedes-Benz endeavouring to repossess these two vehicles, he paid up the arrears in cash, in the sum of about $33,000. He then fell behind again in respect of all three vehicles.

[3] The three vehicles were eventually found and sold at auction. The next step was for MBFS to bring proceedings in the High Court under three causes of action, one for each vehicle, seeking respectively the sums of $132,991.89, $15,090.57 and $97,479.51.

[4] Mr Conway has filed a statement of defence and counterclaim. In his defence he challenges the repossession and sale of each of the three vehicles, in particular, he says MBFS applied the wrong statutes. Mr Conway also contends that MBFS did not apply the applicable statutory provisions, and so the repossession and sale were illegal.

[5] More than that, he contends that because of legal errors that MBFS by its actions in purporting to sell the vehicle has permanently deprived him of his property and that is theft of a vehicle pursuant to s 219 of the Crimes Act 19891, as well as a tort.

[6] By way of counterclaim he seeks damages for the tort of conversion in respect of each vehicle and exemplary damages. The counterclaim seeks relief not only against MBFS, but against its directors.

The issues at this trial

[7] The counterclaim has not been heard. Shortly before the trial on 13 July 2016, Heath J considered an application by Mr Conway to join additional parties to subpoena two members of the firm of solicitors who acted for MBFS, to amend the statement of defence and to bring this counterclaim. Leave to amend the statement of defence was not opposed, but there was opposition to the counterclaim. The Court gave leave for a counterclaim to be filed, but also stayed the counterclaim pending the determination of the original claim by MBFS for judgment for the outstanding debts on these three vehicles.[1]

Which statute?

[8] The statement of defence and counterclaim alleges, at its heart, that MBFS's lawyers fell into procedural error when responding to the default obtaining possession and selling the cars.

[9] It is common ground that there were at the time three statutes regulating the steps that should be taken on repossession and sale. They are the regimes contained in the:

(a) Credit (Repossession) Act 1997 (CRA);

(b) Personal Property Securities Act 1999 (PPSA);

(c) Property Law Act 2007 (PLA).

[10] The CRA was repealed as from 6 June 2015, however, it continues to apply to security arrangements which were entered into prior to this date, under clause 3 of

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1 *Mercedes-Benz Financial Services NZ Ltd v Conway* [2016] NZHC 1587.

Schedule 1AA of the Credit Contracts and Consumer Finance Act. It therefore applies to the first two cars, a 2011 S63AMG and 2011 SLK200 Cabriolet (2-seater).

[11] In respect of the repossession and sale of the S63AMG and the Cabriolet, Mercedes-Benz followed the notice of procedure set out in the CRA.

[12] Mr Conway has not argued that the notices failed to meet the requirements of the CRA, but rather, disputes that the notices should have been served under that Act. This is for two reasons. One that the vehicles were his, so that the obligations of the MBFS was a mortgage and so the PLA applied. Second, the CRA did not apply because these vehicles were not "consumer goods" under the CRA.

[13] Mr Conway's case is that all of these cars were purchased as business vehicles. That MBFS's right to repossess was at all times as a mortgagee of a "mortgage over goods", (the vehicles), which were owned by Mr Conway. And so the first two vehicles were subject to compliance with the provisions of the PLA, which provisions were mandatory, and which were not complied with. Hence, the vehicles were illegally repossessed, and that was a conversion of Mr Conway's property by MBFS.

[14] In respect of the third vehicle, this was a 2011 ML63 SUV. By the time this vehicle was located these proceedings had commenced and the plaintiff was aware that through these proceedings Mr Conway was contending that the PLA applied not the CRA. MBFS then elected to serve a post-possession notice on the defendant in the form required under s 128 of the PLA, without prejudice to the plaintiff's ability to argue that no notice at all was required because the plaintiff's security interest in the vehicles did not constitute a "mortgage over goods".

[15] Mr Conway's defence is that this notice in respect of the SUV was not personally served as required under s 359 of the PLA. The notice was not in the form required under s 128. The plaintiff purported to sell the goods on the basis they were "at risk" when they were not.

Issues which arise for determination in this proceedings

The plaintiff's formulation of the issues

[16] In respect of the repossession and sale of the first two vehicles:

(a) Whether the vehicles are "consumer goods" as that term is defined in s 2 of the CRA;

(b) If they were not, did the plaintiff's security interest in the vehicles constitute a "mortgage over goods"?;

(c) If they did not, did the plaintiff and the defendant contract out of the requirement to serve a post-possession notice under s 114 of the PPSA?

(d) If the plaintiff's security interest in the vehicles did constitute a "mortgage over goods" then could the plaintiff and the defendant contract out of the requirement to service notices under ss 128 and 132 of the PLA?

(e) If they could not, could the Court use its power under s 157 of the PLA to waive the requirement for compliance with issuing a notice under ss 128 and 132 of the PLA?

In respect of the repossession and sale of the third vehicle:

(f) Does the plaintiff's security interest in the vehicle constitute a "mortgage over goods" under the PLA?

(g) If it does not, did the plaintiff and the defendant contract out of the requirement to issue a post-possession notice contained in s 114 of the PPSA?

(h) If it does, then:

(i) Could the plaintiff and the defendant contract out of the requirement to serve notices under s 128 and 132 of the PLA?

(ii) Did the notice that the plaintiff issued for the defendant comply with the requirements of s 128 and 132 of the PLA?

(iii) Did the notice have to be served in compliance with the service requirements contained in s 185 of the PPSA or s 354 of the PLA?

(iv) If the service requirements contained in s 185 of the PPSA applied, then was the notice served under those?

(v) If the service requirements contained in s 354 of the PLA applied, then should the Court make an order dispensing with the requirement of personal service of the notice under s 357 of the PLA?

The defendant's formulation of the issues

[17] The defendant considers there are three major issues to be considered in this case to establish a defence for the defendant:

(a) Did the defendant purchase the cars as consumer goods or for business purposes, and was this disclosed to the dealership by the defendant at the time he purchased the vehicles?

(b) Did the plaintiff ever purchase the vehicles? The plaintiff needs to prove it obtained title of the cars to establish that the plaintiff had title capable of retention for the plaintiff's case to succeed. The plaintiff could not "retain" what it did not have.

(c) If the answer to (a) is "yes", and (b) is "no", the agreement between the plaintiff and the defendant is a loan agreement where the owner of the car has guaranteed a mortgage security over the vehicles with the

intent to use the cars for business purposes rendering the cars "mortgage goods" subject to the PLA notice provisions and not subject to the CRA notices as contended by the plaintiff.

Core issues, as identified by the Court

[18] A variation of the defendant's issue (c) set out immediately above this paragraph, is I think, the core issue dividing the parties and dictating the outcome of the liability of Mercedes-Benz, if any, to Mr Conway.

[19] The core issue is whether or not Mr Conway ever became the owner of the three cars. The competing propositions are:

> For the plaintiff, that ownership of the cars remained at all times with MBFS, the plaintiff in these proceedings. That the dealer, Wellington Star, was never owner and so vendor of any of the cars. The defendant, Mr Conway, never became the owner of any one of the three cars. The three contracts were conditional purchase contracts whereby title to the cars did not pass from Mercedes-Benz to Mr Conway until all his obligations to Mercedes-Benz were discharged.
>
> For the defendant, that when entering into the vehicle offer and sale agreement (VOSA), Mr Conway obtained finance from Mercedes-Benz which together with the trade-in enabled him to purchase outright each car which was his. The financing agreement between Mr Conway and Mercedes-Benz stood alongside this purchase. It was at best a mortgage over Mr Conway's title to each car and so the mortgage could only be enforced pursuant to the requirements of the PLA.

[20] For these reasons most of the evidence and argument in this trial centered upon examining the consequences of the three VOSAs.

The Court's view of the ultimate issues in chronological order

[21] In the court's view the ultimate issues can be stated as follows:

(a) The first question was, who was the vendor of the cars in the yard of Wellington Star: MBFS or Wellington Star?

(b) Depending on whether MBFS or Wellington Star was the owner, did "ownership" in the vehicles remain with either Mercedes-Benz or Wellington Star, or did it pass upon execution of the VOSA to Mr Conway?

Who was the vendor of the three vehicles?

Interest of Wellington Star in the vehicles

[22] MBFS had a dealer agreement with Ingham Motors Wellington Ltd, the owner of Wellington Star. A redacted copy of that agreement, dated 30 November 2010, was admitted as evidence by consent.

[23] The redactions appear to be confined to the calculation of the commission paid to the dealer for each financial product approved and settled by MBFS Products were defined as: "all vehicle finance and lease products developed and offered by MBFS from time to time…". Sales contract was defined as "any contract or agreement between the Dealer and the Customer under which the Dealer agrees to provide goods or services to the customer. By the agreement, Mercedes-Benz promised to pay commission for each approved and settled Mercedes-Benz finance product.[2] That obligation came with claw back provisions which I do not need to go into. Part 6 of the agreement dealt with the dealer's general warranties and undertakings and part 6.2 dealt with sales contracts. Part 6.2(d) provided "the customer will acquire absolute property in, or an unrestricted right to use and enjoy, the goods as soon as it pays for them".

[24] Part 14, under the heading GENERAL has, at clause 14.2:

> No agency: the dealer acknowledges that, except to the extent otherwise expressly provided in this Agreement:
>
> (a) It is not the legal representative, agent or joint venture of MBFS for any purpose; and

[2] Clause 3.3.

(b) It has no right or authority to assume or create any obligations of any kind or to make any representations or warranties, whether express or implied, for or on behalf of MBFS, or to bind MBFS in any respect.

[25] Ms Woon is employed by MBFS as its general manager of credit risk. She has been employed by Mercedes-Benz for ten years. Her written evidence in chief was directed to proving the defaults and the procedural steps undertaken to realise the vehicles. She did, however, discuss the VOSAs. She explained that Wellington Star is the trading name of Ingham Motors Wellington and is an authorised dealer of Mercedes-Benz New Zealand Ltd, which is, of course, not the same entity as MBFS, the plaintiff. She emphasised that Wellington Star is not an agent of Mercedes-Benz for any purpose. She gave evidence that MBFS considers Mr Conway was acquiring each vehicle for personal use and so that the notice provisions contained in the CRA applied and were complied with by MBFS.

[26] In her evidence she said that MBFS never relied on the VOSAs. They processed the application for finance, which was an application on another form filled out by the customer or by the business manager of Wellington Star on behalf of the customer. It was her understanding that VOSA is an agreement between the dealer and the customer. She said:[3]

> [VOSA] happen when the transaction happen but when we approving an application for a customer to agree to advance some fund, it could happen – that would be normally before the vehicle transaction happened. So we would never have received a copy of a VOSA and in this case we never received any of this VOSA that was provided as the evidence.

[27] Ms Woon was cross-examined on the ownership of vehicles starting from when it comes off the assembly line. She did not know who owned the vehicle off the assembly line. She was asked:[4]

Q When it arrives in New Zealand who owns the vehicle?

A I guess is different stage. I mean when it arrive in New Zealand obviously the vehicle will have been sold from the manufacturer to the local distributor or importer but in term of owning they have to pay for it before they own it.

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3 Notes of evidence pages 18 line 31 – page19 line 3.
4 Notes of evidence pages 38 line 30 – page 39 line 18.

Q When the owner of that vehicle forwards it to the dealership, in this case Wellington Star, MBFS is not the owner of that, is it?

A Depend on different arrangement. We also provide financing to the dealership itself on a commercial consignment basis so that any car that was funded under the commercial consignment Mercedes-Benz Financial Services own the vehicle.

Q Now is there any record on the certificate of title of the vehicle that it was owned by Mercedes-Benz Finance Services?

A There is no certificate of title for vehicle.

Q The registration.

A As far as I know registration doesn't constitute ownership and a new vehicle would not be registered in any party name.

Q Well who sells the vehicle, who sold the vehicle to Mr Conway?

A I think that's a rather technical question for me to answer.

[28] The cross-examination continued:[5]

Q Ms Woon, can you point us to any document which shows that MBFS had ownership of the vehicle apart from that provision in the VOSA about retention of title which may or may not apply?

A I guess depend on the stage we refer to but if you referring to this case, under the consumer credit agreement term and condition page 19 of the common bundle 1 under clause 5.7 ownership of the vehicle is clearly say you agree that legal and beneficial ownership of this – of the vehicle will remain with the lender until you have pay all amount owing to the lender by you under this contract.

[29] Further on she was questioned as to what Mr Conway entered into with Wellington Star:[6]

Q Then what was he doing at Wellington Star in relation to these three vehicles?

A This is a conditional purchase agreement which I believe Mr Conway enter into where he will have the ownership of the vehicle at the end of the term of the contract after he repay what's stated under the agreed contract between Mr Conway and [M]BFS.

[30] She reiterated:[7]

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5 Notes of evidence page 39 lines 24-31.
6 Notes of evidence page 42 lines 9-14.
7 Notes of evidence page 42 lines 19-20.

A I'm saying that he would not get ownership of the vehicle at the time he took the car.

[31] Asked for her basis for saying that she said:[8]

A I guess again we need to go back to clause 5.7 on page 19 and also on the dealer manual where we specifically refer to, under the heading for, "Consumer credit contract," which is also in my brief and say that's, is a, the ownership will be remain with the lender until all the debt has been pay in full.

[32] She was then asked this question:[9]

Q On what basis, because you said it never had any direct dealings with the, now, did that, as His Honour has pointed out, that does not preclude someone else being, MBFS being the owner, but what can you point to, can you point to anything which shows that MBFS was the owner? Because it would be only as the owner that it could retain title, I put it to you?

A I mean again I believe this is the reason we are here for, I mean, in this case I can see that the ownership is with us and when you come to the car at the dealership in term of who owned the vehicle that been display in the floor plan I can confirm that also, we also funding the car for the dealership on a commercial consignment basis which under that agreement MBFS owned the vehicle.

Q Does that mean that Mercedes-Benz transfers or sells the vehicle to the dealership on the basis that their customer can get finance to buy it?

A I guess under the commercial consignment basis is we own the vehicle the dealer will be selling on our behalf.

Q That would make him an agent, but you, there are provisions that say that he's not the agent.

A Again, I think that's, I couldn't comment on that, I mean, I can only base on what been written down in the dealer agreement.

[33] The cross-examination was pursued on the second day of the trial, and on the subject of who owned the vehicle. It was put to Ms Woon that MBFS provides the floor plan to the dealership and all cars in the dealer's yard were subject to that floor plan. The answer was:[10]

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8 Notes of evidence page 42 lines 22-26.
9 Notes of evidence page 43 lines 16 – page 44 line 2.
10 Notes of evidence page 47 lines 19-20.

A I mean in term of security interests and also ownership because on floor plan is own by Mercedes-Benz Financial Services.

[34] I asked her to repeat the answer:[11]

A Sure. All vehicle on floor plan is actually own by Mercedes-Benz Financial Services so not sure when you mention in term of security interest because security interest, yes we do have, that's what we put on a PPSR as well, but ownership is – we do have the ownership on the vehicle, that was put on floor plan.

[35] The next question was:[12]

Q You say that MBFS owns the vehicle or is it some other entity within the Mercedes group?

A It all – I mean it can be – in this case MBFS owned the vehicle because MBFS provide the floor plan.

Q Do you have any proof of that?

A There is a commercial consignment that's we doing so on a commercial consignment we own the vehicle. The vehicle was invoice to Mercedes-Benz Financial Services.

Q Have you provided a copy of that?

A No I don't think we provide a copy of that because I think that was a different story in term of in my understanding is not related to the case.

[36] The witness confirmed she could make a copy available, it was never produced. There was no complaint as to its absence.

[37] Further in cross-examination she agreed that ownership and a security interest, amounted to the same:[13]

A I guess – I mean, again as I mentioned we have ownership of the vehicle. If you refer ownership to security interest, then the answer will be yes.

[38] She was then asked by the Court:[14]

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11 Notes of evidence page 47 line 25-29.
12 Notes of evidence page 47 line 34 – page 48 line 9.
13 Notes of evidence page 49 lines 5-7.
14 Notes of evidence page 49 lines 10-13.

> Q So you're including ownership as one of a number of secu – you know, security interests can include ownership and you're saying ownership, is that right?
>
> A Yes.

[39] This was also consistent with Ms Woon's view that the fact that the VOSA documented the transaction but did not mean that Mr Conway purchased the vehicle:[15]

> A To me a transaction, I mean in term of title pass on or a purchase is a tax invoice so a VOSA can be documenting the transaction but doesn't mean that they purchased the vehicle.

[40] Overall, I am satisfied that under persistent cross-examination Ms Woon consistently adhered to the proposition that in this case the vehicles on the floor of the Wellington Star's yard were owned prior to sale by Mercedes-Benz under a finance plan provided to the dealer. There was no evidence to the contrary. Accordingly, I find as a fact that the three vehicles, were prior to the dealing with Mr Conway, owned by Mercedes-Benz and that Wellington Star was selling on behalf of Mercedes-Benz.

The agreements entered into by Mr Conway

[41] The Court does not have the original agreements. It does, however, have digital copies of the agreements prepared for Mr Conway supported by the reliable evidence of Ms Salter, who witnessed the execution.

[42] It was Ms Salter's evidence that Mr Conway executed three documents per vehicle.

(a) The VOSA, which she considered records the agreement between the purchaser of a vehicle and the trader, Wellington Star.

(b) The application for finance.

(c) The consumer credit agreement with MBFS.

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[15] Notes of evidence page 49 line 23-24.

VOSA

[43] As noted above, VOSA is the acronym of Vehicle Offer and Sale Agreement. It is a standard document used in the industry designed to comply with the legislation. It is produced by an entity called Motor Web Vehicle Information Authority. It can be populated with information for particular transactions. It describes the vehicle, records an offer to purchase that vehicle, records the total price of the vehicle, provides for trader-in allowance, establishes the net price and records the amount financed.

[44] On the first page of the VOSA for the first transaction, the 2011 S 63 AMG, the purchaser's offer and agreement, includes the topic of "retention of title" and an acknowledgement, "I understand that this purchase is subject to retention of title clause overleaf".

[45] We do not have the complete document and cannot be certain as to whether there was a clause in the standard terms and conditions called "retention of title", but there certainly was a clause called "security interest" which provides:

> Ownership in the vehicle and accessories supplied by the Trader shall not pass to the purchaser until the purchaser has delivered any trade-in to the Trader's premises and otherwise performed all obligations under this Agreement including but not being limited to making payment of the Purchase Price as required by the Agreement.
>
> …

Consumer credit agreement

[46] The second document Mr Conway executed was a consumer credit agreement which is the contract between the borrower and MBFS. The standard terms and conditions include clause 5.7 headed "Ownership of Vehicle":[16]

> You agree that legal and beneficial ownership of the vehicle will remain with the Lender until you have paid all amounts owing to the Lender by you under the Contract.

[16] Agreed bundle of documents page 19.

[47] Associated with the agreed terms is the disclosure statement for a consumer credit contract issued by MBFS to the borrower. We have the disclosure for contract 44710. This one has been signed by Mr Conway. It includes this provision:

> The Lender has a first registered security interest over the Vehicle to secure performance of your obligations under the contract or the payment of money payable under the Contract, or both. If you fail to meet your commitments then to the extent of the security interest, the Lender may be entitled to repossess and sell the Vehicle.

[48] Mercedes-Benz never received the VOSA. This is unusual in terms of trade practice in New Zealand. Rather, it was the practice of MBFS to raise a tax invoice detailing the subject vehicle details, the price and the trade-in details and the balance payable.

[49] Mercedes-Benz would then pay the sum to be financed to Wellington Star who would in turn remit part of that sum back to MBFS pursuant to its floor plan and the vehicle would be released by Wellington Star to the customer.

[50] Pulling this together, Ms Salter explains the steps of the transaction, taking as example transaction, contract number 44710. Mr Conway executes the VOSA. Wellington Star makes an application for finance in the name of Mr Conway. Mercedes advises Wellington Star by fax that it has approved the finance. Mr Conway then enters a consumer credit contract with Mercedes to finance the purchase. Attached to this contract is the disclosure statement which details the monthly payments and the final payments. The general terms and conditions of the finance statements are also presented at the same time, but contained in a separate brochure. They are incorporated into the agreement by reference. Mr Conway acknowledges to Wellington Star he has received a copy of those terms when he signs the consumer credit contract. On the same day Wellington Star sends a tax invoice to Mercedes by fax detailing the total amount payable and the amount of finance required for Mr Conway to settle. A settlement statement authority is produced by Mercedes internal system showing the payment being made to Wellington Star.

[51] She explains, and this is important:[17]

> This invoice from the dealership to Mercedes is not for the purchase of the car but is for the settlement of the finance arrangements. The dealership's invoice for the sale of the car is the VOSA. The recorded sale was made to Mr Conway by the dealership. The VOSA is the invoice upon which the dealership does its accounting and is the dealership's contract of sale as required by section 21 of the Motor Vehicle Traders Act 2003.

[52] That is Ms Salter's interpretation of the significance of the invoice. Ms Woon's interpretation of the tax invoice is different.

[53] However, from this evidence there can be only one conclusion that these are conditional purchases of motor vehicles. Mr Conway does not get title or ownership of any vehicles until he completed all his obligations in respect of that vehicle. This is a very simple policy by Mercedes-Benz. You own the vehicle, when you have paid for it, not before.

[54] It follows that the indebtedness of Mr Conway to MPFS is not and cannot be a charge on the vehicle which Mr Conway owns. The PLA does not apply. Mr Conway has never owned any of the three vehicles and that his financial obligations do not constitute a mortgage over the vehicle (the goods). This finding resolves the issues in paragraph [16](b) above and renders redundant issues, (d), (e), (f), (h)(i)-(ii) and (h)(v). It also resolves defendant's issue [17](b) and what I have described as the core issue in [19].

[55] Because I have accepted the evidence of Ms Woon that MBFS was always the owner of the Mercedes-Benz cars on the yard of Wellington Star and then Wellington Star was selling on behalf of MBFS. This resolves [21](a).

[56] In respect of [21](b) "title" to the vehicles had never passed to Mr Conway.

The remaining issues

[57] I now turn to the remaining issues which are: [16](a) and (c), (g), (h)(iii), (iv).

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[17] Brief of evidence at [20].

[58] These issues relate to the applications of ss 114 and 185 of the PPSA.

[59] In respect of the first two vehicles, the 2011 S 63 AMG and the Cabriolet, the plaintiff followed the notice of procedure set out in the CRA when repossessing and when selling. This Act was repealed on 6 June 2015 but it continues to apply to security agreements entered into before that date by reason of clause 3 of Schedule 1AA to the Credit Contract and Consumer Finance Act. The defendant has not argued that these notices failed to meet the requirements of the CRA. Nor has the defendant sought to argue that the notices were not served in accordance with the requirements of the CRA.

Consumer goods

[60] The plaintiff's position is that the notice of procedure of the CRA applied as the vehicles were "consumer goods" in terms of s 5 of the CRA. Consumer goods are defined in s 2 of the CRA as:

> Consumer goods means goods that are used or acquire for use primarily for personal, domestic, or household purposes.

[61] The issue here between the parties is whether or not Mr Conway was acquiring the vehicles for personal use or for business.

[62] This argument as to notice also falls away on the finding that the vehicles are not goods of Mr Conway.

[63] I quote from the submissions of Mr Dallas, for Mr Conway:[18]

> The plaintiff's evidence is that the first two sales of the defendant's cars were completed pursuant to the Credit (Repossessions) Act 1997. That legislation is limited to the repossession of consumer goods. These are defined as goods which are acquired for use primarily for "personal, domestic, or household purposes". This procedure is not suitable in the case of mortgaged goods. S.5 deals with security agreements to which the Act applies: 'security interests in consumer goods'. These are to be distinguished from goods purchased for business purposes.

[18] Defendant's legal submissions at [36].

[64] Mercedes-Benz's position is that the vehicles are consumer goods in any event under s 5 of the CRA. The submission is that the evidence shows that Mr Conway acquired the vehicles for his personal use. He bought the first two vehicles in his own name. He applied for finance in his personal name. He advised Ms Salter that he would be personally driving all three vehicles. Ms Salter gave evidence that she knew Mr Conway would be claiming them as a business expense for tax purposes.

[65] If the PLA does not apply, then either the CRA applies or the PPSA. This Court does not presume that the two statutes do not overlap. One of the reasons for not making that presumption is that there is an extraordinary provision in the PLA in case of conflict, which states that if there is a conflict between the PLA and the provisions of the PPSA, the provisions of the PPSA prevail.[19].

[66] There is nothing in the CRA which provides that consumer goods used primarily for personal use, are no longer consumer goods if they are used for business use. Moreover, such an interpretation would be incoherent and would not give effect to the term qualifier in the definition "primarily".

[67] There is no doubt that Mr Conway told Ms Salter that he was claiming GST on the purchase of the vehicle and (the SUV) and that the vehicle was being purchased for business purposes, although he would be personally driving the vehicles. That vehicle was registered in the name of a company, Nippon Privy Ltd. The advice in that, the third purchase, was consistent with what Mr Conway told Ms Salter in respect of one of the first two purchases contract number 44710.

[68] None of this comes to any surprise to this Court. The Court takes judicial notice of the fact that vehicles used for private and family use are frequently registered for GST and are used for business purposes as well as for personal and family purposes. In completing the application for finance for car 44710, Mr Conway ticked the use as "private" when he had the option of ticking "business".

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[19] Property Law Act 2007, s 78.

[69] I am satisfied that MBFS was entitled to, and in good faith did use, the CRA provisions. I am also of the view, and it was not argued to the contrary, that it would have made no difference if MBFS had used the provisions of the PPSA. Either way these two vehicles would have been repossessed and sold.

[70] These findings resolve issues [16](a) and (c) and render redundant issues, (g) and (h). They also resolves issues [17](a) and (c). All these issues have been resolved against Mr Conway and in favour of MBFS.

Result

[71] The result is that these being the only defences to the plaintiff's claim for judgment, the plaintiff's claim succeeds.

[72] The plaintiff is entitled to judgment in the sum of:

(a) $132,991.89 in relation to the 2011 S63AMG;

(b) $15,090.57 in relation to the 2011 SLK 200 Cabriolet CGI; and

(c) $97,479.51 in relation to the 2011 ML63 SUV.

[73] The plaintiff is also entitled to interest on the judgment sum in [72](c) from 29 February 2016 at the default rate of 22.5 per cent per annum. I note that interest has been sought in relation to the third cause of action only. I reserve leave for the plaintiff to apply for interest in relation to the other two causes of action if, by oversight, the plaintiff has omitted to include this in its pleading.

[74] Entry of judgment, however, is stayed pending the hearing of the counterclaim.

[75] Costs are reserved.