IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA739/2023
[2024] NZCA 512

BETWEEN	MAJITHA THANUJAYA PERAMUNE Appellant
AND	SAVAGE GARAGE NZ LIMITED Respondent

Hearing: 30 September 2024

Court: Mallon, Gwyn and Moore JJ

Counsel: Appellant in person
A C Elia for Respondent

Judgment: 11 October 2024 at 11 am

JUDGMENT OF THE COURT

A Leave to adduce further evidence on appeal is declined.

B The appeal is dismissed.

C The appellant must pay costs to the respondent on a Band A basis (including, for the avoidance of doubt, costs on a Band A basis for the preparation of the case on appeal), together with usual disbursements.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] Mr Peramune appeals a decision of Associate Judge Gardiner setting aside a statutory demand that he served on Savage Garage NZ Ltd (SGL) in June 2023.[1]

[1] *Savage Garage NZ Ltd v Peramune* [2023] NZHC 3204 [decision under appeal].

The statutory demand sought payment of $65,000 purportedly owed to him under an arrangement he had with the company to sell six vehicles on his behalf. Mr Peramune now asks this Court to set aside the Associate Judge's decision, to reinstate his statutory demand and to enforce the debt he says is owed to him. In support of his appeal, he seeks leave to adduce evidence not presented in the High Court.

[2] SGL supports the Associate Judge's decision and says she was right to conclude that there was a substantial dispute over the purported debt. For the reasons that follow, we agree.

Background

[3] SGL is a company which carries on business as a car customising garage. In addition to carrying out mechanical and electrical work, SGL provides other services such as window tinting, paint correction, wheel repairs and vehicle detailing. It also helps facilitate the marketing and selling of vehicles through its YouTube channel.

[4] Mr Peramune was one of its customers. In late 2022, Mr Peramune supplied six vehicles to SGL: an Audi Q5, Audi Q2, Honda Civic, Mazda 3, Outlander and Mercedes.[2]

[5] The original basis for why Mr Peramune did so is disputed, as is the condition in which the vehicles were supplied. What is undisputed however is that the vehicles were to be sold by SGL and that Mr Peramune was, through this arrangement, to be paid for them. As the Associate Judge noted, the arrangement between the parties was informal and verbal.[3]

[6] It is the terms of this arrangement which the parties now dispute. Mr Peramune says that he supplied the six vehicles to SGL to "on-sell" to third parties on his behalf. He says that SGL agreed to sell the six vehicles for pre-determined prices totalling $167,000 for all six vehicles and that SGL was able to retain any profit made above those prices if the vehicles were sold. However, he also says that the nature of their agreement was that SGL agreed to pay him the agreed pre-determined price, regardless

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2 We adopt, for the sake of convenience, the same names of these vehicles used by the parties.
3 Decision under appeal, above n 1, at [12].

of what price SGL was able to achieve on any sales to third parties. He says that he supplied the vehicles to SGL in a "fully detailed, registered and … clean state ready to go on the yard for immediate sale", and that he never asked SGL to undertake detailing work on the vehicles or agreed to pay SGL for storing the vehicles. On the basis that he has received $102,000 from SGL to date, he says that $65,000 remains outstanding and it is that sum he seeks to recover from SGL.

[7] SGL has a different view of the arrangement. Through its General Manager, Mr Irvine, SGL says that the arrangement was only ever that it would sell the vehicles on Mr Peramune's behalf, following which it would remit to him the sale proceeds. It says that the arrangement evolved after Mr Peramune first brought the vehicles to the company for detailing and minor repairs in September 2022, and that it was in October 2022 that the parties agreed that SGL would sell the vehicles on Mr Peramune's behalf. While SGL accepts that Mr Peramune had taken the vehicles to other garages for "major repairs" prior to delivering the vehicles to the company for sale, it says that Mr Peramune had struggled to sell the vehicles by himself and so, for that reason, had engaged SGL to "bring the vehicles up to sale standard". SGL says that the $167,000 which Mr Peramune refers to was only ever a total of the prices that the parties expected to achieve on selling the vehicles, but was never a fixed price. It also says that Mr Peramune agreed to pay for detailing work on the vehicles and for storage costs if the vehicles were not sold within 30 days. It says that these were the only avenues through which it was to make any money from the sale of these vehicles.

[8] In the event, the vehicles were listed for sale on Trade Me Motors and four were sold. The proceeds from those sales were transferred to Mr Peramune, although precisely how much was transferred is disputed. Mr Peramune says SGL paid him $102,000 while SGL claims that it paid him $83,000. SGL says that at Mr Peramune's request, the two remaining vehicles were then exchanged for a Jeep Wrangler valued at $65,000.

[9] SGL says that following these arrangements, in January 2023 and March 2023, it sent invoices to Mr Peramune for storage costs of just over $4,000 and just under $33,000 for work it had carried out on the vehicles. Mr Peramune says that he never

agreed to pay for these costs, that he never received these invoices and that they were only referred to him by his lawyer after he issued the statutory demand.

[10] On 2 May 2023, Mr Peramune's solicitors sent a letter of demand to SGL, requiring payment of $65,000. The letter advised that Mr Peramune had supplied six vehicles at a total "pre-determined" price of $167,000, and that SGL could "on-sell the motor vehicles", provided that it first settled the pre-determined prices notified at the time that Mr Peramune handed his vehicles over to SGL for sale.

[11] Just under a month later, on 1 June 2023, Mr Peramune served SGL with the statutory demand.

[12] On 19 June 2023, SGL filed its originating application seeking an order to set the statutory demand aside on the grounds that there was a substantial dispute that the debt was due or owing. Associate Judge Gardiner heard the application on 7 November 2023 and granted it a week later.

Decision under appeal

[13] Mr Peramune's position in the High Court was that there was no dispute that the $65,000 debt was owing or due, and that any dispute as claimed by SGL was a façade. In opposition to SGL's application to set his statutory demand aside, he produced an email dated 2 November 2022 which listed "price expectations" for the six vehicles totalling $167,000; social media messages between the parties; and invoices showing that he had engaged other garages to carry out repair works before they were handed over to SGL to be sold on his behalf.

[14] The Associate Judge was easily satisfied, however, that there was a substantial factual dispute as to the terms of the agreement between the parties and thus whether the $65,000 debt was due or owing. The primary dispute, she said, was whether or not Mr Peramune supplied his vehicles for sale on the basis that SGL would pay him a pre-determined sum, irrespective of what amount SGL actually achieved on their sale.[4] However, the Judge noted that there were related disputes too as to whether

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4 At [26]–[27].

SGL was to carry out detailing and repair work on the vehicles and if Mr Peramune had agreed to pay the company for storage.[5]

[15] The Associate Judge considered that the email setting out price expectations did not necessarily support Mr Peramune's position, and that the term "price expectations" could simply have meant the price that he expected to achieve on the sale of the vehicles, as opposed to an amount SGL was required to pay him directly.[6] Furthermore, she noted that some of the social media messages that Mr Peramune referred to were inconsistent with his position that the parties had agreed a pre-determined sum for the sale of each vehicle, such as a message that "26k" was "too low, bro", because Mr Peramune's "guy" could offer "$28.5k".[7] Finally, while the Judge acknowledged Mr Peramune's invoices for work already carried out on the vehicles prior to their supply to SGL, she acknowledged too that SGL had, in its March 2023 invoice, provided invoices from panel beaters that it had engaged to carry out work on the six vehicles.[8]

[16] In light of that, the Judge concluded that there was a significant conflict of evidence between the parties on the essential terms between them and that such a conflict could not be resolved in the context of statutory demand proceedings. She considered the issue of whether SGL owed money to Mr Peramune and, if so, how much, was best resolved through proceedings where the parties could give evidence and be cross-examined.[9]

[17] The Associate Judge accordingly set the statutory demand aside.

Applicable principles

[18] Section 290(4)(a) of the Companies Act 1993 provides that the court may grant an application to set aside a statutory demand if satisfied that there is a substantial

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5 At [28].
6 At [27].
7 At [29].
8 At [30]–[31].
9 At [32].

dispute as to whether or not a debt is owing or due.[10] The general principles to be applied are well-established:[11]

> (a) The onus is on the applicant seeking to set aside the statutory demand to show that there is arguably a genuine and substantial dispute as to the existence of the debt. The Court's task is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due.
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> (b) The mere assertion that a dispute exists is not sufficient. Material short of proof is required to support the claim that the debt is disputed.
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> (c) If such material is available, the dispute should normally be resolved first in ordinary civil proceedings before any statutory demand is issued.
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> (d) If a counterclaim, cross-demand or set-off is suggested an applicant must establish that this is reasonably arguable in all the circumstances.
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> (e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise unless such evidence is contrary to the available documents or earlier statements made by the parties.

[19] An appeal of this kind proceeds by way of rehearing.[12] The onus is on the appellant to satisfy the appeal court that it should differ from the decision under appeal.[13]

Application to adduce evidence on appeal

[20] In support of his appeal, Mr Peramune seeks leave to adduce an email dated 15 March 2023 that was not before the High Court. The email was sent to Mr Peramune by SGL's Accounts Manager. It is headed "Balance of all works to prepare cars for sale".

[21] As far as we can apprehend, the email set out that SGL had, at that point, "lost/spent repairs and upgrades" of almost $8,800 on the repairs and sale of the

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10 Companies Act 1993, s 290(4)(a).
11 *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 at [16].
12 Senior Courts Act 2016, s 56; and Court of Appeal (Civil) Rules 2005, r 47.
13 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4].

six vehicles and that these were "without the shop making one cent". SGL's Accounts Manager also advised in that email that:

> I also have a few other invoices that [Mr Irvine] has told me not to process for storage and cleaning not including all the time its cost [SGL].

[22] On the basis of this email, Mr Peramune asserts that the invoices issued by SGL in January (for storage costs) and March (for detailing and other services) were fabricated, and that there was never any agreement between him and SGL for the payment of vehicle repairs or storage.

[23] Mr Peramune says that the email was not available at the time of the High Court proceedings due to its recent discovery. And so, given this, he says that it should be adduced on appeal.

[24] While SGL formally abides the decision of the Court on this point, its counsel, Ms Elia, submitted that the evidence was neither fresh (given it was available at the time of the High Court hearing but omitted due to oversight) nor cogent (given it constitutes an incomplete part of a longer thread of emails not before the Court). We agree. Leave to adduce this evidence is accordingly declined.

Is there a substantial dispute that the $65,000 debt is owing or due?

[25] As in the High Court, Mr Peramune's essential argument before us was that any suggestion of a dispute was a façade. He submitted that SGL's invoices for repairs and storage were fabricated, and that social media messages between him and SGL supported his version of the arrangement between the parties. He further submitted that he never agreed to pay SGL for any and all detailing works considered necessary for the vehicles and that if SGL did such work it was only to ensure that the vehicles could be sold for more than the parties' pre-determined prices, so as to enable SGL to make a profit for itself.

[26] While we acknowledge that Mr Peramune may have a claim to recover money from SGL under the arrangement between them, we are easily satisfied that the Associate Judge was correct to set the statutory demand aside in this case. As the foregoing background to this matter reveals, there is clearly a substantial dispute as to

the arrangement between the parties and whether SGL is liable to Mr Peramune for $65,000 under it. We say this for three primary reasons.

[27] First, we are satisfied that SGL has ample evidence to evince a substantial dispute in this case. The contract or arrangement on which the $65,000 debt is said to be founded was oral and informal. There are no contemporaneous records of its terms. Instead, each party has proffered affidavit evidence setting out different arrangements. In this case, SGL is able to point to the fact that it carries on business as a car-customising garage (as opposed to as a car retailer) and at least one message to SGL's social media account on 1 November 2022 in which Mr Peramune said (apparently in relation to the sale of the Mercedes):[14]

> Hey bro $25k received, selling price was $29k right. Also can you send me the work deduction brother?

[28] Given the nature of SGL's business, it is difficult to see why Mr Peramune would have engaged it solely for the purpose of buying his vehicles for it to then on-sell, and why SGL would have agreed to do this, with the obvious risk of making losses on any sale. Furthermore, as Ms Elia submitted, the message referred to suggests that Mr Peramune had agreed to pay SGL for work in relation to at least one of the vehicles (the Mercedes), contradicting his claim that he never agreed to pay SGL for any such work. The implication of the message is that, in essence, Mr Peramune wanted to see what had been taken out of the $29,000 of sale proceeds received. The fact that SGL can at least make these arguments on the evidence it has adduced satisfies us that it has more to rely on than the mere assertion of a dispute in this case.

[29] Secondly, the evidence that Mr Peramune relies upon to say that there can be no dispute over the purported debt is equivocal and, in fact, supportive of the contrary. For example, the email of 2 November 2022 that he relies upon as the basis for SGL's obligation to pay him $167,000 as a pre-determined sum merely states prices for the six vehicles with the subject line: "Vehicles price expectations". Nothing more is mentioned. As Ms Elia submitted, it is difficult to see how that email, with the use of

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[14] We say "apparently" because this claim is only substantiated by an annotation that Mr Peramune made on this message, and not other messages adduced before us.

the word "expectations", supports his contention that SGL agreed to pay him a pre-determined sum. A similar point can be made in respect of the social media message evidence. In correspondence on 28 October 2022, SGL advised Mr Peramune of a potential buyer of the Mercedes and Outlander. In response, Mr Peramune said:

> Oh okay, bro can you let me know today? My guy is 100% keen and he wants to see the car today somehow. If your guy don't confirm by afternoon, I'll get my guy as he's cash sale, no finance.

[30] Again, if the arrangement truly was as Mr Peramune asserts, it is difficult to understand why he would have arranged for a buyer for SGL if he was guaranteed payment of a pre-determined price in any event. Indeed, the sentence "I'll get my guy as he's cash sale, no finance" tends to support SGL's case that it was only ever a selling agent for Mr Peramune and that Mr Peramune was only ever to be transferred proceeds from the sale of these vehicles to third parties. Certainly, such evidence falls well short of demonstrating that no genuine dispute exists.

[31] The same may be said of the email that Mr Peramune seeks to adduce on appeal in support of his argument that SGL's invoices for storage and repairs are fabricated, notwithstanding that leave is declined to adduce it. While the email says that SGL's General Manager had told the Accounts Manager not to "process" the "storage and cleaning" invoices, that sentence could equally mean that SGL's General Manager had told the Accounts Manager not to "process" them at that point in time, but instead to do so later. And in any event, the fact that there may be a dispute over the propriety of SGL's invoices for storage and repair costs does not mean that there is no dispute as to whether SGL agreed to pay $167,000 to Mr Peramune for the six vehicles, which is the central issue here.

[32] Finally, and perhaps most fundamentally, we agree with the Judge that the conflict of evidence in this case is simply not of a nature that the Court can resolve in the context of statutory demand proceedings. Given the informal and oral nature of the parties' arrangements, the legitimacy of the $65,000 debt will turn on who the Court finds to be more credible. In the circumstances of this case, that is an exercise for which oral evidence needs to be given and then tested in cross-examination. It cannot be resolved on the evidence filed by the parties here.

[33] For all these reasons, the appeal is dismissed.

Costs

[34] Given our conclusion as to the appeal, we consider it appropriate for SGL to be awarded costs.[15] SGL claims for the costs of preparing the case on appeal, in addition to preparing for the hearing of the appeal and attending the hearing itself on a Band A basis. It seeks costs for preparing the case on appeal given the case on appeal that was filed by Mr Peramune did not comply with the Court of Appeal (Civil) Rules 2005.

[35] We agree that this is appropriate. Costs as sought are ordered in SGL's favour.

Result

[36] The application to adduce evidence on appeal is declined.

[37] The appeal is dismissed.

[38] The appellant must pay costs to the respondent on a Band A basis (including, for the avoidance of doubt, costs on a Band A basis for the preparation of the case on appeal), together with usual disbursements.

Solicitors:
Brookfields Lawyers, Auckland for respondent

[15] It is a general principle that costs will follow the event. See Court of Appeal (Civil) Rules, r 53A.