



[2015] JMSC Civ 181

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**THE CIVIL DIVISION**

**CLAIM NO. 1999 CLD 00106**

<b>BETWEEN</b>	<b>CARLTON DUNKLEY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JEREMY CHEN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>LISA CHEN</b>	<b>THIRD PARTY</b>

**IN OPEN COURT**

Mrs. Marvalyn Taylor-Wright instructed by Taylor Wright & Co. for the Claimant.

Mr. Debayo Adedipe, Attorney-at-Law for the 1<sup>st</sup> Defendant and the Third Party.

Heard: 8<sup>th</sup> February 2012, 9<sup>th</sup> February 2012 and 21<sup>st</sup> September 2015.

**Breach of Contract – Oral Agreement for sale and purchase of Motorcar – Recovery of sum due and owing – Interest at Commercial Bank Rate - Beneficial and Legal owner - Counterclaim – Failure of Consideration – Rental Arrears – Insufficient evidence – No receipt of payment - No date of payment – Substantial deprivation of Benefits – Least difficulty or embarrassment caused by burden – Proof of positive proposition preferred than negative proposition – Judgment for the Claimant.**

**CAMPBELL J,**

**Background**

- [1] Carlton Dunkley and Jeremy Chen are businessmen of Mandeville, in the parish of Manchester. The Third Party, Lisa Chen, is the sister of the 1<sup>st</sup> Defendant.
- [2] The Claimant, Mr. Dunkley and Ms. Chen, had an intimate relationship and co-habited for a number of years. Mr. Dunkley and Mr. Chen were good friends, but it all unraveled when the relationship between Mr. Dunkley and Ms. Chen came to an end in August 1999.

[3] The Claimant commenced his claim against the 1<sup>st</sup> Defendant, by writ of summons filed on the 17<sup>th</sup> November 1999;

*“to recover the sum of One Million Nine Hundred Thousand Dollars (\$1,900,000.00) representing a balance due and owing on the purchase of BMW 528 motorcar bearing registration number 1990 BR as per an oral agreement made between the Claimant and the Defendant, wherein the Claimant agreed to sell and the Defendant to purchase the said motorcar for the total sum of Four Million Dollars (\$4,000,000.00)*

And the Claimant Claims;

- (i) The said sum of One Million Nine Hundred Thousand Dollars (\$1,900,000.00);*
- (ii) Interest and continuing at the Commercial Bank Rate up to the date of judgment ;*
- (iii) Such further and other relief as the Honourable Court deems just.*

[4] The Statement of Claim states: -

1. At all material times up to March 1997, the Claimant was the owner of a black BMW 528 motorcar with registration number 1990 BR.
2. In March of 1998 the Defendant offered to purchase and the Claimant agreed to sell the said motorcar for the sum of Four Million Dollars (\$4,000,000.00).
3. It was a term of the said agreement that the Defendant would pay the sum of Two Million One Hundred Thousand Dollars (\$2,100,000.00) in the first instance which payment was duly made. It was agreed that the balance of One Million Nine Hundred Thousand Dollars (\$1,900,000.00) was to be paid within a period of one year from March, 1998 but not later than March 1999.
4. That despite the Claimant’s requests made to the Defendant for payment of the balance since June of 1999, the Defendant has refused to pay and there is now due and owing to the Claimant the sum of One Million Nine Hundred Thousand Dollars (\$1,900,000.00)

5. In his Defence;
  - i. The Defendant (1<sup>st</sup> Defendant) denies paragraph one of the Statement of Claim and says that his sister Lisa Chen, was the registered owner of the said motorcar at all material times.
  - ii. Paragraphs two and three of the said Statement of Claim are admitted. The Defendant admits that he made no further direct payments but says, in relation to paragraph four of the Statement of Claim, that the Claimant had told him that he would set-off sums, he the Claimant, owed and would owe to the Defendant against the balance of \$1,900,000.00.
  - iii. These said sums would eventually have amounted to \$213,300.00 less than the \$1,900,000.00.
  - iv. The Claimant has by his Statement of Claim elected not to set-off the said sums.
  - v. In any event the Defendant says, further to paragraph one of this Defence and Counterclaim that it was sometime after entering into the agreement that he discovered that his sister, Lisa Chen, was the registered owner of the car. His said sister has permitted him, to remain in possession of the motorcar.
  - vi. At the time the agreement was entered into the Claimant and Lisa Chen were living together as man and wife and the Defendant was not aware that Lisa Chen was the registered owner of the motorcar.
  - vii. In the premises the Claimant is unable to perform his obligations under agreement because he is not the registered owner of the motorcar he has contracted to sell. He is thus in breach of contract.
  
6. In the Defendant's Counter Claim: -
  - i. The Defendant says further that there has been a total failure of consideration and he is

- entitled to recover the sum of \$2,100,000.00 paid to the Claimant in March 1998.
- ii. At or about the beginning of January 1997 the Defendant let the Claimant into possession of this Townhouse at 5230 Gate Lake Road, Tamarac, Florida, United States of America as a tenant.
  - iii. The agreed monthly rental was \$1,200 in the lawful currency of the United States of America.
  - iv. The said Claimant used the premises to accommodate his cousin and family from January 1997 to April, 1999; a period of twenty-eight (28) months.
  - v. The Claimant failed to pay any part of the agreed rental and thus owes the Defendant the sum of US\$33,600.00.

**[5]** In the Claimant's Reply and Defence to Counterclaim;

- i. The Claimant says that at all material times the Defendant knew that although Lisa Chen was the registered owner of the motorcar she holds no beneficial interest in the same and that the Claimant is the sole beneficial owner.
- ii. The Claimant denies that he was let into possession of the Defendants townhouse. He introduced his cousin Jameel Rasheed to the Defendant, with whom the said Defendant negotiated rental of the said townhouse and placed the said Jameel Rasheed into possession thereof.
- iii. The Claimant served a third party notice on Lisa Chen, claiming to be entitled to indemnity or contribution from her to the extent of the said sum claimed by the Defendant which sum the Defendant may recover against him because Lisa Chen holds the bare legal interest in the motorcar, as a result she is obliged to transfer title in the said vehicle to the Claimant.

**[6]** On 26<sup>th</sup> October 2000, Lisa Chen entered appearance as Third Party and in her Defence, denied holding the bare legal interest in the motorcar; or that the car is held on trust for the Claimant and asserts that she is beneficially entitled to the said motor vehicle. She says the motor vehicle was purchased for her, by the Claimant, as a gift. At the time of purchase Mr. Dunkley and herself were living together as man and wife and were engaged to be married. She did see her

brother drive the car but she did not think this strange, because the Claimant and her brother were de facto brothers in law. She was not aware of the agreement entered between her brother and Mr. Dunkley until sometime after the breakdown of the relationship between herself and Mr. Dunkley. She denied promising to transfer the vehicle to the Defendant.

- [7] An importation question for the court's determination is; *was there an agreement for the sale of the motorcar between the Claimant and the Defendant?* Mr. Dunkley's evidence is that the motorcar was purchased in the United States of America in 1997. In March 1998, Jeremy Chen offered to purchase and he to sell the vehicle. There is no challenge that both men agreed a purchase price of Four Million Dollars (\$4,000,000.00). That the terms of the agreement had been settled and agreed. There is no challenge that the sum of Two Million One Hundred Thousand Dollars (\$2,100,000.00) had been paid in pursuance of the Agreement. Neither is there challenge that the Defendant had been in possession of the vehicle since the payment has been made. It is common ground, that the sum of One Million Nine Hundred Thousand Dollars (\$1,900,000.00) was to be paid within one (1) year of the agreement, and has not been paid.
- [8] Mr. Chen contends that the agreement was void ab initio because, Mr. Dunkley was not the owner of the vehicle and this was not disclosed to him. Mr. Dunkley testifies that Mr. Chen knew about the circumstances of the registration, and that he was the owner, being beneficially entitled.
- [9] In March 1998, when the agreement was concluded, both men; *"had a very good relationship and we were quite close"*, according to the parties. Mr. Dunkley and Ms. Lisa Chen had been cohabitating from August 1994. That relationship came to an end, in March 1999, approximately one (1) year after the verbal agreement was entered into. There is no receipt, adduced in evidence, in respect of the Defendant's payment of Two Million One Hundred Thousand Dollars (\$2,100,000.00), which is not being challenged. Neither is there a date proffered by either side as to when the payment was made.
- [10] It is an important consideration, that Mr. Chen would have had custody and control of the vehicle for about one (1) year, before Mr. Dunkley's and Ms. Chen's relationship came to an end. In his witness statement, dated 24<sup>th</sup> October 2006, Mr. Chen states that it was after the breakup of his sister's relationship with Mr. Dunkley that she informed him that; *"the motorcar I was buying from the Claimant was really hers and that she was in possession of the certificate of title for the car."* The Third Party says; *"When I left the relationship...my brother Jeremy had the said BMW motorcar. I had thought that the Claimant had lent it to*

*him but I discovered then that he had actually agreed to sell it to him. I told my brother the car was really mine and he should not pay the Claimant any more money for it.”*

- [11] Although her brother had been driving the car from March 1998 to the breakup of her relationship in March 1999, she was not aware that he had purchased the vehicle. It is Mr. Dunkley, who was conducting himself as owner. Her conduct is more consistent with Mr. Dunkley’s assertion that; *“I only registered it in her name for her to hold it on my behalf because it was already shipped in her name and we were living together. I trusted her and it was at all material time understood that she would transfer the car to me when required.”*
- [12] Mr. Dunkley has testified that the vehicle was purchased in the United States of America, and shipped to Jamaica in the name of his then girlfriend, Lisa Chen. He says that he did that because he was then “coming and going” between Jamaica and the United States of America. He would be in the United States of America for a month to six weeks and would return here to Jamaica for a longer period, than he had been away before returning to the United States of America. The car was purchased in Lisa Chen’s name to facilitate the clearing of the vehicle through the Jamaican Customs.
- [13] Mr. Chen, in response has said that the motor vehicle was not the only thing the Claimant was purchasing in the United States of America; he would import car parts, and those he cleared in his own name. Counsel for the Defendant and Third Party, Mr. Adepide, submitted, that Mr. Dunkley was in breach of the implied condition of the agreement, and in breach of the agreement for sale, and on that basis there is a total failure of consideration. He further submitted that the car was disposed of to a third party. There is no evidence as to who it was sold to or for what sum. That transfer, would put, it beyond Mr. Dunkley’s reach to meet his obligations under the contract.
- [14] I cannot agree with Mr. Adepide. Firstly, at the time of sale it was not disputed that all the funding for the purchase of the vehicle was from the Claimant. The Claimant has asserted that he has full beneficial interest in the vehicle. There is therefore no misdescription for him to describe himself as the owner. The car was in the custody and control of Mr. Chen, to whom Mr. Dunkley had delivered the car. There is evidence adduced that the car has since been sold. There is no evidence adduced on Mr. Chen’s counterclaim that he has not derived all the benefits that was due to him under the oral agreement.
- [15] In **Hong Konkong Fir Shipping Co. Ltd. v Kawaskai Kisen Kaisha, Ltd.** [1962] 2 Q.B 26, a decision of the Court of Appeal, the Claimants agree to let a

vessel to the defendants under a charter for twenty-four (24) months. The vessel lost several weeks under repairs for a defective engine among other serviceability issues. The charterers repudiated the contract and the owners sued for wrongful repudiation. Lord Diplock, in his judgment posed a question; which I consider germane to the issues raised before me. He asked:

*“In what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?”*

His Lordships judgment recognized, that contracts may expressly state what those events are but, *“human prescience being limited, it seldom does so exhaustively and often fails to do so at all”*. His Lordship states that; *“when the parties or Parliament, does not expressly state which event will discharge one of the parties from further performance of his undertaking it is for the court to state whether the event has this effect or not.”*

- [16] I therefore ask, if the court accepts, that that the purchaser only discovered that the Claimant was not the registered owner, one year after purchase, does that discovery discharge the Defendant from his undertaking, of paying the outstanding sum of One Million Nine Hundred Thousand (\$1,900,000.00). Lord Diplock states the applicable test to determine the consequence of the event, this way is to ask;

*“Does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?”*

- [17] The Defendant bears the evidential burden, of producing sufficient evidence to raise the issue for the court’s consideration; whether the event, of the discovery of the registered owner, being other than the Claimant, deprived the purchaser of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the motorcar under the agreement.

- [18] Was there substantial deprivation of benefits by the Purchaser? It is the purchaser, who is best able to tell. The Claimant has given evidence unchallenged that the motorcar was never returned to him. The whole benefit that was to be derived from the sale must have been for the purchaser to use the motorcar as he wishes and be able to sell it, if and when he so desired. If there were a diminution of those benefits, the purchaser was best able to say. The benefits derived or lost from the use of a motor vehicle, whose registered owner’s

name was not discovered until, one year after purchase is best received from the person who suffered that loss of benefits.

[19] In any event, it is preferred that the positive proposition, be proved; *“I lost these benefits, than for the negative to be proven, in this case by the Claimant, testifying ‘the purchaser did not lose these benefits’.”* Questions were asked in cross-examination of the Third Party who was unable to state the amount the car was sold for and to whom.

[20] The learned author of **Murphy on Evidence, Ninth Edition**, Peter Murphy, at page 71 states; *“it is a sound rule, therefore that every party must prove each necessary element of his claim or defence”*. There are cases, where it is not easy to determine whose case, a fact in issue, is essential and who should be held to fail, if the fact in issue is not proved. In such cases, the courts have inclined to require proof of the party to whom the least difficulty or embarrassment will be caused by the burden. This in fact leads to two guidelines which are usually followed; (1) each party should prove facts peculiarly within his own knowledge; and (2) proof of a positive proposition is to be preferred to proof of a negative. For these reasons I would give judgment for the Claimant on the claim, with costs to the Claimant to be agreed or taxed.

The court hereby orders:

1. That the sum of One Million Nine Hundred Thousand Dollars (\$1,900,000.00) be paid to the Claimant.
2. Costs to the Claimant to be agreed or taxed.