APPROVED **[2024] IEHC 656**

THE HIGH COURT
CIRCUIT APPEAL

2024 4 CA

BETWEEN

CONNOLLY BROS. CAR SALES (BALLYBRIT) UNLIMITED COMPANY

(TRADING AS CONNOLLY'S HYUNDAI)

PLAINTIFF

AND

SHARON GILLIGAN
KEVIN GILLIGAN

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 November 2024

INTRODUCTION

1. This judgment is delivered in respect of an appeal against an order of the Circuit Court. The order was to the effect that the Defendants were to return a replacement vehicle which had been provided to them by a car dealership. The principal issue for determination on the appeal is whether the Plaintiff, the car dealership, is entitled to summary judgment pursuant to Order 28 of the Circuit Court Rules.

PROCEDURAL HISTORY

2. The present proceedings have their genesis in a dispute concerning the sale of a motor vehicle. The vehicle had been purchased in January 2021 by Sharon Gilligan from Connolly Bros. Car Sales (Ballybrit) Unlimited Company trading as Connolly's Hyundai ("*the car dealership*"). The vehicle is a Hyundai Tuscan Executive Plus (1.6 litre) and has a 2021 registration. The purchase price had been €37,800.

3. Mrs Gilligan alleges that the vehicle has a number of defects which render it unusable. Mrs Gilligan also alleges that, at the time the vehicle had been sold to her, the clutch had been repaired but this fact had not been disclosed to her.

4. Mrs Gilligan avers that she had to return the vehicle to the car dealership for repairs on multiple occasions. Mrs Gilligan returned the vehicle to the car dealership on 22 April 2022 for yet further repairs and had been provided with a replacement vehicle. As explained shortly, the precise legal basis upon which this replacement vehicle had been provided remains unclear. The car dealership now contends that Mrs Gilligan is obliged to return the replacement vehicle.

5. The fate of the vehicle which had been purchased by Mrs Gilligan is surprising. The car dealership contends that this vehicle has been ready for collection since 26 April 2022 and has threatened to charge storage fees. Notwithstanding this, it has since emerged that the car dealership has allowed one of their employees to use Mrs Gilligan's car extensively. It appears that an additional 13,500 kilometres has been clocked up on the vehicle's odometer. This conduct on the part of the car dealership is potentially relevant to the outcome of these proceedings. I return to this point at paragraphs 41 to 45 below.

6. Mrs Gilligan instituted proceedings before the Circuit Court in February 2023 seeking rescission of the contract for the purchase of the vehicle and seeking damages (in addition to, or in lieu of, rescission). The progress of these proceedings had been delayed by a procedural skirmish over the identity of the proper defendant. The title of those proceedings has since been amended in June 2023. This first set of proceedings has not yet been heard.

7. The car dealership instituted its own proceedings before the Circuit Court in March 2023. Mrs Gilligan and her husband, Kevin Gilligan, are named as defendants ("*the Gilligans*" or "*the Defendants*"). A defence was delivered in June 2023. The defence consists largely of a traverse. It is, however, pleaded that any agreement in relation to the replacement car was conditional upon the purchased vehicle being returned to the Defendants in satisfactory working order or their being compensated adequately in respect of same.

8. The car dealership then issued a motion in July 2023 seeking summary judgment. The Circuit Court made an order on 23 January 2024 directing the Gilligans to return the replacement vehicle by five o'clock the following day. The Circuit Court refused an application for a stay on the order. (A stay was placed on the costs order).

9. The Circuit Court's refusal of the stay had the potential to frustrate the Gilligans in the exercise of their statutory right of appeal to the High Court. The practical effect of the refusal of the stay is that the Gilligans were deprived of the benefit of the ten day period then prescribed for the serving of an appeal. Instead, they were required to file an appeal within 24 hours and to make an urgent application to the High Court for a stay. The appeal was filed on 24 January 2024. Happily,

the High Court was able to accommodate a hearing of the application for a stay the same week.

10. It is unfortunate that the Circuit Court, having only allowed a period of 24 hours for the return of the vehicle, then refused an application for a stay on its order to facilitate an appeal. Whereas there will occasionally be urgent cases where it may be necessary for a lower court to give immediate effect to an order by refusing a stay, it is difficult to understand why this was considered necessary in the present proceedings. The *status quo ante*, whereby the Gilligans had retained possession of the replacement vehicle, had been in existence for some twenty months prior to the Circuit Court hearing. The Circuit Court should have been prepared to stay its own order for a short period to allow the Gilligans to file an appeal. Such a stay, which would be measured in weeks only, would not have caused any prejudice to the car dealership having regard to the chronology of the proceedings. In the event, both parties will have incurred significant costs in preparing for an urgent hearing before the High Court seeking a stay. This could have been avoided had the Circuit Court taken a more reasonable attitude to the application for a stay.

11. On 26 January 2024, following a contested hearing, the High Court (Barr J.) imposed a stay on the Circuit Court order which required the delivery up of the replacement vehicle. This stay allows the Gilligans to retain the replacement vehicle pending the determination of the appeal. The costs of the stay motion were reserved.

12. The appeal came on for hearing before me on 15 November 2024 and judgment was reserved for one week. Both sides had filed very helpful written legal

submissions, and these have been carefully considered in preparing this judgment.

13. For ease of exposition, the two motor vehicles will be referred to in this judgment as "*the purchased vehicle*" and "*the replacement vehicle*", respectively.

DETINUE

14. As explained shortly, one of the issues to be resolved by the court is whether the present proceedings constitute an "*action for detinue*" for the purposes of Order 28, rule 1 of the Circuit Court Rules. It is necessary, therefore, to say something about the tort of detinue.

15. The tort of detinue is committed where a person, without lawful excuse, retains property in breach of the rights of the person who is entitled to immediate possession of the property. The retention of the property must be done in intentional defiance of the rights of the person who is entitled to immediate possession of the property. The requisite intention can usually be established by demonstrating a demand for, and a refusal or neglect to return, the property.

16. Historically, there had been an important distinction, in terms of remedy, between the common law and equity. Prior to the Common Law Procedure Act 1854, the defendant in an action for detinue had an option whether to return the chattel or to pay its value; if a plaintiff wished to insist on specific restitution of the chattel, he had to have recourse to the courts of chancery. The modern position is that the court enjoys discretion to order the delivery of the property irrespective of the wishes of the defendant. This is reflected under Order 36, rule 6 of the Circuit Court Rules where it is provided that where a judgment or order is for the recovery of any property other than money or land, the judge may

order that in default of delivery an execution order shall issue for the delivery of the property *without* giving the defendant the option of retaining the same upon payment of the value assessed.

17. An action in detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for its detention; or (2) for return of the chattel or recovery of its value as assessed and damages for its detention; or (3) for return of the chattel and damages for its detention. (*General and Finance Facilities Ltd v. Cooks Cars (Romford) Ltd* [1963] 1 WLR 644).

18. Relevantly, the court has *discretion* as to whether to make an order for the return of the property. There are *dicta* to the effect that such discretion ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate. See further paragraphs 46 and 47 below.

DISCUSSION

19. Order 28, rule 1 of the Circuit Court Rules provides, in relevant part, as follows:

> "Where the plaintiff's claim in a Civil Bill is:—
>
> […]
>
> (b) for the delivery of a chattel or specific goods in an action for detinue, […]
>
> and a defendant has entered an Appearance or has delivered a Defence, the plaintiff may apply to the Court for summary judgment against such defendant in accordance with the provisions of this Order."

20. The very first issue to be addressed in this appeal is whether the present proceedings constitute an "*action for detinue*" for the purposes of this rule. Counsel on behalf of the Defendants submits that the proceedings are not an action for detinue and places emphasis on the fact that the term "*detinue*" does not appear anywhere in the civil bill.

21. Whereas it would have been preferable—and would have added to the clarity of the pleadings—had the term "*detinue*" been deployed in the civil bill, this omission is not fatal. In any individual case, it is necessary to consider the pleadings, *in the round*, in order to identify the cause of action. Here, the civil bill pleads all the essential ingredients of an action in detinue. In particular, it is expressly pleaded that the Plaintiff is entitled to possession of the disputed property, i.e. the replacement vehicle; that demand for return has been made; and that the vehicle has not been returned. (It is a separate matter as to whether these pleas are established at the trial). The principal relief sought is an order for the "*immediate delivery*" of the replacement vehicle. The Plaintiff has chosen to waive any potential claim for damages caused by the loss of the use of the replacement vehicle in the intervening period. Rather, the Plaintiff has confined itself to seeking the return of the vehicle.

22. The pleadings thus put the Defendants on notice of the case being made against them and of the asserted facts. The pleadings also identify the relief being sought as an order for the immediate delivery of the disputed property. It follows, therefore, that the proceedings meet the criteria for an action in detinue.

23. Having determined that the Plaintiff's action is of a type eligible for summary judgment under Order 28, it is next necessary to consider the proofs for such an application.

24. Order 28, rule 5 provides that summary judgment may be ordered to be entered for a plaintiff unless the defendant:

    (a) satisfies the judge that *prima facie* he has a good defence to the plaintiff's claim, or

    (b) pays into court to abide the result of the action such sum as may be deemed sufficient to entitle him to defend.

25. Order 28, rule 7 provides, *inter alia*, that where the judge does not order judgment to be entered for the plaintiff, the judge may give the defendant leave to defend unconditionally, or subject to such terms as to giving security, or as to the time and mode of trial, or otherwise, as he may think fit.

26. The principles governing an application for summary judgment are well established. In brief, the court must assess whether the defence set out in the affidavits, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. The fair and reasonable probability of the defendant having a real or *bona fide* defence is not the same thing as a defence which would probably succeed, or even a defence whose success was not improbable. In deciding whether the defendant has a credible defence, the court should concentrate its attention on the matters put forward by the defendant. (*Aer Rianta cpt v. Ryanair Ltd (No 1)* [2001] 4 I.R. 607, [2002] 1 I.L.R.M. 381).

27. If issues of law or interpretation are put forward as providing a credible defence, then the court can determine whether the propositions advanced are stateable as a matter of law. The court should, however, only carry out such an assessment where the issues are relatively straightforward and where there is no real risk of

an injustice being done. (*Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749).

28. The approach to be taken to affidavit evidence on a summary application has been explained as follows by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraph 105 of the reported judgment):

> "The jurisdiction is one vested by the CCR but may properly be said to be one that exists in any case heard on affidavit. It is perhaps the default position in any case where the affidavit evidence is evenly balanced, where there is a conflict on the affidavits between the parties which cannot be or has not been resolved by way of further affidavit, where the court considers that a matter raised on affidavit, particularly one raised in defence, might have such a bearing on the outcome that its credibility deserves to be fully tested, or where a judge considers that in the light of certain averments which are credible, but not dispositive, it would be either difficult or unfair to resolve the matter without giving both sides the opportunity to further advance that evidence or, where necessary, to test it. The adjudicative function is not a matter of box ticking or a purely logical engagement with a checklist of proofs that must be met by a plaintiff. Certain evidential presumptions or burdens can make the task of adjudication at times appear almost effortless, but the fact remains that a judge met with evidence, whether contested or not, must weigh that evidence, assess its veracity, credibility, and importance for the purposes of proving those matters that are required to be established. In a case where the action is heard on affidavit, courts are vigilant to consider the option to adjourn the matter for plenary hearing. The vigilance derives from the fact that affidavit evidence of its nature is often in terms which have a tone of certainty which is not always found in oral testimony, particularly where that is cross-examined, and because the affidavits are often drafted by lawyers with a view to the legal test."

29. These, then, are the principles to be applied in deciding whether to enter summary judgment. For the reasons which follow, I am not satisfied that the present proceedings are an appropriate case in which to enter summary judgment.

30. There is a real controversy between the parties as to the precise legal basis upon which the replacement vehicle had been provided to the Gilligans. On the one side, Mrs Gilligan asserts that the agreement had been that they were entitled to retain the replacement vehicle until such time as the dispute in relation to the purchased vehicle was resolved. Mrs Gilligan has averred on affidavit as follows:

> "I say that on the last occasion I returned my car to the Plaintiff for repair I communicated my dissatisfaction and frustrations to the Plaintiff. I communicated to the Plaintiff that I wanted a new car or my money back plus damages. The Plaintiff assured me that they would properly fix the car on this occasion and deal with matters to my satisfaction. Similar to the previous occasions the Plaintiff provided me with a replacement car on the understanding that I would retain the replacement car until such time as this matter was resolved to my satisfaction."

31. On the other side, it is contended on behalf of the car dealership that the arrangement was narrower. The car dealership, in its civil bill, has put forward two competing legal theories as to the basis upon which the replacement vehicle had been provided. First, it is pleaded that the car dealership had agreed to provide the replacement vehicle to the Gilligans as a "*courtesy car*" to be used by them over the course of, and during such time as, their own vehicle was being serviced, maintained and/or repaired. It is pleaded that the replacement vehicle was to be returned on demand and/or upon notice to the Gilligans of the completion of the servicing, maintenance and/or repair of their own vehicle.

32. Secondly, it is pleaded, in the alternative, that the replacement vehicle had been provided to the Gilligans by way of a *licence* for use until such time as they were notified that their own vehicle was ready for collection or were requested to return the replacement vehicle. No particulars have been provided as to the

terms of any such licence nor has any documentary evidence of such licence been exhibited.

33. It is pleaded that the Gilligans were notified on 26 April 2022 that their vehicle was ready for collection. No detail is given as to the form this supposed notice took. For example, there is no reference to correspondence by way of email or post in this regard.

34. It is next pleaded that letters of demand were sent on behalf of the car dealership through its solicitors on 16 December 2022 and 9 February 2023. This correspondence has been exhibited as part of the grounding affidavit in respect of the motion for summary judgment.

35. Tellingly, the first of these letters puts forward a different rationale for seeking the return of the vehicle:

> "Separately, we are instructed that your client has been using a loan car from our client, motor vehicle registration number 191–G–1562, since 22nd April 2022. Given the potential duration of any proceedings, arbitration or otherwise, and given that this vehicle is subject to depreciation the current status quo cannot continue. Accordingly, we hereby request that your client returns our client's property within 7 days from the date hereof."

36. This letter implies that the Gilligans' use of the replacement vehicle for the previous eight months had been lawful. It is inconsistent with the plea that the Gilligans had been required to return the replacement vehicle on 26 April 2022, i.e. the date that the purchased vehicle was supposedly repaired.

37. The car dealership has failed to provide, on affidavit, any particulars of the alleged agreement pursuant to which the Gilligans were given use of the replacement vehicle. In particular, the car dealership has failed to put forward a first person account of the nature of the agreement supposedly reached on 22 April 2022.

38. The deponent who swore the affidavit grounding the application for summary judgment describes himself as the general manager of "*Connolly's Hyundai*". There does not appear to be any such legal entity. The term "*Connolly's Hyundai*" is at most a trading name of the car dealership company rather than a separate legal entity. The deponent does not claim to be a director or officer of the company. There is no detail provided of the events of 22 April 2022, i.e. the date upon which the replacement vehicle was provided to the Gilligans. It is unclear whether the general manager, who has sworn the affidavit, had any personal involvement in this transaction. No documentation has been produced—such as, for example, by way of receipt or licence agreement—setting out the governing terms upon which the replacement vehicle was being provided.

39. The Gilligans have since sought discovery of the documentation in this regard by way of solicitor's letter dated 10 July 2023. No such documentation has been provided. The existence, or otherwise, of any such documentation is directly relevant to the proper resolution of the proceedings.

40. It is not possible to determine, by reference to the limited evidence currently before the court, the precise legal basis upon which the replacement vehicle had been provided to the Gilligans. The car dealership has failed to adduce any direct evidence as to the terms of the oral or written agreement governing the provision of the replacement vehicle. Mrs Gilligan, the first named defendant, has averred as to her understanding being that she would retain the replacement vehicle until such time as the matter was resolved to her satisfaction. This averment finds some potential support in the content of the letter from the car dealership's solicitors of 16 December 2022. This letter tends to negate any suggestion that

the Gilligans were required to return the replacement vehicle in April 2022 immediately upon having been told that their own vehicle was ready for collection. Rather, the letter suggests that the parties intended that the Gilligans would have use of the vehicle for a significantly longer period of time. The question of whether the letter of 16 December 2022 was sufficient to terminate the agreement is a matter which can only be resolved on oral evidence and following a process of the discovery of documents.

41. There is an additional consideration which militates against the summary disposal of the present proceedings. A significant factual matter has only recently emerged. It appears that the car dealership allowed one of their employees to use Mrs Gilligan's vehicle extensively. It appears from photographic evidence that an additional 13,500 kilometres has been clocked up on the vehicle's odometer. Separately, toll charge receipts have been exhibited which indicate that the vehicle has been driven in Galway (N6), Limerick and Dublin (M50).

42. The half-hearted explanation offered by the car dealership for all of this is that extended periods of non-use are detrimental to motor vehicles. It is said that vehicles need to be regularly started and driven to maintain battery power, to prevent tyre depreciation, to prevent condensation, to prevent Add-Blue crystallisation, to prevent hardening of wiper-blades, to prevent hardening of engine oil-sets, and to maintain fuel delivery pressure and central locking function. The car dealership, very sensibly, accepts that the actual use made of the Gilligans' vehicle is far in excess of what is required for maintenance.

43. This conduct on the part of the car dealership is potentially relevant in three respects. First, the conduct is inconsistent with the car dealership's own case.

The car dealership contends that the supposed agreement between the parties had been that the replacement vehicle would be returned once the Gilligans had been notified that the purchased vehicle had been repaired. On this theory of the case, the car dealership would have no legal right to convert the purchased vehicle to its own use by allowing one of its employees to drive same extensively. The attitude which the car dealership took to the purchased vehicle, as evidenced by its conduct, tends to support the Gilligans' theory of the case.

44. Secondly, even if the car dealership were able to establish, at the trial of the action, that the agreement had been that the replacement vehicle would be returned once the purchased vehicle had been repaired, any such supposed agreement may since have been frustrated by the conduct of the car dealership. The additional wear and tear occasioned by an additional 13,500 kilometres is likely to have greatly reduced the value of the purchased vehicle. The car dealership may not now be in a position to honour its side of the supposed agreement by returning the purchased vehicle with the same value as it had when left in for repair.

45. Thirdly, and more generally, the trial court would be entitled to have regard to the conduct in deciding whether the car dealership is entitled to equitable relief in the form of an order for delivery. The trial judge might well take the view that the fact that extensive use was being made of the purchased vehicle should have been disclosed to the Circuit Court as part of the application for summary judgment.

46. The final consideration which militates against the summary disposal of the present proceedings relates to a (potential) requirement that a chattel must be of special value or special interest to its owner. The leading textbook states that an

order for damages is the appropriate remedy where the chattel is an ordinary article of commerce: McMahon & Binchy, *Law of Torts* (Bloomsbury Professional, 4th ed., 2013, §29.11) citing *Webb v. Ireland*, unreported, High Court, Blayney J., 10 December 1986.

47. It is open to argument whether this requirement continues to pertain, and, if so, as to how it applies in the context of a vehicle which is the stock in trade of a car dealership. These are difficult legal issues and are not suitable for summary disposal.

CONCLUSION AND PROPOSED FORM OF ORDER

48. For the reasons explained, this is not an appropriate case in which to enter summary judgment. The Defendants have a *prima facie* defence to the claim for the immediate delivery of the replacement vehicle. On the basis of the limited evidence currently before the court, the Defendants have a credible defence that the agreement between the parties in April 2022 had been that the Defendants were entitled to retain the replacement vehicle until such time as the dispute in relation to the purchased vehicle had been resolved to their satisfaction. The Defendants also have a credible defence by reference to the discretionary nature of the remedy in an action for detinue and the requirement that the property to be returned must be of special value or special interest. The conduct of the car dealership in allowing an additional 13,500 kilometres to be clocked up on the purchased vehicle is a matter which the trial judge will be entitled to take into consideration in the exercise of their discretion.

49. Accordingly, the judgment and order entered by the Circuit Court (His Honour Judge Garavan) on 23 January 2024 is set aside in its entirety (including the costs

order). In lieu, an order will be made, pursuant to Order 28, rule 7 of the Circuit Court Rules, giving the Defendants leave to defend unconditionally and to file a counterclaim in relation to their complaint in respect of the purchased vehicle. As to costs, my *provisional* view is that the Defendants, having been entirely successful in resisting the application for summary judgment, are entitled to recover the costs of the proceedings to date as against the Plaintiff. This would represent the default position under section 169 of the Legal Services Regulation Act 2015.

50. It would seem to follow from *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraphs 110 to 113 of the reported judgment) that the plenary hearing of the action will take place before the High Court (rather than the action being remitted to the Circuit Court). If either party wishes to contend otherwise, they will have an opportunity to do so when these proceedings are next listed.

51. These proceedings will be listed before me for directions in respect of pleadings and discovery and to address the allocation of legal costs on Tuesday 10 December 2024 at 10.30 AM. If it is of assistance, either party may join the hearing remotely.

Appearances

Charles Murray for the plaintiff instructed by MacSweeney & Co.
Tim Dixon for the defendants instructed by Swaine Solicitors LLP