COURT OF APPEAL FOR ONTARIO

CITATION: Hav-A-Kar Leasing Ltd. v. Vekselshtein, 2012 ONCA 826
DATE: 20121128
DOCKET: C54392

Cronk, Epstein and Pepall JJ.A.

BETWEEN

Hav-A-Kar Leasing Ltd.

Plaintiff (Respondent)

and

Zinovi Vekselshtein also known as Zorik Vekselshtein

Defendant (Appellant)

and

Prestige Toys Ltd. and Ghasem Gil

Third Parties

W.A. Kelly, Q.C., for the appellant

M.S. Martin, for the respondent

J.W. Chidley-Hill, for the third parties

Heard: September 4, 2012

On appeal from the judgment of Justice Sidney N. Lederman of the Superior Court of Justice, dated February 8, 2011.

Cronk J.A.:

[1] This appeal concerns the enforcement of the terms of an automobile lease agreement entered into by the appellant, Zinovi Vekselshtein, also known as Zorik Vekselshtein ("ZV"), with the respondent, Hav-A-Kar Leasing Ltd. ("HAK"), for the lease of a used BMW vehicle. At issue is the trial judge's ruling that ZV is liable to HAK for accelerated rent under the lease and for damages on account of HAK's loss on the sale of the BMW, as well as for various costs and expenses incurred by HAK in connection with its recovery and disposition of the car.

I. Facts

(1) The Lease[1]

[2] In the spring of 2008, ZV negotiated an agreement for the lease of a BMW automobile with Ghasem Gil ("Gil"), a manager and salesperson with Prestige Toys Ltd. ("Prestige"), a vendor of luxury used cars. As Prestige was not in the vehicle-leasing business, it was arranged that HAK, a lease financing company, would purchase the BMW from Prestige for the sum of $73,000 in order to lease the vehicle to ZV.

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[1] The materials filed on appeal include several written riders to the Lease. The parties were unable to confirm whether these riders formed part of the Lease, they placed no reliance on the riders on appeal, and the trial judge's reasons contain no mention of the riders. In these circumstances, my interpretation of the Lease does not extend to the riders, the pertinent contents of which appear, in any event, to be consistent with the relevant terms of the Lease.

[3] On March 15, 2008, ZV entered into an automobile lease agreement with HAK for the rental of the BMW (the “Lease”). ZV is described in the Lease as the “lessee” and HAK is described as the “lessor”. Prestige and Gil are not parties to the Lease.

[4] Under the Lease, ZV agreed to pay HAK a total monthly rental payment of $1,263.34 for the BMW during the four-year term of the Lease (clause 2). He also agreed to insure the BMW (clause 6).

[5] In the event of the lessee’s breach of the Lease, clause 16 provided that the lessor was entitled: (1) to the return or the re-taking of the BMW, (2) to re-lease or sell the vehicle at private or public sale, and (3) to payment of liquidated damages by the lessee. Clause 16 stated, in part:

> After deducting Lessor’s expenses incurred in connection with such sales or leasing, the total proceeds of (i) such sale or sales, less the value of the Vehicle at the end of the term provided for herein, as determined by an independent appraiser selected by the Lessor, and (ii) such leasing with respect only to the balance of the term provided for herein, shall be subtracted from the total rentals provided for herein then remaining unpaid. The remainder shall be liquidated damages for the breach hereof by Lessee and shall be payable by Lessee to Lessor upon demand.

[6] Clause 16 further stipulated:

> The retaking by Lessor of the Vehicle and the sale or leasing of the Vehicle shall not affect the right of the Lessor to recover from Lessee any and all damages which Lessor may have sustained by reason of the

> breach by Lessee of any of the terms or provisions of this Lease. In the event of any default, Lessee will pay to Lessor any solicitors' reasonable fees incurred in enforcing or attempting to enforce its rights under this Lease and any other costs and expenses incurred by Lessor in connection therewith.

[7] Clause 12 of the Lease provided that all right, title and ownership of the BMW would remain vested in the lessor for the duration of the Lease. Under this provision, ZV agreed "not to do or perform any act prejudicial thereto, and ... not to do any act to encumber, convert, pledge, sell, assign, rehire, underlet or lease, lend, conceal or abandon, give up possession of or destroy the Vehicle".

[8] The delivery and return of the BMW to HAK was addressed in clause 14 of the Lease. Under this provision, ZV agreed to "forthwith redeliver" the BMW to HAK upon the cancellation or the expiration of the Lease, or upon the cancellation of the insurance coverage for the BMW by the insurer. He also agreed that upon redelivery:

> [t]he Vehicle ... shall, except for normal and reasonable wear and tear, be in the same order and condition as it was when it was originally delivered to the Lessee. The Lessee shall pay to the Lessor as additional rent the Lessor's cost of repairing any damage or replacing any parts to the Vehicle not required only by reason of normal wear and tear.

[9] Clause 9 of the Lease concerned risk and indemnity. It read:

> The Lessee further covenants and agrees to indemnify the Lessor for, and hold the Lessor free and harmless from any and all claims, liabilities, costs, expenses and damages, including legal expenses on a solicitor and

> client basis arising out of or connected with the ownership, possession, use, rental, leasing or operation of the Vehicle which may be made against or incurred by the Lessor, on [*sic*] which the Lessor may be obligated to pay or suffer.

[10] The Lease made no provision for the substitution of the BMW, by the lessee, for another vehicle during the term of the Lease.

(2) Guaranteed Residual Contract

[11] Also on March 15, 2008, ZV and HAK executed a document entitled "Guaranteed Residual Contract No. 9137" and "Guaranteed Residual Value Letter", under which ZV guaranteed, in favour of HAK, the residual value of the BMW upon expiration of the Lease, in the sum of $39,500, plus certain costs and applicable taxes. As with the Lease, Prestige and Gil are not signatories to this document.

(3) Return of the BMW to Prestige

[12] Within about one month of executing the Lease, ZV contacted Gil, indicating that he wished to exchange the BMW for another car. Gil testified at trial that he told ZV that he had just leased the car and could not return it, and that HAK would not permit ZV to switch his vehicle.

[13] Several months later, in September 2008, in the course of other vehicle-related dealings with Gil, ZV learned of a 2007 Mercedes automobile that was available for purchase from Prestige. On September 25, 2008, without any prior

notice to or communication with HAK, ZV returned the BMW to Prestige and purchased the Mercedes for the sum of $79,900.

[14] ZV made all monthly lease payments due on the BMW to HAK until September 2008. Upon ZV's purchase of the Mercedes, Prestige provided ZV with cheques for the BMW lease payments for the next three months. The lease payments were remitted to HAK up to and including the month of December, 2008.

(4) HAK's Recovery Attempts

[15] In October 2008, HAK learned from the insurer of the BMW that the insurance coverage on the car that ZV was required by the terms of the Lease to maintain, had been cancelled effective October 31, 2008. Terry Green, the principal of HAK, testified at trial. The trial judge accepted his evidence that, on learning of this development, Green promptly called ZV and spoke to his wife. During their discussion, ZV's wife confirmed that ZV had purchased a new car from Prestige and had left the BMW with Prestige, which would look after it. Green told ZV's wife that HAK owned the BMW, asked why the car had been returned to Prestige, and warned that ZV was responsible for insuring the BMW. This was the first notice to HAK that the BMW was no longer in ZV's possession.

[16] Green then called Gil at Prestige. Gil acknowledged that ZV had delivered the BMW to Prestige and had purchased a new car from it. He also informed

Green that Prestige intended to find a new lessee to assume the Lease. Green told Gil that Prestige had no right to take possession of the BMW and demanded the immediate return of the car to HAK.

[17] The BMW remained in Prestige's possession for several months. During this period, Gil proposed the names of several prospective new lessees to HAK. However, these candidates were unacceptable to HAK as successor lessees because they had poor credit ratings.

[18] In March 2009, Green again demanded the return of the BMW to HAK. Gil took the position that if HAK wanted possession of the car, it was required to pay storage fees for six and one-half months. The following month, HAK retained a bailiff to recover the BMW. However, Prestige refused to return it.

[19] On April 1, 2009, HAK sued ZV for damages and the return of the BMW. ZV defended the action on the sole ground that the Lease was subject to an alleged collateral agreement with HAK, whereby the parties agreed that if ZV entered into the Lease, he would be entitled to return the BMW if he were dissatisfied with it and, in that event, he would have no further obligations under the Lease (the "Oral Agreement").

[20] In May 2009, HAK applied to the Superior Court for an order compelling the return of the BMW. No relief was specifically sought on the application as against ZV and he took no position on the application.

[21] HAK and Prestige resolved their dispute. HAK paid Prestige $2,205 for storage fees in exchange for the return of the BMW. HAK maintained that, on its return, the BMW was in poor condition, with serious electronic problems. It repaired the vehicle, at a cost of approximately $5,000, and eventually sold the car at public auction for $32,000.

II. The Trial

[22] HAK's action against ZV proceeded to trial in January 2011. HAK maintained that ZV had breached the Lease by failing to make the post-December 2008 monthly rental payments for the BMW, by defaulting on his obligation to insure the BMW, and by delivering possession of the car to Prestige without HAK's consent. HAK claimed accelerated rental payments and damages for the costs and expenses incurred by it in recovering and disposing of the BMW, as well as for its loss on the sale of the vehicle.

[23] As I have said, ZV defended the action and denied any liability to HAK based on the alleged Oral Agreement. He also commenced third party proceedings against Prestige and Gil, claiming contribution and indemnity from them for any damages found owing by him to HAK.

[24] Although not pleaded in his statement of defence, ZV also challenged, on several grounds, HAK's entitlement to and the quantum of the damages claimed. Among other matters, he argued that: (1) the accelerated rent provision of the

Lease (clause 16, quoted above) constituted a penalty clause rather than an agreement on liquidated damages and, hence, that it was unenforceable; (2) HAK had failed to mitigate its damages; and (3) he had no responsibility for various costs and expenses incurred by HAK to recover the BMW, or for HAK's loss on the sale of the BMW.

[25] The trial judge rejected ZV's assertion that there was an Oral Agreement between ZV, HAK and Prestige. He held that there was no evidence of such an agreement between HAK and ZV directly. Moreover, there was no evidence of an agency or any actual authority given by HAK to Prestige to enter into a collateral agreement of the type asserted by ZV on HAK's behalf. Further, there was no evidentiary basis for any claim that HAK held out or represented an agency relationship between HAK and Prestige to ZV. Consequently, the trial judge held that HAK was not bound by any representations made to ZV by Gil or Prestige.

[26] The trial judge also rejected ZV's challenges to HAK's damages claims, including his assertion that HAK failed to mitigate its damages and incurred recovery costs or expenses for which ZV was not responsible.

[27] However, the trial judge accepted ZV's claim that he had concluded an arrangement with Prestige whereby Prestige assumed responsibility under the Lease for the BMW in consideration for ZV's purchase of the Mercedes.

[28] Accordingly, by judgment dated February 8, 2011, the trial judge held that ZV was liable to pay HAK the amount of $72,358.80 on account of the accelerated rental payments due under the Lease and damages for the difference between the agreed guaranteed residual value of the BMW and the sale proceeds realized by HAK on its disposition, plus damages for various costs and expenses incurred by HAK in recovering and disposing of the BMW. The trial judge also granted ZV's third party claim as against Prestige, but not as against Gill, for the full amount of ZV's liability to HAK.

III. Discussion

[29] Before this court, ZV challenges the trial judgment in two respects. First, he attacks the trial judge's liability finding, arguing that the trial judge erred by concluding that Gil or Prestige had no authority from HAK to negotiate the Oral Agreement with ZV, in addition to the Lease.

[30] Next, ZV renews his attack on the trial judge's holding that he is liable to HAK for certain of the damages claimed, namely, the damages associated with HAK's loss on the sale of the BMW and those damages related to the storage fees, repair costs and legal fees incurred by HAK in recovering and disposing of the BMW.

[31] In my view, absent the alleged agency relationship between HAK and Prestige and/or Gil, the trial judge's liability finding against ZV is unassailable. In

other words, if, as the trial judge found, the claim that Gill and/or Prestige had HAK's authority to negotiate the terms of the Oral Agreement is unsustainable, it follows that ZV is bound by the terms of the Lease. Accordingly, I turn first to ZV's assertion that the Oral Agreement was entered into by ZV with Gil and/or Prestige, with HAK's authority.

(1) Liability: Alleged Agency Relationship

[32] ZV's argument on appeal concerning the Oral Agreement proceeds as follows. First, he contends that the trial judge did not reject the existence of the Oral Agreement. Rather, in effect, the trial judge erred by misapprehending or ignoring the evidence of Gil's and/or Prestige's authority from HAK to enter into the Oral Agreement. ZV argues that as Gil and/or Prestige had HAK's authority to negotiate the Oral Agreement, HAK is bound by that contract. As the Oral Agreement was performed – ZV returned the BMW to Prestige – HAK has no claim against ZV for any payment or damages under the Lease.

[33] I would reject this argument.

[34] I note, first, that ZV continued to pay monthly rental payments on the BMW for at least three months after he returned the car to Prestige in September 2008. The fact that Prestige provided ZV with the funds necessary to make these payments does not alter the fact that they were made by and to the credit of ZV. These payments are inconsistent with ZV's claim that his obligations under the

Lease came to an end once he returned the BMW to Prestige and purchased the Mercedes as a substitute. The trial judge does not comment on this inconsistency in his reasons.

[35] That said, it is true that the trial judge did not reject the existence of the Oral Agreement, as between ZV and Gil and/or Prestige. He held that there was "no evidence of the existence of any collateral agreement entered into between [ZV] and [HAK] *directly*" (emphasis added). Later in his reasons, when addressing ZV's third party claim against Gil and Prestige, the trial judge also held:

> [52] It is more likely than not that an arrangement was made directly between Prestige and [ZV] that if [ZV] was unhappy with the BMW it could be exchanged for another vehicle and that [ZV's] obligations under the Lease would be taken over initially by Prestige and then passed over to one of its customers.
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> ...
>
> [54] Even with some minor inconsistencies in [ZV's] testimony, I accept [ZV's] evidence over Gil's that an arrangement was entered into between him and Prestige whereby Prestige would take responsibility for the BMW under the Lease in return for his purchasing a newer Mercedes. It does not make sense that [ZV] would continue with his obligations under the BMW Lease and at the same time purchase a newer Mercedes, both vehicles for his own personal use, unless Gil, in fact, made the representations in question and [ZV] relied upon them.

[36] Thus, on my reading of his reasons, the trial judge found that while Prestige (acting through Gil) agreed, in its own interests, to step into ZV's shoes under the Lease, HAK was not a party to that agreement or arrangement. I did not understand ZV to attack this finding on appeal. Indeed, ZV acknowledged in his trial testimony that he never discussed the Oral Agreement with HAK and that Green, on HAK's behalf, never said anything to him similar to what ZV alleged Prestige had committed to under the Oral Agreement.

[37] That, however, does not end the matter. In his statement of defence, ZV alleged that HAK entered into the Oral Agreement with him. He did not allege that an agent of HAK concluded, and thereby bound HAK to, the Oral Agreement. Nonetheless, the trial judge expressly considered ZV's assertion that Prestige and/or Gil entered into the Oral Agreement with the authority of HAK. This constituted a claim of agency between Prestige and/or Gil and HAK.

[38] The trial judge noted, correctly, that the burden of proof to establish agency rests with the party who asserts its existence. He then made the following factual findings:

> [41] There is no evidence of an agency or that any actual authority was given to Prestige by [HAK]. Moreover, there is no evidence that [HAK] ever held out to [ZV] that there was an agency relationship. In the circumstances of this case, there was no conduct or statements of [HAK], the alleged principal, that clearly and unequivocally establish that the alleged agent, Prestige, was represented to [ZV] as possessing

> [HAK's] authority in respect of the lease transaction in issue.

[39] There is nothing in the record before us, and ZV was unable to point to any evidence, establishing that these findings are tainted by palpable and overriding error or that the trial judge's appreciation of the evidence was flawed.

[40] On the contrary, the trial judge's rejection of the alleged agency relationship between HAK and Prestige and/or Gil is supported by the following:

(1) HAK and ZV were the only parties to the Lease and the Guaranteed Residual Contract. Neither Prestige nor Gill is mentioned in either document;

(2) clause 12 of the Lease stated, in unambiguous and clear language, that HAK was the owner of the BMW. Under the same provision, ZV expressly covenanted and agreed not to give up possession of or abandon the BMW;

(3) on the trial judge's uncontested findings, ZV knew that Green was the President of HAK, that HAK and Prestige were separate entities, and that HAK, rather than Prestige, owned the BMW and leased it to ZV;

(4) according to Green, ZV never suggested to him that the BMW could be returned if ZV was unhappy with the car, or that ZV could be released from his obligations under the Lease; and

(5) ZV did not plead any agency relationship between HAK and Prestige and/or Gil, or any representations by any party indicating that ZV was entitled, in effect, to unilaterally cancel the Lease and exchange the BMW for another vehicle if he were dissatisfied with it. These allegations appear to have first been raised at the close of trial, after HAK had presented its case and all evidence had been tendered. At no time did ZV seek to amend his statement of defence to

> advance an agency or misrepresentation defence to HAK's claims.

[41] ZV argues that Prestige and Gil, with HAK's knowledge and authority, negotiated the purchase price for the BMW, the monthly rental payments and the guaranteed residual value of the BMW with ZV. ZV also emphasizes that he had no contact with HAK until the day the Lease was signed. In these circumstances, he submits, Prestige and/or Gil had the authority to negotiate the Lease and the Oral Agreement on behalf of HAK.

[42] I disagree. It is well-established that the actual authority of an agent requires a "manifestation of consent" by the principal to the agent that the agent should act for or represent the principal: *Monachino v. Liberty Mutual Fire Insurance Co.* (2000), 47 O.R. (3d) 481 (C.A.), at para. 33. Further, apparent or ostensible authority in favour of an agent only arises where the alleged principal has impliedly represented that another person has the authority to act on the principal's behalf. The implied representation must be that of the principal, not that of the agent. See *Monachino*, at paras. 35-36; *Hunter's Square Developments Inc. v. 351658 Ontario Ltd.* (2002), 60 O.R. (3d) 264 (S.C.), at para. 23, aff'd (2002), 62 O.R. (3d) 302 (C.A.), at para. 9.

[43] There is no evidence in this case that HAK authorized Prestige – impliedly or otherwise – to act on its behalf in respect of any collateral agreement with ZV concerning the Lease, or the rental of the BMW. The absence of such evidence

is fatal to ZV's agency claim. ZV failed to establish at trial the legal requirements for a finding of agency, on any basis, between HAK and Prestige and/or Gil with respect to the Oral Agreement.

[44] I therefore see no justification for appellate interference with the trial judge's holding that HAK is not bound by any representations made to ZV by Gil and/or Prestige. In my view, the appellant's arguments to the contrary are designed to displace the trial judge's factual findings on appeal. As I have already said, the challenged findings are firmly anchored in the evidentiary record.

[45] I would dismiss ZV's appeal from the trial judge's liability finding.

(2) ZV's Attack on the Damages Awards

[46] In the absence of the alleged Oral Agreement binding HAK, it is my view that the trial judge's damages awards are unassailable. The provisions of the Lease govern the relations between ZV and HAK and ZV is bound by its terms. I will comment briefly on ZV's grounds of appeal from the damages awarded to HAK.

[47] In his factum, ZV renewed his argument, advanced at trial, that the accelerated rent provision of the Lease constitutes a penalty clause and, consequently, that it is unenforceable as against ZV. Again, I disagree.

[48] I note that this defence to HAK's claim for accelerated rent was not pleaded by ZV. Nonetheless, as with the other unpleaded defences raised by ZV at trial, the trial judge fully considered, and rejected, this argument. In doing so, the trial judge properly identified the controlling legal principles and applied them to the terms of the Lease entered into by the parties. As he observed, there is considerable contemporary precedent for the enforcement of contractual rent acceleration clauses upon default of automobile leases: see for example, *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440; *Peachtree II Associates – Dallas LP v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.A.A. No. 420. This reflects the reluctance of the courts to interfere with freedom of contract, including the right of contracting parties to agree on the consequences of a contractual breach.

[49] The trial judge concluded in this case that the accelerated amount provided for in the challenged provision of the Lease, clause 16, "is not excessive or unconscionable" and that it "merely puts [HAK] in the position it would have been in if [ZV] had performed his obligations under the contract" (at para. 48). These findings accord with the standard measure for compensatory damages in contract, under which the plaintiff is entitled to the value of the promised performance of the contract. As held in the seminal case of *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307, the damages awarded to the

plaintiff for breach of contract should place the plaintiff in the same position as if the contract had been performed.

[50] That is what occurred in this case. The accelerated rent provision in clause 16 of the Lease reflects the parties' bargain at the time the Lease was entered into regarding the reasonably anticipated damages that HAK would probably suffer if ZV were to breach the terms of the Lease. This is consistent with the basic principles underlying expectation damages in contract set out in *Hadley v. Baxendale* (1854), 9 Exch. Rep. 341, 156 E.R. 145 (Eng. Ex. Div.), at p. 151.

[51] I note that ZV pointed to no evidence at trial suggesting that the accelerated rent provision of the Lease was unfair or unconscionable, or that it did not reflect the parties' reasonable estimate, at the time the Lease was executed, of the probable damages that would arise upon ZV's breach of the Lease.

[52] I therefore agree with the trial judge that the challenged provision is enforceable as against ZV.

[53] ZV next contends that the trial judge erred by finding that HAK attempted, acting reasonably, to mitigate its damages. I would not accede to this contention.

[54] ZV complains that HAK sold the BMW at a loss instead of re-leasing the vehicle to a prospective lessee identified by Gil or another lessee. He also

complains that HAK allowed the BMW to remain in Prestige's possession for many months after HAK learned, in October 2008, that ZV had returned the vehicle to Prestige in breach of his obligations under the Lease and also defaulted on his contractual obligation to maintain insurance on the BMW. ZV says that in the months prior to HAK's recovery of the BMW, the market value of the vehicle diminished, a loss that HAK could have avoided if it had recovered the BMW earlier and re-leased it.

[55] There are several difficulties with this failure-to-mitigate argument. First, although ZV did not advance these complaints in his statement of defence, the trial judge addressed ZV's failure-to-mitigate argument on its merits. He held, at para. 50, that on the evidence HAK took "reasonable steps to mitigate its damages when it first learned that the BMW was no longer insured by [ZV] and in the possession of Prestige". He found that HAK's mitigation efforts included repeated demands for the return of the BMW, investigation of the creditworthiness of the prospective successor lessees proposed by Gil, and the expenditure of "appropriate costs in recovering, repairing and selling the BMW at a commercially reasonable price". The trial judge also found that HAK took reasonable steps in disposing of the BMW at public auction, as it was entitled to do under clause 16 of the Lease, and that HAK realized the most reasonable return on its disposition. The trial judge put it this way, at para. 49: "[HAK] took reasonable steps in disposing of the automobile at a reputable auction house that

exposed the vehicle for sale on the market and achieved the most reasonable return on its disposition."

[56] Second, and importantly, as the trial judge noted, there was no evidence at trial that re-leasing the BMW would have been more favourable than selling it.

[57] These findings by the trial judge were open to him on the evidence. They attract deference from this court. In particular, whether HAK's mitigation efforts were reasonable in all the circumstances was a question squarely within the trial judge's adjudicative domain. Absent palpable and overriding error, there is no basis for appellate interference with the trial judge's mitigation findings.

[58] Third, I emphasize that this is not a case where the respondent was inactive and failed to take any reasonable steps to mitigate its losses. Rather, on the trial judge's findings, HAK took reasonable, proactive steps to recover the BMW, to repair it for resale and to obtain a commercially reasonable sale price in the open market, all as permitted by the agreed terms of the Lease.

[59] As the Supreme Court recently confirmed in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, at para. 24, where it is alleged that a plaintiff failed to mitigate, the defendant bears the burden of establishing that the plaintiff failed to make reasonable efforts to mitigate and that mitigation was possible. See also *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at p. 331; *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*,

[1979] 1 S.C.R. 633, at pp. 647-648; and *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30. ZV failed to discharge his burden under both branches of this test.

[60] Accordingly, I would reject ZV's claim that the trial judge erred in his mitigation analysis and findings.

[61] Finally, ZV submits that certain of the other losses suffered by HAK, for which it was awarded damages at trial, were not caused by ZV. He points to the $7,500 loss sustained by HAK on the sale of the BMW (measured against its residual value as agreed by the parties), the legal fees incurred by HAK to recover the vehicle ($7,852.31), and the costs incurred by HAK to repair the car before it was sold at auction ($4,946.30). I would reject these submissions.

[62] As I have indicated, it was open to the trial judge to conclude, as he did, that HAK's conduct in selling, rather than re-leasing, the BMW was reasonable in the circumstances. Clause 16 of the Lease expressly confirmed HAK's right to re-lease or sell the BMW at public sale on its return to HAK, at HAK's option.

[63] Clause 16 also provided that ZV would pay HAK's reasonable legal fees incurred in enforcing or attempting to enforce its rights under the Lease, as well as any other associated costs and expenses incurred by HAK in that regard. Clause 9 of the Lease imposed liability on ZV for HAK's legal expenses arising out of or connected with the ownership or possession of the BMW. As I have

said, the Lease also prohibited ZV from relinquishing possession of or abandoning the BMW (clause 12).

[64] Moreover, under clause 14 of the Lease, ZV agreed to return the BMW to HAK in the same condition as it was on delivery of the car to him, save for normal wear and tear, and to pay HAK's costs of repairing any damage or replacing any parts to the BMW not required only by reason of normal wear and tear.

[65] Thus, it was well within the contemplation of the parties at the time of the formation of the Lease that, in the event of ZV's default under the Lease, he would be responsible for the types of losses that he now disputes.

[66] Nor, in the circumstances, can any complaint regarding the quantum of HAK's challenged losses succeed. The trial judge addressed the reasonableness of HAK's damages claims for its loss on resale of the BMW, legal fees incurred to recover the vehicle, and the costs of repairs to the BMW prior to resale. He held that the losses in question were reasonably sustained and that the terms of the Lease permitted HAK to recover those losses from ZV. I see no basis on which to disturb these factual findings.

[67] In all the circumstances, I conclude that ZV's challenges to the trial judge's damages awards must fail. It remains open to ZV, in accordance with the trial judge's ruling in the third party proceeding, to seek full reimbursement from Prestige for all damages owed by ZV to HAK.

(3) The Pleadings Issue

[68] In light of my proposed disposition of this appeal, it is unnecessary to consider whether ZV is precluded from relying on defences that he failed to plead. However, as this matter was fully argued, I make the following observations.

[69] The failure to raise substantive responses to a plaintiff's claims until trial or, worse, until the close of trial, is contrary to the spirit and requirements of the *Rules of Civil Procedure* and the goal of fair contest that underlies those Rules. Such a failure also undermines the important principle that the parties to a civil lawsuit are entitled to have their differences resolved on the basis of the issues joined in the pleadings. I endorse in this regard, the concerns expressed by MacPherson J.A. of this court in *Strong v. M.M.P.* (2000), 50 O.R. (3d) 70 (C.A.), at paras. 33-40.

[70] Thus, in my opinion, where a defence to a civil action is not pleaded and no pleadings amendment is obtained, judges should generally resist the inclination to allow a defendant to raise and rely on the unpleaded defence if trial fairness and the avoidance of prejudice to the plaintiff are to be achieved.

IV. Disposition

[71] For the reasons given, I would dismiss the appeal. I would award HAK its costs of the appeal, fixed in the amount of $10,000, inclusive of disbursements

and all applicable taxes. I would award no costs to the third parties, who took no position on this appeal.

Released:
"Nov 28 2012"
"EAC"

"E.A. Cronk J.A."
"I agree Gloria Epstein J.A."
"I agree S. Pepall J.A."