IN THE DISPUTES TRIBUNAL **[2014] NZDT 603**

BETWEEN	**BG LIMITED** APPLICANT
AND	**YT** RESPONDENT
Date of Order:	29 April 2016
Referee:	Referee Reuvecamp

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that BG **Limited must refund the amount of $795.00 to YT, on or before 16 May 2014 and its claim is dismissed.**

Material facts

[1] The matter relates to a non-maintained operating lease entered into on 22 February 2013 for 130 weeks in respect of a 1993 model Nissan car with an odometer reading of 252,975 kms. The total amount payable under the lease is $8,450 at $65 per week. The residual value of the car at the end of the period is specified as $65.00 at which price the car may be retained by the lessee under clause 2.2 of the lease agreement. BG Limited (BG) alleges that YT is in arrears. It retrieved the car on 3 August in an alleged damaged state and not worthy of repair. It terminated the lease on 4 September and sold it for a wreck value of $450. It seeks compensation for breach of contract at $2,685 including arrears of $680, repossession cost of $150 and the difference of the assessed market value of the car at $2,000 less the wreck value of $450 received for it. YT denies liability claiming that she advised BG on 3 August that she could not afford to proceed with the agreement.

Law

[2] Law of Contract, Contractual Remedies Act 1979, Credit Contracts and Consumer Finance Act 2003 (CCCFA) and Credit (Repossession) Act 1997 (C(R)A).

Issues

[3] Is BG entitled to compensation at the amount claimed for breach of contract by YT with, as sub-issues:

a. Whether the agreement is a consumer credit contract or is to be treated as one under the provisions of the CCCFA, notwithstanding that its text declares it to be an (operating) lease.

b. Whether and if so and to what extent the provisions of the C(R)A apply in relation to the repossession of the car by BG.

[4] If so, what are the consequences of this in relation to BG's claim to be compensated for the various costs incurred by it as a consequence of the alleged breach by YT?

Whether the agreement is a consumer credit contract or is to be treated as one under the provisions of the CCCFA, notwithstanding that its text declares it to be an (operating) lease.

Section 60 CCCFA reads as follows:

> **60 Consumer leases**
>
> (1) For the purposes of this Act, a lease is a consumer lease if—
>
> (a) the lessee is a natural person; and
>
> (b) the lessee enters into the lease primarily for personal, domestic, or household purposes; and
>
> (c) when the lease is entered into, the lessor, or one of the lessors, carries on the business of leasing goods (whether or not the business is the lessor's only business or the lessor's principal business), or makes a practice of leasing goods in the course of a business carried on by the lessor; and
>
> (d) when the lease is entered into, 1 or more of the following applies:
>
> (i) the term of the lease is for 1 year or more:
>
> (ii) the lessee has an option to purchase the goods.
>
> (2) However, a lease that is to be treated as a consumer credit contract under section 16 is not a consumer lease.

[5] I find that the lease is a consumer lease as described in section 60(1) CCCFA, but that subsection is qualified by its subsection (2). It refers to section 16 which reads as follows:

> **16 Lease of goods treated as consumer credit contract**
>
> (1) For the purposes of this Act, a lease is to be treated as a credit sale and a consumer credit contract if—
>
> (a) the lessee is a natural person; and
>
> (b) the lessee enters into the lease primarily for personal, domestic, or household purposes; and
>
> (c) when the lease is entered into, the lessor, or one of the lessors, carries on the business of leasing goods (whether or not the business is the lessor's only business or the lessor's principal business), or makes a practice of leasing goods in the course of a business carried on by the lessor; and
>
> (d) either or both of the following applies:

(i) the amount payable by the lessee under the lease is substantially equivalent to, or in excess of, the cash price of the goods (whether or not the lessee has an option to purchase the goods):

(ii) the lessee has an option to purchase the goods for no additional amount, for a nominal amount, or for an amount substantially below a reasonable estimate (calculated as at the date the lease is made) of the fair market value of the goods at the end of the term of the lease (whether or not the amount payable by the lessee under the lease is substantially equivalent to, or in excess of, the cash price of the goods).

(2) For the purposes of this section, the amount payable by the lessee under the lease does not include—

(a) any amount payable for optional services or services that are incidental to the hire of the goods; and

(b) any amount payable to exercise an option to purchase the goods; and

(c) any amount that would cease to be payable on the cancellation of the lease if the lessee were to exercise a right of cancellation at the earliest opportunity.

…..

[6] As may be seen, the lease falls also within the ambit of section 16(1) due to subsections (d)(i) and (ii). This means that the effect of section 60(2) above is that a lease as this operating lease will need to be treated as a credit sale and consumer credit contract, rather than as a consumer lease, although the wording of the lease itself specifies that it is a rental agreement rather than a financing contract. The reason is that the terms of this lease have basically the same effect as a credit sale in the nature of what used to be called a “true hire purchase agreement” since it is intended to operate for the entirety of the life of the car with all main risks and costs relating to the cash value of the car, maintenance, repairs and insurance etc., imposed on the lessee.

[7] The result of it being treated as a credit sale and consumer credit contract under section 16 is that, for example, a consumer lease is subject to the reopening provisions of the CCCFA , if the creditor’s conduct is oppressive, and further that the creditor will have to comply with the strict disclosure requirements and restrictions on fee limits, termination payments and the applicability of statutory damages in the event of certain breaches of the Act, rather than being governed by the relevant provisions applicable to consumer leases.

[8] I further refer to sections 61 and 13 of the CCCFA which read:

61 Presumption relating to consumer lease

(1) In any proceedings in which a party claims that a lease is a consumer lease, it is presumed that the lease is a consumer lease unless the contrary is established.

(2) This section is subject to section 13.

13 Presumption relating to consumer credit contract

In any proceedings in which a party claims that a credit contract is a consumer credit contract, it is presumed that the credit contract is a consumer credit contract unless the contrary is established.

[9] In accordance with section 61(2) I must therefore apply the presumption of section 13, and treat the transaction as a consumer credit contract in terms of the CCCFA notwithstanding the provisions of section 60(1) and the wording of the Agreement to Lease which purport to convey a different impression. This may therefore be a reason for BG to consult its legal advisers and review its documents and procedures in light of the effect of the sections referred to.

Whether and if so and to what extent the provisions of the C(R)A apply in relation to the repossession of the car by BG

[10] The provisions of the C(R)A, relating to the creditor's obligations on repossession of the car apply if the lease is or is to be treated as a credit sale or if the transaction provides for a security interest in consumer goods. For present purposes the relevant provisions are sections 2 and 5 C(R) A and 17 Personal Property and Securities Act 1999 (PPSA) which read as follows:

Section 2 C(R)A Interpretation

Secured credit sale agreement means an agreement for the sale of consumer goods under which payment of the whole or a part of the purchase price is deferred and a security interest in the consumer goods is created or provided for to secure the payment of the whole or a part of the purchase price; and includes a lease for consumer goods that is treated as a credit sale under section 16 of the Credit Contracts and Consumer Finance Act 2003.

Security interest has the same meaning as in section 17 of the Personal Property Securities Act 1999; but excludes—

(a) An interest in personal property created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, or a commercial consignment:
(b) Any security interest created by a company within the meaning of section 2(1) of the

Companies Act 1993 or by a society registered under the Industrial and Provident Societies Act 1908.

Section 5 C(R)A Security agreements to which Act applies

(1) This Act applies to a security agreement—

(c) That creates or provides for a security interest in consumer goods; and
(d) (b) That is entered into on or after the date of commencement of the Credit (Repossession) Amendment Act 1999.

.....

Section 17 Personal Property Securities Act 1999

Meaning of "security interest"

(1) In this Act, unless the context otherwise requires, the term **security interest**—

(a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—

(i) The form of the transaction; and

(ii) The identity of the person who has title to the collateral; and

(b) Includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).

(2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.

(3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

[11] This consumer lease is therefore also a secured credit sale agreement since it provides for a security interest in consumer goods in terms of the PPSA and is to be treated as a credit sale agreement. I note that the facts in this case are therefore different from those between BG and another third party in my decision of 18 November 2012 in CIV 2012 - 094 – 1611 where the presumption of section 61(1) CCCFA, rather than of section 13 of that Act, applied. As a consequence the provisions of the C(R)A, and in particular the notice

requirements on repossession do apply in this case to the consumer lease, whereas they did not apply in that other decision which I refer to only for BG's convenience.

[12] I note in passing that this may well be different for other claims lodged or to be lodged by BG with the Tribunal and, if so, my comments in paragraph 6 relating to the possible need to review BG's documents and procedures may therefore equally apply to the possible application of the provisions of the Personal Property Securities Act in relation to repossession in transactions where the C(R)A does not apply.

Decision

[13] BG is in terms of its contract on first sight entitled to compensation of its loss due to YT's default on the lease and may repossess the car to secure payment of any amount due to it. Section 68 CCCFA deals with what is payable on termination of the lease and therefore also applies to the early termination by BG due to breach by YT. In terms of that section the lessor under a consumer lease is entitled to compensation for an amount payable under the lease that does not exceed a reasonable estimate of the lessor's loss relating to the termination.

[14] Clause 12.3 of the lease provides that all unpaid amounts will become immediately payable, i.e. here, rental for more than 110 weeks remaining. Since it should generally be possible to re-lease the car, such a claim would not fit well with section 68. However, BG claims only rental arrears for 8 weeks plus compensation for the car's value less the wreck value on 4 September when it terminated the lease. It says that the car could not be repaired and therefore could not be re-leased.

[15] However, BG is entitled to the amount of its loss under section 68 CCCFA only if it can establish that the car was indeed no longer capable of being re-leased due to the respondent's negligence after she had paid $1,170 in rental payments during the period from 22 February to the date it was repossessed and has complied with the requirements of the C(R)A in relation to repossession. YT accepts that the current market value of $2,000 as estimated by BG may be reasonable, but denies that the car suffered any material damage during the period that it was in her possession. She therefore claims that there was no reason for it to be written off rather than being re-leased.

[16] Although I have no doubt that YT was in arrears, the burden of proving its claim for additional loss is on BG. I find that BG was unable to provide any evidence of: a. the cash

value of the Nissan 2002 car with 252,975 kms on the clock at the time the contract was entered into; b. the market value of 2,000 as estimated by it at the time it was repossessed; c. the alleged repair costs; d. that any such repair costs were caused due to the negligence of YT during the time that she had possession of the car; and e. that those repair costs were such that the car could not reasonably be expected to be released. I find that there is therefore insufficient evidence to persuade me that there was any deterioration in the condition of the car that was attributable to YT. I find that she is therefore entitled to a credit of not less than the $2,000 estimated market value of the car on repossession.

[17] I further find that it would be entirely inequitable and, indeed, oppressive, to allow a claim for $2,000 or, for that matter, thousands of dollars in excess of that amount in rental payments accruing under clause 12.3 of the lease agreement, after BG terminated the agreement for default. I find that it is unlikely in the absence of any evidence showing otherwise, or the agreement of both parties, that the cash value of the high mileage Nissan 2002, which was taken on lease only around 6 months before, at that time was much higher than at the time it was repossessed 6 months later. I note that in the meantime already $1,170 had been paid by YT by way of rental.

[18] Since the total payment for the car over 130 weeks is stated as $8,450, of which $1,105 relates to registration and w.o.f. certificates, the balance of $7,345 relates to payments to be made for the car itself. This means that the rental payable is well in excess of an equivalent interest rate of around 78% per year, if I assume for the moment that the cash value was around $2,500 at the time the lease was signed (in fact even more since the amount outstanding in fact reduced with each payment). YT, as the consumer, therefore would have ended up paying about 3 times the assumed value of the car at the commencement of the lease.

[19] The evidence provided established that no initial disclosure was made at the time of the lease that it was in fact a consumer lease. Neither was the cash value of the car disclosed at that time nor was the establishment fee of $500, which appears to have been payable by way of prepayment in addition to the amounts referred to above, included in the contractual document. All are requirements of Schedule 2 to the CCCFA in respect of a consumer lease under section 64 CCCFA and the equivalent Schedule 1 for consumer credit contracts. This lack of disclosure has deprived YT of the opportunity to appropriately ascertain the relative costs she incurred by renting this car, which Parliament considered important to protect consumers by requiring compliance with those Schedules.

[20] I have taken note of BG's comment that the contract has been considered by the Commerce Commission and that it has not led to any further action being taken by that statutory body. I have not been provided with any document reflecting the reason for or the results of the Commission's findings. I therefore only note that, if no action was taken by the Commission, this does not necessarily mean that the documents submitted to it were approved or that they comply with the relevant statutory requirements, since providing such confirmation is not within the role or task of the Commission. It is more likely to mean that the Commission did not consider it at that stage of sufficient public importance to take any action on whatever the documents were that were submitted to it.

[21] Its failure to provide the appropriate prescribed disclosures exposes BG to liability for statutory damages in terms of sections 88(3) and 89(1)(d) CCCFA, being the lesser of $3,000 or 5% of the cash price of the goods. It may therefore be open to the Tribunal to impose $3,000 statutory damages where no cash value is disclosed in a consumer lease. The same calculation applies under section 88(1) if the transaction is to be treated as a consumer credit contract. Further, in the absence of proper disclosure the contract becomes unenforceable by the creditor under sections 102 and 99 respectively.

[22] I find that this ought not to prevent the Tribunal to impose statutory damages on BG for not complying with the disclosure requirements of the Schedule. However, I find that to take the sum of $3,000 as the amount prescribed by way of statutory damages because no other amount is stated, may be inequitable unless BG fails to remedy this deficiency in the future.

[23] As mentioned before, the contract specifies a net sum payable over the term of the lease of $7,345 (incl. gst) for the car, payable by way of instalments of $56.50 per week. Since YT accepts a market value of around $2,000 at repossession, I find that an estimated cash value of $2,500 at the time the lease was entered into for the high mileage Nissan 2002 is reasonable. Taking that amount as the basis for my calculation and multiplying it by 5%, I therefore arrive at $125 as a reasonable alternative calculation of the statutory damages.

[24] As stated in paragraphs 7 and 8 the provisions of the C(R)A also apply to this contract since it is to be treated as a secured credit sale agreement. This means that the provisions relating to repossession must be complied with. Here too BG had difficulty with complying with the requirements of the Act. It provided YT with a "Recovery Notice" dated 2 August advising her of her default and that the car was being recovered and giving her 24 hours to "redeem it". However, that notice was handed to her on 3 August, not prior to but on

the day of the repossession. It was not in the form and did not comply with the requirements of Schedule 1 C(R)A, nor with the 15 days prior notice requirement applicable to a pre-possession notice prescribed by section 9 of the Act. I note that contravening section 9 is an offence and on conviction a fine not exceeding $3,000 may be imposed by the District Court (section 11). Repossessing the car without the appropriate notice means that the repossession and further disposition of the car is unlawful and the contract unenforceable enabling a Court or Tribunal to grant relief to the debtor under section 32.

[25] BG further provided YT with what may be considered a purported post-possession notice, as required by section 21, dated 12 August, offering her the opportunity "to redeem the vehicle" by 16 August after which it was to be re-leased. It did not comply with the form and requirements of Schedule 2 to advise YT of the various alternatives available to her, nor did it provide her with the prescribed Notes containing an explanation of her rights and required warnings. Since the vehicle was not re-leased, but sold as a wreck, the notice was also incorrect and therefore misleading. Non compliance with the requirement to serve a post-possession notice means that the creditor is not entitled to recover the cost of repossession (section 22) and since no post-possession notice is given as required, the debtor is not liable for more than the advance made to it under the security agreement which is the cash value for which it reasonably could have been acquired (sections 2 and 24).

[26] It then notified YT on 4 September that it terminated the lease agreement and it sold the car on 1 October. This happened without prior notice to YT of its intention to do so or of the car's estimated value of which she was not advised until she received a letter dated 18 October requiring payment of $2,685 when it was assessed at its wreck value of $450. I accept this notification as equivalent to a statement of account to the debtor, as required by section 33.

[27] I find therefore that BG did not comply with many of the provisions applicable to its lease agreement. As a creditor providing credit in the course of its business in terms of the Acts referred to it is required to comply with the relevant legislation. It failed to do so. Because the appropriate pre- and post-possession notices were not given, the repossession was unlawful and so was the sale of the wreck since the lack of proper disclosures deprived YT of the opportunity to consider all her alternatives. She suffers the loss because she ends up without a car as a consequence. Section 24 addresses the consequential hardship by providing that only the advance under the security agreement is payable. For a consumer

good as a car, which the consumer has agreed to purchase or has an option to do so, this means, in terms of section 2(1)(c) the cash price of the car.

[28] I have assessed the actual cash value of the car (i.e. the advance made to her in terms of section 24) that should have been disclosed to her initially, at $2,500. I have assessed the value on repossession, in the absence of evidence that she caused the damage to the car, at $2,000, as she accepted. I find that she should be given credit for that amount in terms of the Schedules referred to above. The amount payable by her therefore for the annulled transaction would be $500. That amount is reduced by the statutory damages of $125 to $375. Since she already paid $1,170 she would be entitled to a refund of $795 under section 24(b) due to non-compliance with the disclosure notices referred to precluding a lawful sale of the car.

[29] I order accordingly and dismiss BG’s claim as a consequence.