

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 113/2019
[2019] NZSC 150

BETWEEN

GEOFFREY BRIAN KENNY
Applicant

AND

MINISTRY OF BUSINESS, INNOVATION
AND EMPLOYMENT
Respondent

Court: Glazebrook, O'Regan and Ellen France JJ
Counsel: A O'Connor for Applicant
P H Courtney and S P Connolly for Respondent
Judgment: 19 December 2019

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

Introduction

[1] The applicant, Mr Kenny, operates a finance company business that sells repossessed vehicles. He sought a declaration in the High Court to the effect that he is not a motor vehicle trader under the Motor Vehicle Sales Act 2003 (the Act) and so did not have to meet the regulatory requirements for a motor vehicle trader.¹ Mallon J

¹ A trader must register at a cost of \$456 each year and provide a detailed consumer information notice to purchasers: Motor Vehicle Sales Regulations 2003; and Consumer Information Standards (Used Motor Vehicles) Regulations 2008. See also *Kenny v Ministry of Business, Innovation and Employment* [2019] NZCA 435 (Kós P, Woolford and Dunningham JJ) [*Kenny* (CA)] at [10].

in the High Court concluded Mr Kenny was a motor vehicle trader under the Act.² His appeal from that decision was dismissed by the Court of Appeal.³ Mr Kenny seeks leave to appeal to this Court.

Background

[2] Mr Kenny’s business operates in the following way. First, purchasers find cars at a dealership and financing is undertaken by Mr Kenny. Next, the dealer sells the car to Mr Kenny who enters into a finance agreement with the purchaser by which title passes only on full payment. Mr Kenny repossesses vehicles approximately 100 times a year in circumstances in which a purchaser has defaulted. He then sells the repossessed vehicles himself on Trade Me.

[3] Mr Kenny’s case required consideration of the various definitions in the Act. Sections 7 and 8 set out the definition of a “motor vehicle trader”. Section 7(a) provides that a motor vehicle trader “means any person who carries on the business of motor vehicle trading (whether or not that person carries on any other business)”. Section 8 deals with “Who is treated as a motor vehicle trader” and, relevantly, s 8(1) states that:

- (1) A person is treated as carrying on the business of motor vehicle trading for the purposes of this Act if—
 - (a) the person holds out that the person is carrying on the business of motor vehicle trading; or
 - (b) in any specified period, the person sells more than 6 motor vehicles, unless that person proves that those motor vehicles were not sold for the primary purpose of gain; ...

[4] Section 9 sets out circumstances in which a person “is not treated as carrying on the business of motor vehicle trading”. For present purposes, s 9(1)(g), (1)(h) and (2) are relevant. This section provides that:

- (1) A person is not treated as carrying on the business of motor vehicle trading for the purposes of this Act only because that person is—

...

² *Kenny v Ministry of Business, Innovation and Employment* [2018] NZHC 1984, (2018) 15 TCLR 114 [*Kenny* (HC)].

³ *Kenny* (CA), above n 1.

- (g) a finance company selling any motor vehicle under a transaction in which a motor vehicle trader acts as an intermediary between the finance company and the buyer (whether or not the motor vehicle trader acts as an agent of the finance company); or
- (h) a finance company, ... or any other person, that sells any motor vehicle as an incidental part of the person's ordinary business; or

...

- (2) Subsection (1)(d), (h), and (i) applies only if the person sells motor vehicles through a motor vehicle trader registered under this Act.

[5] A “finance company” is defined in s 6 to include:

... any person who carries on a business (*except the business of motor vehicle trading*) and who, in the course of that person's ordinary business,—

- (a) buys, exchanges, or takes by way of assignment any motor vehicle for any of the following purposes:
 - (i) letting or hiring it to any other person under a hire purchase agreement:
 - (ii) taking or enforcing a security over it:
 - (iii) leasing it to any other person without conferring on that person the right to buy the motor vehicle; or
- (b) sells any motor vehicle bought, exchanged, or taken by way of assignment for any of the purposes specified in paragraph (a); or
- (c) sells any motor vehicle under a right of sale conferred by a security interest (within the meaning of section 17(1)(a) of the Personal Property Securities Act 1999)

(emphasis added)

[6] Both Courts below found Mr Kenny came within the definition in s 8(1)(b). He sold more than six vehicles and did so for gain. The Court of Appeal agreed with Mallon J that “gain” “encompasses some commercial advantage or improvement to the seller's position which may be something other than receiving in monetary terms more than the costs involved in the sale”.⁴ Retrieving the monies outstanding under

⁴ *Kenny* (CA), above n 1, at [37], citing *Kenny* (HC), above n 2, at [92].

the finance contract from the sale of a repossessed vehicle represented “gain” and was the primary purpose of the sale.⁵

[7] The Court of Appeal stated that the subsections of s 9, identified above, supported this interpretation. The exemption for a finance company only applies if it is selling the vehicle through another registered trader, encapsulating the consumer protection purpose. The Court said that a finance company selling motor vehicles incidentally, but directly (as in Mr Kenny’s case), does not have the benefit of exemption.⁶

The proposed appeal

[8] Mr Kenny wishes to argue the Court of Appeal’s interpretation of s 9 is incorrect and that the Court has not correctly factored in the definition of “finance company” in the Act. The latter argument is the primary focus of the application. Mr Kenny’s contention is that the definition of “finance company” means that, if he is in the business of motor vehicle trading, then he cannot be a finance company as well.

[9] He says these questions involve a matter of general and commercial significance.⁷ This is because there are many finance companies in New Zealand to whom the Court of Appeal’s decision will apply. Additionally, the decision will impact on debtors and finance company consumers generally.

[10] The respondent accepts the Court of Appeal decision has broader implications. However, the submission is that leave should be declined because the arguments have no realistic prospect of success.

Assessment

[11] We are not satisfied that the arguments the applicant wishes to pursue meet the test for the grant of leave. In terms of the argument based on s 9, nothing raised by

⁵ If necessary, the Court of Appeal would also have found Mr Kenny was a motor vehicle dealer under s 8(1)(a). He held himself out in this way on Trade Me and his disclaimer “We are not registered traders” was insufficient to dispel the impression he was: at [43].

⁶ At [40].

⁷ Senior Courts Act 2016, s 74(2).

the applicant calls into question the Court of Appeal's construction of the statutory language or the Court's assessment that its interpretation met the consumer protection purpose of the provision. Mr Kenny's argument about the effect of the definition of "finance company" does not square up to the wording of the section and nor does it fit with s 7(a) which contemplates a person carrying on business as a motor vehicle trader and another business.⁸ We do not consider these arguments have sufficient prospect of success to justify a further appeal.

[12] The application for leave to appeal is accordingly dismissed. The applicant must pay the respondent costs of \$2,500.

Solicitors:
Surridge & Co, Porirua for Applicant
Crown Law Office, Wellington for Respondent

⁸ The argument is also inconsistent with s 9(1)(g) and (h) as that section has been interpreted by the Court of Appeal.