IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 4017

BETWEEN	Carole McKenzie	Claimant
AND	Clive Spencer	1st Defendant
AND	Courtney Dean	2nd Defendant
AND	Laxdine Anderson	3rd Defendant
AND	Lurdys Anderson	4th Defendant

Mrs. Susan Reid-Jones for the claimant.

Ms. Georgia Hamilton instructed by Georgia Hamilton & Co. for the defendant.

Heard 12th and 15th November 2007 and 6th October 2010

Campbell, J.

(1) On the 22nd August 2002, the claimant was a passenger in a public passenger vehicle registered 0110 PA that plies the route Highgate to Ocho Rios. The bus was being driven by the 1st defendant whom she knew before. The minibus collided with a Toyota Camry which was travelling in the opposite direction. The 3rd and 4th defendants were the driver and owner of the Toyota Camry respectively. The claimant suffered an open traverse fracture of the left tibia, fracture of the left fibula, lacerations and swellings and was hospitalized at St. Ann's Bay Hospital.

(2) On the 28th October 2005, the claimant filed a Claim Form with Particulars attached. On the 26th April 2006, the 2nd defendant filed his defence in which he denied the allegations in paragraph 2 of the Particulars, that he was the owner of the minibus. He alleged that the minibus had been sold pursuant to a Sales Agreement entered into between himself and the 1st defendant.

He further alleged that the minibus was the subject of a Hire-Purchase Agreement between himself and Denlor Car Sales. He denied that he had owned the bus or had any interest in it at the time of the collision.

(3) On the 27 June 2007, default judgment was entered for the claimant against the 1st, 3rd and 4th defendants. Several case management conference sessions were also adjourned. On 21st June 2007, the 2nd defendant filed a notice for court orders, seeking the following orders;

(1) That the claimant has no real prospect of succeeding on the claim against the 2nd defendant.

(2) That there be summary judgment for the 2nd defendant.

(3) Costs and costs of this application to the 2nd defendant.

(4) The issues for the determination of the court were identified as follows:

(a) Whether the 2nd defendant was the owner of motor vehicle registered 0110 PA, as alleged by the claimant in her Particulars of Claim filed herein on the 28th October 2005.

(b) Whether the 1st defendant, Clive Spence, was driving as the 2nd defendant's servant and/or agent, as alleged by the claimant in her said Particulars of Claim and

(c) Whether there is any other legal and/or factual basis for holding the 2nd defendant liable for the claimant's losses alleged in the said Particulars of Claim.

(5) In his affidavit in support of the application, Courtney Dean claims that on the 28th April 2000, he entered into a written agreement with Denlor Car Sales Ltd. to purchase a used 1996 Toyota Hiace motorbus at a cost of $690,000.00; he deposited $280,000, the balance to be paid over three years.

The vehicle was transferred into his name with a lien in favour of the vendor for the remainder of the purchase-price. He obtained a road licence and operated the vehicle along the Highgate to Ocho Rios route.

(6) He entered into an oral agreement with the 1st defendant, in January 2001 and sold him the bus. He said the 1st defendant paid $661,510.00 for the bus, which sum represented all the monies he had paid to Denlor, and assumed responsibility for the outstanding amount on the purchase price agreed with Denlor. According to the 2nd defendant, he handed over the title document, motor vehicle fitness, road licence, certificate of insurance and registration documents for the motorbus to the 1st defendant. He advised Denlor of the sale and of the responsibility of the 1st defendant for liquidating the outstanding amount. He was advised that receipts for further payments would have to be issued in the joint-names of the 1st and 2nd defendants. He said an attempt to effect a transfer of the vehicle into the name of the 1st defendant was unsuccessful because the lien on the vehicle was not discharged. The accident of which the claimant complains occurred and the 2nd defendant has been unable to secure the assistance of the 1st defendant to transfer the title to the 1st defendant's name.

Was the 2nd defendant the owner of the vehicle?

(7) In his defence, the 2nd defendant states that at the time of the agreement (i.e.

to sell to the 1st defendant), the said bus was subject to a Hire-Purchase Agreement with Denlor. In a letter dated 21st May 2007 and relied on and exhibited to the affidavit of the 2nd defendant in support of the application, it is stated, "He (2nd defendant), informed us that the vehicle would be transferred to Mr. Spence (1st defendant) *when the final payment was made."* (Emphasis mine)

Denlor's Contract

(8) Despite being described as a Hire-Purchase Agreement by the 2nd defendant, the agreement between Denlor and the 2nd defendant appears to pass the property in the car on the execution of the contract. The learned authors of Commercial Law by Lowe, Fourth Edition, at page 247,

> "The difference between sale and hire-purchase is that under an agreement to sell, the buyer is bound to buy, whereas under a hire-purchase agreement the hirer has an option to buy or not to buy. Modern hire-purchase agreements usually provide that the property will pass to the hirer when he has paid all the instalments or that when he has paid all the instalments, he may buy the goods by paying a further nominal amount."

It is clear that the intention of the party was for the property (the vehicle) to pass to the purchaser. The contract allows for a reclaiming of the car in the event of arrears for a period of two months, a sale of the vehicle and a refund of any residue to the purchaser. Denlor's letter acknowledging the sale of the vehicle to the 1st defendant is only understandable if an outright sale had been effected to the claimant by themselves.

If on the other hand there was a hire-purchase agreement as contended by the 2nd defendant, the property in the vehicle would not have passed. The 2nd defendant would not have been able to effect a transfer to the 1st defendant.

The oral contract between the 1st and 2nd defendants

(9) The duration of the contract between the 1st and 2nd defendants was for a period of 36 months and was due to come to an end on the 28th April 2003, some eight months after the accident. The letter from Denlor which was written on the 21st May 2007, states that the 2nd defendant had informed them "that the vehicle would be transferred to Mr. Spence when the final payment was made." There was no countervailing evidence that this was not a term of the oral

agreement between the parties. If this is so, then this agreement is a Hire-Purchase Agreement, under which title would not pass until the specified event. The hire-purchase may be defined as a contract of hire coupled with an option to purchase. The hirer is not legally obliged to purchase the goods, as the 1st defendant demonstrates with his refusal to assist in the transfer of the vehicle to himself. If the contract is one of hire-purchase then the property would not have passed to the 1st defendant.

(10) Ownership of the vehicle is determined by the Road Traffic Act, and the Regulations made thereunder, which regulate road traffic in the island of Jamaica. This Regulation extends to both private and public passenger vehicles. Section 2 of the Road Traffic Act defines owner as follows;

> "Owner means the person for the time being in whose name any motor vehicle or trailer is registered."

Stones Justice Manual, in the treatment of the Road Traffic Act 1969 (UK), notes that "owner" there was defined as follows;

> "'Owner;' in relation to a vehicle which is the subject of a hiring agreement or hire-purchase agreement, the person in possession of the vehicle under that agreement."

(11) Possession under the Agreement between the 1st and 2nd defendants would only pass from the 2nd defendant to the 1st defendant on the final payment being made. It seems to me that the identification of the registered owner raises a presumption that the person so named, is the person with custody and control of the motor vehicle. This of course is a rebuttable presumption. Once raised it shifts the evidential burden to the registered owner, who is contending the contrary. If, as is the case here, the vehicle was registered as a PPV vehicle, then its road licence being not transferable, evidence might be adduced to show that a later licence was issued in the

name of the new owner, or that the vendors assigned plates have been removed from the vehicle or that the vendors insurable interest in the vehicle has been terminated. The receipts from the sale of the vehicle would be some of the ways amongst others that would be open to a registered owner to demonstrate that despite his name being on the register as owner, the mantle of ownership and the control of the vehicle have passed from himself to another.

(12) The standard of proof is on the balance of probabilities. A party who seeks to show the registered owner as the true owner may, in addition to the fact of registration, point to other facts which are consistent with ownership.

The 2nd defendant, in an attempt to rebut the presumption, proffers the oral agreement with the 1st defendant. That agreement, argues the claimant, is contradictory, on the important term of the amount of the purchase-price. The affidavit sworn to on the 13th June 2007, at para 8, states,

> "In consideration of the said sale, the 1st defendant paid me the sum of $661,510.00, representing all the money I had paid to Denlor up to 31st January 2001 and in addition, he assumed responsibility for the balance of the purchase price owed to Denlor."

However, the payment history supplied by Denlor showed that as of the 31st January 2001, the sum representing "all the money I had paid to Denlor," was $413,000.00 and not the sum of $661,510.00 as deponed in the 2nd defendant's affidavit of 13th June 2007. The payment history showed a further payment of $248,000.00 after the date of the purported sale. Confronted with this, the 2nd defendant, in his supplemental affidavit filed 31st October 2007, stated that it was agreed that he would retain $413,000.00 and pay over the sum of $248,000.00.

(13) The 2nd defendant cannot support this agreement for sale with any proof of receipt of the purchase price. The applicant is vague about the date of the receipt of this sum, at best being

able to say, "on or about January 2001." It is unclear whether that sale was before or after the 31st January 2001. A construction that it was after January 2001 is aided by the statement that the consideration was determined by a formula of all the monies the 2nd defendant **had paid to Denlor up to 31st January 2001**. The assertions in the supplemental affidavit however support a construction that the payment was made before January 2001. The supplemental affidavit states, **I would retain the sum of $413,000.00 and pay the sum of $248,000.00 to Denlor on behalf of the 1st defendant**. Despite paying this amount on behalf of the 1st defendant, Denlor issued the receipt in the 2nd defendant's name.

Was the 1st Defendant the agent/servant of the 2nd defendant?

(14) The 2nd defendant has denied that the 1st defendant was his agent. To demonstrate this, he asserts that after the sale, he handed over the certificate of title, insurance and registration documents for the bus. Those acts are equivocal, and are not inconsistent with the 1st defendant being his servant and agent. This is more so because these documents were not transferred to the name of the 1st defendant. The requirement of enforceable comprehensive insurance was a vital obligation placed on the purchaser by Denlor. Was such insurance in place? The only reference the 2nd defendant makes to that his having handed the policy to the 1st defendant. Similar concerns are expressed in relation to the road licence for a PPV vehicle. The claimant has alleged that she has travelled on that minibus for sometime before with the 1st defendant as driver. This is a vehicle that was operating on a route that the owner has a valid licence for, and had not exhibited proof of having signalled the authorities that he was ceasing operation of his licence, which is not transferable.

(15) The principles established in **Ormrod v Crosville Motor Services Ltd. (1953) 1WLR 409**, where **A** was held liable for damages done by **B**, who was driving from **C** to **E** where he was to collect **A** and proceed on holidays. **B** was to meet friends at D, shortly after doing so, he had an accident. At trial. Devlin J., the trial judge said at p 410;

> "It is clear that there must be something more than the granting of mere permission in order to create liability in the owner of a motorcar for the negligence of the driver to whom it has been lent. But I don't think it is necessary to show a legal contract of agency. It is an area between the two that this is to be found, and it may be described as the case where, in the words of du Parcq LJ, there is a social or moral obligation to drive the owners car."

Upheld in the Court of Appeal (1953) 1 WLR 1120, Lord Denning, said at page 1123;

> "This puts an especial responsibility on the owner of a vehicle who allows it out on to the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, then the owner is liable for any negligence on the part of the driver."

(16) The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern; see **Hewitt v Bonvin** (1940). That is not this case. This is a commercial vehicle that requires a special road licence, insurance and carries fee-paying passengers.

The applicant has failed to prove that the claimant has no real prospect of succeeding on this claim. The application is dismissed, cost to the claimant to be agreed or taxed.