Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. 2004/HCV 2520

BETWEEN	VILMA VERLY	CLAIMANT
AND	MICHAEL POWELL	DEFENDANT

Miss Simone Jarrett instructed by Kingston Legal Aid Clinic for Claimant

Wendel Wilkins instructed by Robertson Smith Ledgister & Company for Defendant

Heard: May 11, June 14, 17 and July 29, 2005

Sinclair-Haynes, J (Actg.)

Michael Powell decided to sell his 1993 Honda Civic hatch back motor vehicle. In furtherance of that decision, he engaged the services of De Planners Auto Dealers. On the 17th January 2003, he gave them possession of the vehicle.

On the 31st January, Miss Vilma Verly entered into an agreement with De Planners for the purchase of the vehicle for the sum of

$220,000.00. The vehicle that she agreed to purchase bore the registration no. 3408 BY.

In order to facilitate the sale transaction, the defendant handed the certificates of fitness and registration to De Planners.

He retained the certificate of title. Miss Vilma Verly insured the vehicle in her name and the defendant's pending the grant of the title. Upon failure by De Planners to present her with the title, she made enquiries at the company and discovered that the owners of the company were in police custody. She contacted the defendant who told her the company did not pay him. He refused to hand over the title to facilitate the transfer. In fact, he obtained a new certificate of title.

On the 31st May 2004, a police officer accompanied him to her place of employment and seized the car. Miss Vilma Verly has now instituted proceedings by way of Fixed Date Claim Form against Mr. Powell for possession of the vehicle and that the defendant sign the necessary document to effect transfer of the vehicle or alternatively, a refund of the purchase price and a sum representing money she expended in repairing and enhancing the vehicle.

Defendant's Version

The defendant has, however, trenchantly resisted this claim.

In his affidavit in answer dated 18th March 2005, he avers that the car was left with De Planners to be exhibited for eventual sale. It was his intention that he would transfer title or ownership to the purchaser after he had personally received the agreed purchase price. He denied giving De Planners any authority to pass the title of the motor vehicle.

He avers that the certificates of fitness and registration and the title were to be released to the company or a potential purchaser for the purpose of facilitating the eventual sale of the vehicle, such as providing the potential purchaser with documentary proof of the vendor's ownership to present to a financer or lender to enable the potential purchaser to qualify for a loan.

About a week later, he called the claimant and discovered that the principal officer of the company was in police custody. The company informed him that it had received payment for the car, but the company was unable to pay the purchase price less the commission. He reported the matter to the police.

On the 1st December 2003, he saw the car parked at Discount Pharmacy with registration no. 3408 BY affixed which was the same registration plate he owned. He realized there was a fraudulent

duplication of this registration number so he reported the matter to the police.

On the 3rd May 2004, he caused an inspector of police to seize the vehicle. He recovered possession of the certificates of registration and fitness. He discovered that both were renewed without his knowledge or consent. The car, he avers had deteriorated significantly. He further avers that he was not aware of the fact that the claimant had insured the vehicle in their names. He did not authorize or consent to the vehicle being insured by anyone or any purchaser until he received the full purchase price. Further, he gave no assurance that the claimant would receive the title for the car until he received full payment.

Claimant's Version

The claimant's version is that on the 31st January, she purchased motorcar bearing registration no. 3408 BY. She paid De Planners the sum of $220,000.00 and was given a receipt. Upon receipt of the fitness and registration and pending the transfer of the vehicle, she insured the car with NEM in her and the defendant's name. De Planners assured her that she would soon obtain the title. An employee informed her that the title was ready. However, she attended

De Planners' office and did not receive it. Consequently, she reported the matter to the police and was informed that the owners were in police custody.

Contact with the defendant revealed that he was not paid. She had by this time expended $239,592.86 in repairing and enhancing the vehicle.

Submissions by Mr. Wendel Wilkins on behalf of the defendant

On the 11th May 2005, the matter was fixed for the first hearing of the fixed date claim form. The court is of the opinion that the matter ought to be disposed of in a summary manner. Mr. Wilkins, who was of a contrary view, was instructed to put his submissions in writing.

He submitted that the claim is a Fixed Date Claim Form and that the rules expressly prohibit the court on its own motion from granting summary judgment. The court, he submitted, ought to complete the Case Management Conference, make the orders and give such directions as it deems fit in consultation with the parties.

Further, he submits, Rule 27.7 of the Civil Procedure Rules (CPR) bars the judge conducting the Case Management Conference from trying the case. Consequently, the claim ought to be Case Managed to trial by a different judge.

Ruling on submission

At this juncture, I will consider the merits of this submission. The court is not seeking to grant summary judgment in terms of Part 15 of the CPR. The word summary was used to denote the expeditious manner in which the matter ought to be dealt with in light of the overriding objective.

Rule 27(7) states that at the first hearing of a Fixed Date Claim, the judge has all the powers of a Case Management Conference. Rule 26.3 (c) confers upon the judge the power to strike out the statement of case which discloses no reasonable grounds for bringing or defending a claim.

Further submissions by Mr. Wendel Wilkins

Mr. Wilkins further submitted that the relationship between the company and defendant was based on an agreement. In order to ascertain the terms of the agreement, the court must have regard to the intention of the defendant and the company. It must look at what was written; what was said and the conduct of the parties. It must take into consideration the evidence before it and nothing else in arriving at a finding. Only the defendant in this regard provided the evidence.

His evidence therefore ought to be accepted by the court. The evidence elicited by defendant, he submits, is that the defendant engaged the company to expose the vehicle to the market for eventual sale by him (the defendant) to a third party. The defendant did not sell the vehicle to the company nor did he authorize the company to sell the vehicle as an agent on his behalf. He did not intend to sell the vehicle on credit. The company was a mere market facilitator of the sale of the motor vehicle to the market. This, he contends, is supported by the fact that the defendant retained the certificate of title which was to ensure that he was paid the purchase price before title or property passed to the purchaser.

None of these intentions, he submits is reflected in the written agreement between the company and the defendant. It was not intended that the written agreement, which was prepared by the company would reflect all the intentions of the parties and terms of the agreement. It is trite; he submits that a contract may be oral, in writing or a mixture of both. He submits that the document was:

(a) Prepared by the company;

(b) A standard document used by the company. It was not specifically drafted for benefit of the company and defendant.

He further submitted that:

(i) The first page of the document contained the conditions;

(ii) The price was not fixed. There is a "not less than" clause to be completed by the defendant, the document was therefore not an entire agreement. It did not capture all the terms and conditions;

(iii) The purpose of the reverse side was to protect the interest of the company. Legally trained professionals did not draft the language used. It reflected the concerns that the company had in respect of the consequences of the company entering into an agreement with a purchaser to facilitate the eventual sale of the vehicle.

He submitted that the written agreement between company and the defendant shows that the defendant did not give the company the right to sell the vehicle on his behalf. This does not conflict with the

terms of engagement as described by the defendant. The fact that the claimant insured the vehicle in their joint names pending transfer of the vehicle shows that only the defendant could do the transfer. She recognized that the defendant and not the company was the owner of the vehicle and that it had no right to transfer the vehicle to her. The company had no right to sell the vehicle.

The mere giving of possession of the vehicle does not prevent the defendant from denying that the company had authority to sell the vehicle. He relied on the case of **Newbury Car Auctions v Unity Finance Ltd.** (1957) QB 371.

There is no evidence, he submitted, that the defendant represented to the claimant that the company was authorized to sell the motor vehicle.

It cannot therefore be said that the defendant by his conduct is precluded from denying the company's authority to sell.

He submitted that if the *nemo dat non-habet* rule applies, the company did not give ownership in law to the claimant, as it had no authority or right to do so. The claimant is therefore a mere possessor of the vehicle and must pay the defendant the purchase price in order to obtain title.

The principle of a bona fide purchaser is not applicable, as the company had no right to sell the vehicle. The claimant therefore had notice and cannot qualify as a bona fide purchaser without notice.

He also submitted that the clauses on the reverse side were to inform the defendant of the consequences of possession and obligations of the company and defendant. The reverse side was not drawn to the attention of the defendant before he signed the front of the document. The clauses were therefore not incorporated into the written agreement between the parties. They are therefore not applicable to the terms of any agreement between the parties. The notice drawing the attention of the defendant to the reverse side was inconspicuous.

Ms. S. Jarrett's submission

Ms. Jarrett on behalf of the claimant submits that the claimant is a bona fide purchaser for value without notice.

The defendant engaged the services of the company to sell his vehicle. The conditions of the contract expressly state the conditions under which the car was being received with the objective of an eventual sale. Clause 7 makes it clear that once an agreement has

been entered into with a potential purchaser, the agent/dealer was bound to sell the vehicle.

Clause 8 of the contract, which he signed, clearly states the modus operandi of the car dealership is to allow the principal to remain in possession of the relevant documents until a request is made for them to be submitted.

The defendant's assertions that the fact that he remained in possession of the title is proof that he had not agreed for the car dealership to sell the vehicle, is not borne out even in his own case.

The Sale of Goods Act S. 22 states that the owner cannot escape his obligation where it can be shown that his own conduct precludes him from denying that the seller had the authority to sell.

She relies on the defendant's assertions in his affidavit and submits that the defendant has clearly shown that he took the vehicle to the car dealer with the intention that the company should act on his behalf in the sale of the vehicle.

He submitted some of the documents to facilitate the transaction but refused to co-operate further after he realized that the company had collected the claimant's money and had not passed any of it to him.

She relied on the House of Lord's case of **Lloyd v Grace, Smith & Co.**

Consideration of the evidence and the authorities

I will first consider the following submissions of Mr. Wilkins:

a. that the attention of the defendant was not drawn to the terms and conditions which were written on the back of the contract before he signed the face of the document;
b. that the notice drawing the attention of the defendant to the back was inconspicuous;
c. that the clauses are not incorporated into the written agreement between the parties and are therefore not applicable to the terms of any agreement.

Mr. Wilkins relied on the case of ***Silvestri v Italia Societa Per Azioni Di Navigazione*** *(1968) 1 Lloyds Reports 263* in support of his contention that the back side was not incorporated into the contract.

In that case, the complainant sustained personal injuries whilst a passenger on the defendant's steamship. In an action for damages, the defendant argued that the complainant's action was statute barred by virtue of the conditions that were incorporated into the Contract of Carriage. The wordings on the ticket were almost all in bold letters or

capital letters. The striking exception was the statement, which made the company's liability subject to conditions, which was printed on the cover of the ticket and which informed that such condition formed a part of the contract. The terms and conditions were printed on other leaves and were in very small print. At the end, there were spaces for signatures. These spaces remained unsigned by the parties.

The US Court of Appeal held that the conditions were not incorporated in the contract. The claimant was not warned that the terms and conditions in the ticket were important matters of contract, which affected her legal rights.

Judge Friendly at page 268 concluded as follows:

> "The thread which runs implicitly through the cases sustaining incorporation is that the steamship line had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights."

The **Majestic**, 166 US 375 (1897) was a similar case. In that case, underneath an agreement of carriage, which was signed by the company, was a notice to cabin passengers. The provisions were not relevant to the issue of the ticket except for a reference 'See Back.' The printing on the ticket was in bold except the condition which limited liability for the luggage.

This was in fine print and was to be found on the reverse side of the ticket. The court, in deciding that the limitations 'were not included in the contract proper, in terms, or by reference' relied on the English cases of **Richardson, Spence & Co. Ltd. v Rowntree** (1894) AC 217; and **Henderson v Stevenson** (1875) LR 2 HL.

However, in **Murray v *Cunard Steam Co.,*** *235 N Y 162 (1923)* the US Court of Appeal found that the passenger had notice of a 40-day notification requirement although the passenger, it appeared was required to surrender the ticket aboard the ship. In that case, the condition was a part of the ticket. It was clearly a contract with all kinds of conditions, which were obvious to even the casual observer.

Judge Cardozo stated that:

> "The plaintiff's ticket... is described in large type as a 'cabin passage contract ticket.' It provides, again in large type, that 'this contract ticket is issued by the company and accepted by the passenger on the following terms and conditions.'
> ... At the top of the ticket is printed a notice. 'The attention of passengers is specially directed to the terms and conditions of this contract.'"

In the instant case, the word ***'PLEASE'*** is printed in large type with an asterisk beside it. It is beside the signature of the company's representative and right under the defendant's signature. The words

'CONDITIONS OF CONTRACT' are printed on the reverse side. These words are in bold type, the conditions are in regular print and obvious.

Mr. Wilkins argues that the full terms of the contract can be inferred from the conduct of the parties. He also argues that the company is no longer in existence and so the court has to accept the facts as presented by the defendant in determining whether the reverse side is incorporated in the contract.

Whether the reverse side was incorporated in the contract with the knowledge of the defendant can indeed be gleaned from his conduct.

Clause 8 – states:

> *"Once the company makes final arrangements with the customer we will ask that all relevant documents be submitted to the company and we will in turn issue a committal letter to the said claimant with the company's seal stating the date of payments."*

In compliance with Clause 8, the defendant duly handed over the certificates of registration and fitness to the company after the purchaser was identified. He therefore conducted himself in a manner consistent with Clause 8 and I so conclude.

It is the court's finding therefore that the conditions are in fact incorporated in the contract.

I will now consider the point advanced by Mr. Wilkins that De Planners was not the defendant's agent to sell the vehicle. The front of the contract is really a form on which defendant is asked certain questions. The answers are to be filled in, for example, his name, telephone number, type of vehicle, chassis number, condition of vehicle, asking price, and whether he is interested in financing. It is stated that the company accepted full responsibility for the vehicle whilst at their address.

In bold type, it is stated that the sale contract attracts 4% commission. It is therefore, an expressed term of the contract that De Planners has authority to sell. The agreement is that the company is entitled to 4% commission. The term is clear and unambiguous. Also at paragraph 18 of his affidavit of his answer, he said:

> "The agreed selling price for the motor vehicle was set at $260,000 but I subsequently agreed to accept $220 000. The company was to get a 4% commission based on the selling price of the motor vehicle. There was no agreement with the company that it had the right to give title or ownership to any purchaser before I received the purchase price less the agreed commission."

Contrary to Mr. Wilkins' contention that a price was not fixed, a price was in fact agreed. It is the court's finding that De Planners acted as the agent of the defendant. The pertinent question is, whether De Planners acted within the scope of its authority?

De Planners, authorized by the defendant, entered into a contract for the sale of the vehicle. This was evidenced by the contract signed by the defendant. He contends, however, that he placed limitations on the sale of which the complainant had knowledge.

In **Lloyd v Grace, Smith & Company,** H.L (E) 1912 page 737 Lord MacNaughton said:

> "The principal is not liable for the torts or negligence of his agent unless he authorized to be done or he has expressly authorized them to be done or he has subsequently adopted them for his own use and benefit."

Mr. Wilkins argues that De Planners acted outside the scope of its authority when it sold the car to the complainant. However, this is not borne by the evidence. What is the evidence in this regard?

(a) The defendant and De Planners agreed on the commission payable to De Planners upon the sale of the vehicle.

(b) The defendant had originally set a price of $260,000.00 but agreed to sell at $220,000.00 which was the price the claimant paid for the vehicle.

He relied on the case of ***Central New Bury Car Auctions Ltd. v Unity Finance Ltd.***

In that case the plaintiff agreed with a rogue named Cullis to purchase his Hillman motorcar at a price of £110.00.

An agreement was arrived at whereby the plaintiff would sell his second-hand Morris car to a finance company and a hire purchase company would enter into a hire purchase agreement with the rogue Cullis. Cullis signed the relevant form for submission to the finance company. Contrary to the agreement with the plaintiff, the finance company allowed Cullis to take away the car's registration book. Cullis left behind in part-exchange, a Hillman motorcar. It was discovered later that this motorcar was on hire purchase. The car which Cullis was allowed to take away was purchased at an auction and registered to one A. A did not sign the book containing a warning that the person in whose name the vehicle was registered might not be the legal owner of the vehicle.

A rogue, no doubt the same Cullis, sold the Morris to another garage. A signature purporting to be that of A found its way in the book. The garage owner sold the said Morris to the first defendant, a hire purchase company who let the car to the second defendant.

The plaintiff brought an action against defendants for conversion. The defendants resisted the claim on the ground that the plaintiff permitted Cullis to take possession of the car and the registration book without making sufficient enquiries. It was held that the document entrusted to Cullis did not prove legal ownership. The plaintiff therefore did not make any representation that Cullis was entitled to deal with the car as his own so to estop the plaintiff from asserting his own title.

That case is distinguishable from the instant, as Cullis was not given possession of the car so that he could sell it or hold for eventual sale. He was not given the registration book to prove ownership. The book specifically stated the contrary. At no time did the plaintiff hold Cullis out as having the ability to dispose of the vehicle. He was simply allowed to drive the vehicle pending completion of the hire purchase agreement because he deceived the plaintiff into thinking he was respectable and trustworthy. The receipt book was necessary for driving purposes not selling. At no time was he endowed with any apparent authority to sell.

On those facts, the purchaser could not plead estoppel as the registration book stated specifically that the person in whose name a vehicle was registered might not be the legal owner of the vehicle. The

purchaser therefore had a duty to enquire into the ownership. At page 390 Hudson L.J. said:

> "In my judgment the case fell to be determined not upon a consideration of negligence but upon what is the nature of the representation made by the delivery of the registration book. The book itself is not a document of title; its terms negative ownership and it contains no representation by the plaintiffs or anyone else that the thief was entitled to deal with the car as his own."

In the instant case, the question is, what is the nature of the representation made by the defendant concerning the sale of the vehicle?

De Planners is a car company, which sells vehicles to the public. The evidence is that the defendant left the vehicle with the company to be sold. In paragraph eight of his affidavit he said:

> "Nor did I intend that the motor vehicle would be insured by any purchaser until I personally received the agreed purchase price for the motor vehicle either from the company or the purchaser of the motor vehicle."

At paragraph 10 of his said affidavit, he averred that he had no intention to either give title or transfer ownership of the motor vehicle to the claimant until he was in personal receipt of the agreed purchase money for the vehicle.

At paragraph 12, he further avers:

> "The claimant spoke with me in or about March 2003 about the motor vehicle. I told her then that the motor vehicle was left by me at the company for eventual sale that I was aware that she was in possession of it but that I had not yet received any purchase money. I did not specifically tell her that the company acted on my behalf."

In fact, in contrast to the ***Newbury*** case, he handed over his certificate of registration and fitness so that the claimant could use them as proof of his ownership in order to facilitate the claimant obtaining a loan. Unlike the situation in ***Newbury,*** he knew also that the company had entered into a contract with a purchaser. His contention that the sale was not completed because he did not receive the purchase price flies in the face of the law.

Section 22(1) of the Sale of Goods Act states:

> "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

Is the defendant precluded from denying De Planners authority to sell? Is there anything about his conduct from which that fact can be inferred?

He did absolutely nothing. He was aware that a purchaser was found. In fact, he facilitated the sale by handing over the documents to prove his ownership. At no time, did he make it plain to the purchaser before she handed over her money to his agent that the money was to be paid to him. He remained silent until the money was paid and contract completed. It was only upon discovering that the company's principal was in custody that he refused to co-operate so that the sale could be completed.

In **Rimmer v Webster** (1902), 2 Ch 163, Sir George Farwell stated the following principle:

> "The owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee."

The defendant in the instant case, signed with the company an agreement for the sale of the vehicle.

In ***Henderson and Company v Williams*** (1895), 1 QB 521 at page 25 Lord Halsbury said:

> "There may be a question where, although no property had in fact passed, yet the true owner has allowed another person to hold himself out as the owner in such a way as to make an innocent person

> enter into a contract, which contract being performed cannot be set aside."

From the evidence adduced, the court is driven to the conclusion that Mr. Powell empowered De Planners with both the apparent and actual authority to sell his vehicle.

In the circumstances, the defendant is hereby ordered to:

a. deliver up possession of the 1993 Honda Civic Hatch Back motor car licensed 3404 BY to the claimant on or before September 30, 2005;

b. sign the necessary documents to effect proper transfer of the said motor car and to deliver the same to Mr. Leroy Equiano, attorney-at-law at the Kingston Legal Aid Clinic on or before August 5, 2005.

Should the defendant fail to sign any relevant document to facilitate the transfer of the said motor car, the Registrar of the Supreme Court is empowered to sign all relevant documents to facilitate the process on behalf of the defendant.

No order as to cost.