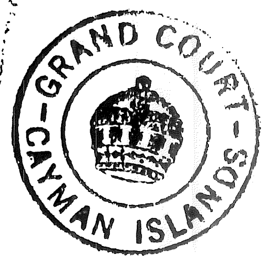
Smellie J.



2-09-93

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cause No. 126/93

VINCENT WEDDERBURN
(TRADING AS ISLAND PARADISE RENT-A-CAR)

v.

CARMALEE MILLER

Mr. Parkinson for the plaintiff
Mr. O'Riordan for the defendant

ORDERS

Schofield J.

The defendant rented a motor car from the plaintiff on the 18th December, 1992, at the daily rate of $30. The motor car was to be returned on 8th January, 1993. The defendant signed a rental agreement form and this form was subsequently amended because the defendant returned the vehicle originally rented and another vehicle was substituted for it. The vehicle so substituted was not returned on 8th January, 1993, because on that date it was destroyed by fire. The claim in this suit is for the value of the motor car, the total rental payable for the twenty-one day hire period, less an amount paid by way of deposit, and damages for loss of profits on the plaintiff being deprived of the use of the motor car.

The writ and statement of claim were filed on 30th March, 1993. They were served on the defendant on 6th April, 1993. No appearance was filed by the defendant, and on 6th May, 1993 judgment was entered for the plaintiff with damages to be assessed. Damages have not yet been assessed and the defendant now seeks to have the judgment set aside.

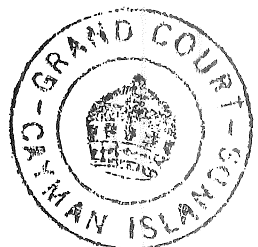
The defendant's attorney has filed an affidavit in support of

the application and therein has explained the reason for the delay in defending this matter. I do not think it is contended by the plaintiff that there has been an inordinate delay on the part of the defendant.

The defendant maintains that she has a defence on the merits. The draft defence filed sets out as I understand it, three points of argument. First, that the rent for the motor car was $25 per day and $5 per day was for full insurance coverage, and that the defendant understood that the vehicle was thereby insured on a comprehensive basis for all usual risks. Second, that the destruction of the vehicle was not the fault of the defendant and may have been the result of a latent defect or even inadequate maintenance, and thus liability is denied. Third, that the plaintiff is not entitled to claim the ongoing loss of profit by way of hire fees. This third issue is, I suppose, a matter which could be argued on the hearing relating to assessment of damages.

The plaintiff has exhibited the rental agreement which contains the following clause:

> "PLEASE NOTE: Customer is fully responsible for any damages which may occur to the vehicle while rented by him/her.
>
> Customer is required to pay a deposit of $600.00. After rental date is terminated refund will be returned to Customer. Costs for repairs to any damage which may occur while the vehicle is rented by the customer will be deducted from the deposit. Should the repairs cost more than the deposit the Customer will be required to pay the balance to cover damages.



Quoting the rule against the inadmissibility of extrinsic evidence in relation to such a written agreement, the plaintiff's attorney argues that there is nothing in the draft defence to take the case outside that rule, and that as the defence is presently drafted parol evidence could not be admitted to take the rental contract beyond that contained in the written form particularly with reference to the clause quoted above. I think

that he is right in that contention and it appears that the draft defence may not adequently set out the defendant's case.

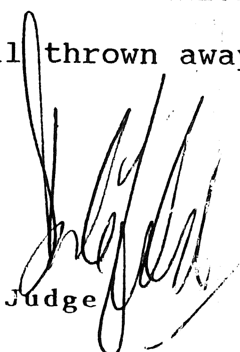
However, the plaintiff does not deny that there was an agreement between the parties relating to insurance of the vehicle. Indeed written at the foot of the agreement tendered to this Court are the words:

> "Note: Drivers and Passengers liability not covered. Drunk and drive and negligence driving not covered."

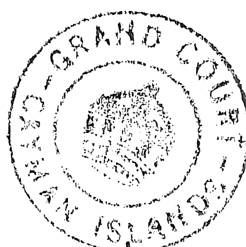
Apparently there was collateral agreement relating to insurance cover for the vehicle. Such a collateral agreement would fall outside the rule against parol evidence, but unfortunately no reference was made to its existence in the draft defence. Its existence may affect the defendant's liability for damages in the case.

I consider that the defendant must have an opportunity to defend this action and file a defence, albeit that the defence may not take the form of the draft tendered in support of this application. To hold otherwise would be to ignore completely the undeniable fact that there was some agreement between the parties relating to insurance of the motor car and to shut the defendant out of an arguable case because her draft defence was defective.

The summary judgment will be set aside on terms that the defendant will file her defence within 7 days. The costs of this application, which on the documents filed was not unfairly opposed by the plaintiff, and all thrown away costs to date will be those of the plaintiff.



Judge



Dated this 2nd day of September, 1993