



# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION

2012 No: 14

**CARLA LARISSA MARIE ZUILL**

**Appellant**

**-v-**

**TINEE DONNIQUA LESLIE-ANN BEAN**

**Respondent**

## JUDGMENT

(In Court<sup>1</sup>)

Date of hearing: August 15, 2014

Date of Judgment: August 22, 2014

Mr. Eugene Johnston, J2 Chambers, for the Appellant

Mr. Christopher Swan, Christopher E. Swan & Co, for the Respondent

### Introductory

1. The Appellant appeals against the Judgement of the Magistrates' Court (Wor. Charmaine Smith (Acting)) dated September 21, 2012 granting judgment in favour of the Respondent in the amount of \$7070.00. \$5000, paid by way of deposit by the Respondent to the Appellant under a contract for the sale of a car dated December 13, 2009 ("the Contract") was ordered to be repaid on the grounds that the Contract was null and void. Damages were awarded in respect of the loss of use of the car which was eventually sold to third party was awarded in the amount of \$2000, together with the sum of \$70 in respect of court fees.
2. The Appellant principally complains that the Learned Magistrate erred in law in finding that the Contract was null and void on the grounds that the car did not belong to the Appellant because it was registered in someone else's name. Mr. Johnston rightly pointed out that a major difficulty for the Learned Acting Magistrate at trial

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<sup>1</sup> The Judgment was circulated without a hearing with a view to saving costs.

and this Court on appeal was that both parties had appeared in person below in a case involving modest sums but comparatively complicated legal issues, the complexity of which was magnified by the fact that the parties presented their cases in a non-legalistic manner.

### **The Magistrates' Court Judgment**

#### **The evidence**

3. The Learned Magistrate found that the following facts were not disputed:
  - (a) the parties signed an agreement dated December 13, 2009 (amended on January 15, 2010) whereby the Plaintiff agreed to purchase a car from the defendant for \$9500 and was required to pay a non-refundable \$5000 deposit;
  - (b) when the contract was concluded, the Defendant's uncle was the registered owner of the car;
  - (c) the Plaintiff was unable to transfer test the car because it was in the Defendant's uncle's name;
  - (d) the Plaintiff had possession of the car until January 2010 when the Defendant took it to Peugeot for repair but at no time thereafter;
  - (e) after several months during which there was no communication between the parties, the car was sold to a third party with the Defendant returning the Plaintiff.
4. These findings are generally supported by the record. However, as regards (c), the Plaintiff's own evidence was that the car was actually transfer tested on July 11, 2010 and she produced the passing report as Exhibit 2. She further testified that the Transport Control Department ("TCD") subsequently told her "*there was nothing I could do because I did not have the car*". It is unclear from the record whether this was before or after she "*was told by TCD that the car had been resold*".
5. The Plaintiff described a dispute between the parties in which the Defendant insisted that she pay \$500 towards the cost of repairing the car and the Plaintiff was unwilling to pay because the car was in the Defendant's possession after it had been repaired. The Plaintiff's evidence suggested the failure to resolve the dispute over payment for the car repairs was the reason why she never pursued the purchase. She explained that she was claiming transportation costs from January 1, 2010 until September 23, 2011 when she commenced the present proceedings, representing the estimated costs of using taxis during that period.
6. Under cross-examination, the Plaintiff repeated that the reason she did not get the car transferred into her name after it was transfer-tested was that she did not have the car. She also agreed that the Contract was amended to require her to pay an additional \$500 for repairs, but refused to pay it because "*I did not have the car and was not*

*going to pay for something I did not have.*” In addition the Plaintiff admitted that she had an automatic transmission driver’s license, and not a stick-shift license.

7. The Defendant testified that the car was a stick-shift and placed in her uncle’s name because her new jeep arrived before the car was sold. The car was listed for sale at \$18,000 but because the Plaintiff was a former student and a single mother, she agreed to help her by selling the car for \$9500. The only faults were the absence of air-conditioning and a non-functioning rear windshield wiper. The only problem was the need for the Plaintiff to learn how to drive a stick-shift. After signing the Contract, and before the car had been transfer-tested, she was pressured by the Plaintiff to give her the car before Christmas. In January the Plaintiff called her and told her the car had broken down. Shortly thereafter, the car was seen being driven by persons other than the Plaintiff. The Contract was amended to cover the costs of repairs done at Thorpe’s Garage. Further repairs were carried out by Continental Motors in relation to an ignition problem and she produced as Defence Exhibit #1 a bill for \$1000 which the Defendant paid. Thereafter the Plaintiff demanded her deposit back and refused to accept delivery of the car.
8. The Defendant testified that in August she told the Plaintiff to pay the balance “*or forfeit the car*”. In September the Defendant was questioned by the Police about allegedly stealing the car, a matter which was not pursued when she produced documentation. In May 2011 the car was sold to a third party for \$6000 and he transferred it into his name without incident. From March 2010 to May 2011 the car was not driven. She crucially testified:

*“Regarding block at TCD, I went there in person with my uncle and we were told that the car was legally still his because no transfer documents...My uncle Ronald was told he could do a new bill of sale. 22 May 2011, gentleman bought car for \$6000, deposited money, went to TCD and had car transferred...No incident...”*

9. Under cross-examination of the Defendant, the Plaintiff explored the issue of who owned the car and why she signed the Contract when it was in her uncle’s name. (This issue did form part of the case set out in her Ordinary Summons: “*Carla sold me a car that wasn’t hers and it broke down. After that I did not receive the car or my money back*”). The Defendant responded: “*Because cash belonged to me-car was in his name because it was illegal to own 2 cars; my plate # was transferred to my new car and his plate # was put on the Peugeot.*” The Defendant agreed that at one point the Plaintiff had refused to pay until she had the car in her possession, but insisted that once the car was fixed by Continental Motors on February 15, 2010 the Plaintiff demanded her money back, and rejected the Defendant’s offers to deliver the car.

### **The submissions**

10. The Plaintiff submitted that the Contract as amended did not entitle the Defendant to retain the car until the \$500 had been paid and that as the Defendant was not the owner of the car when the Contract was made, it should be declared to be null and void and she should be repaid her deposit.

11. The Defendant submitted that she had done everything possible to placate the Plaintiff. The deposit under the Contract was stated to be non-refundable and the car was explicitly sold “*as is*”. The Defendant could have sued the plaintiff for non-payment. TCD confirmed that “*everything was legal*” when the car was sold in May 2011.

### **The Decision**

12. The Learned Magistrate made the following key findings which represent the essence of the Judgment delivered at the end of the trial:

*“The Court must determine whether or not the Defendant has legal authority to enter into a contract to sell the subject car to the Plaintiff...”*

*The Defendant argues in answer to the Plaintiff’s complaint that ‘her car’ was sold to someone else, that when the black Peugeot was sold to the third party, ‘...TCD said that everything was legal and gave assurances that the car was registered to Ronald Saunders and that because the prior transfer test was never submitted, he was free to write the bill of sale to whomever he liked...’ Ironically, this is the argument which unravels her defense-the car was not hers to sell at the time she purported to contract with the Plaintiff to do so. Thus the Court finds as a matter of fact that the Defendant was not the legal owner of the black Peugeot on 13 December 2009 nor on 15 January 2010.*

*Having considered all the evidence submitted in this case, the court is reminded of the principle of, ‘nemo dat [quod non] habet’ meaning ‘no one gives what he doesn’t have.’ The court is satisfied on the balance of probabilities that the Defendant did not have the legal capacity to contract with the Plaintiff to sell the black Peugeot motor car to her. As such, the court finds that the purported contract... [is] null and void and finds that the Defendant owes to the Plaintiff the sum of \$5000...*

*The court finds the application for damages reasonable in all the circumstances of this case and awards \$2000 in damages to the Plaintiff...”*

### **The arguments on appeal**

13. The Appellant, the unsuccessful Defendant below, relied upon two main grounds of appeal: (a) the Learned Magistrate erred in finding that the Defendant was not the lawful owner of the car; alternatively, (b) the Learned Magistrate ought to have found that the Defendant was the lawful agent of her uncle, capable of entering into the agreement on his behalf.
14. Mr. Johnston firstly submitted that no question of capacity to contract arose in the present case: his client was neither a minor nor mentally incompetent to contract. The question was properly analysed with reference to the Sale of Goods Act 1978 and the implied condition under section 12 (1) (a) of the seller either has the right to sell the goods or will have the right to sell when the property is intended to pass. The crucial question was whether anybody had the right to prevent the Appellant from effecting

the sale at the time of the sale: *Microbeads A.G.-v- Vinehurst Road Markings Ltd.* [1975] 1 WLR 218 at 221-222 (per Lord Denning); *Niblett, Limited-v- Confectioners' Materials, Limited* [1921] 3 K.B. 387 at 397-398 (per Scrutton LJ). Counsel also submitted that section 12(1) must be read together with section 12(2).

15. The Appellant's counsel next submitted that ownership and registration as owner for TCD purposes under section 16 of the Motor Car Act 1951 are two distinct concepts. However, he was forced to concede that section 16(1)(a) had been breached and that section 16(1)(c) simply read was inconsistent with this argument.
16. On the facts, it was submitted that the property passed on December 13, 2009, the date of the Contract and the Appellant's subsequent sale of the car proved her title to sell to the Respondent had existed. The Magistrates' Court had failed to consider the evidence of what happened after January 2010.
17. Mr Swan submitted that the evidence showed that TCD would not transfer the car because it was in someone else's name. He did not substantiate this point by reference to the typed transcript of the evidence, which was produced at the Appellant's request to supplement the initial record. In light of section 16(1)(c) of the Motor Car Act ("*no person shall own or be registered as the owner of more than one motor car*"), in a contract for the sale of a car property or title to the car did not take place until TCD registers the change in ownership.
18. The Respondent's counsel submitted the Learned Magistrate was correct to find the contract was null and void. The Appellant's uncle ought to have entered into the Contract. He could have prevented the Appellant from selling the car to the Respondent. Mr. Swan invited the Court to have regard to the fact that the Appellant had benefitted from selling the car to a third party, and accepted that at some point the parties clearly agreed not to proceed with any agreement that had been consummated. He also submitted that that TCD does in practice grant waivers; the Appellant did not have to place the car in someone else's name.
19. In reply, Mr. Johnston submitted that there was no evidence to support a finding that the transfer of title could not have been completed. It was clear that after the contract was initially executed at least, the Respondent was aware the car was registered in someone else's name. There had been no misrepresentation and arguably a waiver of her Sale of Goods Act rights.

### **Findings: merits of appeal**

#### **Appellate jurisdiction**

20. Section 14 of the Civil Appeal Act 1971 provides as follows:

***“Determination of appeals***

*14 (1) Subject to any other provision of law, upon the hearing of an appeal the Court may allow the appeal in whole or in part or may remit the*

*case to the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just.*

*(2) All appeals to the Court shall be by way of re-hearing on the record, and shall be by notice of appeal, and no writ of error or other formal proceedings other than such notice of appeal shall be necessary.*

*(3) The Court shall have power to draw all inferences of fact which might have been drawn in the court of summary jurisdiction and to give any judgment and make any order which ought to have been made.*

*(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.*

*(5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition.”*

21. The Court’s powers under section 14(1) are broadly framed, but section 14(4) makes it clear that an appeal shall not be allowed merely on the grounds of technical errors of law. Appeals take place based on the record of the proceedings in the Magistrates’ Court. Clearly, the power to receive fresh evidence and make primary findings of fact on matters not in evidence before the Magistrates’ Court is an exceptional one.
22. I remind myself of these jurisdictional parameters because it was clear from the outset that the Appellant had identified at least one error of law in the Judgment below and one area of the evidence in which no primary findings had been made. In light of the passage of time since the relevant Contract was consummated (nearly 5 years) and since the present proceedings were commenced in the Magistrates’ Court (nearly 3 years), the option of remitting this matter for rehearing appeared to be an unattractive one.
23. Section 14 (2) does in my judgment permit this Court to draw inferences from the evidence adduced in the Magistrates’ Court, and forming part of the record, even where no primary factual findings were made in the first instance judgment. This power is not routinely exercised by this Court. However, the construction of contractual documents and/or the determination of what constitute the terms of a contract are very much questions of inference, and the sort of matters upon which appellate courts are inclined to substitute their own view of how the primary facts ought properly to be interpreted.

**Was the Respondent the legal owner of the car?**

24. I find that the Learned Magistrate was correct in her finding that the Appellant was not the legal owner of the car.
25. The Learned Magistrate’s judicial instincts in reaching the key conclusion she did reach were fundamentally sound, because they were apparently based merely on the

lay litigants' evidence without the benefit of any legal analysis in submissions on the impact of the Motor Car Act 1951. She rightly placed pivotal reliance on the Appellant's own evidence at trial that (a) TCD regarded the registered owner of the car as the true owner, who had to transfer title through a bill of sale to a new owner, and (b) that her uncle had adduced such evidence to facilitate the eventual sale of the car to a third party. That evidence was broadly consistent with the scheme of section 16 of the Motor Car Act as a whole, and following provisions of section 16 of the 1951 Act in particular:

- (a) Section 16(1)(c): "*no person shall own or be registered as the owner of more than one private motor car*";
- (b) Section 16(5): "*While a motor car licence issued to any person in respect of a particular private motor car remains in force, a motor car licence shall not be issued to that person in respect of another private motor car*";
- (c) Section 16(6): "*While a person is registered as the owner of a particular private motor car he shall not be registered as the owner of another private motor car*";
- (d) Section 16 (7): "*While a person is entitled to use a particular private motor car on the highways of Bermuda, he shall not use or cause or allow any other person to use on such highways any other private motor car which, though not licensed or registered in his name, is owned by him or is ordinarily at his disposal*".

**Did the fact that the Appellant was not the legal owner of the car at the date of the Contract render the Contract null and void?**

- 26. The Learned Magistrate erred in characterising the consequences of her finding that the vendor was not the legal owner of the car as reflecting a lack of capacity to contract, which rendered the Contract void. As a result, the Court failed to proceed to consider what legal and factual consequences flowed from what was treated as a dispositive finding, but was in fact only a threshold conclusion.
- 27. On the facts of the present case, it does not appear to me to be arguable that the Contract was illegal and null and void on that alternative ground. This point was not considered at trial nor fully argued on appeal. It is not obvious that the intent of section 16 of the Motor Car Act is to prohibit the creation of equitable interests by one person in a car which is legally owned by another. Clear statutory words are required to justify the conclusion that a particular type of private contract has been prohibited by Parliament.

**What was the legal effect of the Appellant not being the owner of the car?**

28. I accept the submission of Mr. Johnston that the correct legal analysis is whether the Appellant would potentially have been in breach of the implied covenant as to title under section 12 (1)(a) of the Sale of Goods Act 1978, which provides as follows:

*“(1) In every contract of sale, other than one to which subsection (2) applies, there is-*

*(a) an implied condition on the part of the seller that, in the case of a case of a sale, he has a right to sell the goods...”*

29. Section 16(1) must, as Mr. Johnston also pointed out (although I did not appreciate the significance of the point in the course of the hearing), be read in conjunction with subsection (2) of section 12, which provides for implied warranties in relation to “*a contract of sale, in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller should transfer only such title as he or a third person may have*”.
30. In the present case it was essentially common ground that by January 2010 when the Respondent went to get the car transfer-tested, she was aware that the Appellant was not the registered owner of the car. After she got the car transfer tested on July 11, 2010, the Plaintiff signed an amendment to the Contract on January 15, 2010. The only reasonable inference from these facts is that the parties by their conduct agreed (by no later than January 15, 2010) that the Contract was one according to which the parties agreed, for the consideration stated, that the Respondent would purchase the car from the registered owner.
31. Consistent with this finding, the parties must by necessary implication be deemed to have intended that title to the car would not pass until the necessary transfer documentation at TCD had been duly registered. In the event title never passed, and the car remained free for the Appellant’s uncle to transfer to the third party as the TCD officials appear to have readily understood the correct legal position to be.
32. There was no basis on the evidence before the Magistrates’ Court for the finding to the effect that the Respondent was unable to complete the transfer of ownership at TCD because the Appellant was not the registered owner of the car. The preponderance of the evidence supported only one conclusion. That the parties were unable to resolve a dispute about payment for repairs, the purchaser by her conduct repudiated the Contract and the vendor accepted that repudiation by selling the car to a third party. Since the car was agreed to be sold as is, the Appellant was clearly entitled to insist on being paid for the repairs.
33. Accordingly, the only reasonable inference to be drawn from the evidence on the record as a whole is that it was the Respondent who decided not to go through with the purchase and wrongfully repudiated the Contract. There was no breach of contract on the Appellant’s part.



**Effect of the correct legal and evidential analysis on the financial elements of the impugned Judgment**

34. The above-mentioned legal and factual misdirections resulted in substantial injustice to the Appellant because she was ordered to pay \$2000 on the premise that she was to blame for the non-delivery of the car. Having set aside that factual finding, the entire basis for that compensatory award falls away. This Court is bound to set aside that aspect of the Judgment below.
35. The position of the Order for repayment of the \$5000 deposit is less straightforward. It requires the Court to have regard to:
- (a) whether the Contract fairly be read as entitling the Appellant to keep the deposit in circumstances where she has suffered no loss and the Respondent never acquired the car; and
  - (b) whether the Appellant has in fact suffered any loss by reason of the Respondent's wrongful repudiation of the Contract.
36. The Contract provided in material respects as follows:
- “I Carla Zuill...have accepted a non-refundable deposit of \$5000....as payment towards the purchase of my Black 2001 Peugeot as is...”* [emphasis added]
37. There are two possible interpretations of this instrument, which was drafted by the Appellant. One is that the deposit was only intended to be non-refundable if it was applied to towards the actual purchase of the car i.e. if the bargain was consummated. The other is that it was intended to be non-refundable in any event. The idea of a non-refundable deposit constituting more than 50% of the total consideration which a vendor could keep, even if the goods were not ultimately sold, is so outlandish a commercial proposition that clear words would be required to support such an interpretation.
38. I find that the clear meaning of “*non-refundable*” linked to the words “*as payment towards the purchase*” is that the deposit is intended to be a partial payment and not refundable only in the event that the car was actually sold by the Appellant and/or her uncle to the Respondent. If, contrary to my primary finding the meaning of the relevant words is ambiguous, I would resolve the ambiguity against the drafter of the instrument, the Appellant. The Respondent was in my judgment entitled to be repaid the deposit as the Learned Magistrate correctly ruled.
39. The issue of what loss the Appellant suffered by reason of the Respondent's wrongful repudiation of the Contract was alluded to in argument and is quite straightforward. The Appellant sold the car at a loss for \$6000, \$3500 less than the Respondent promised to pay. Her evidence in this respect does not appear to me to have been in dispute. Although she might complain that had the Contract been consummated the

Respondent would have had to pay \$1500 for repairs, the Appellant retained the benefit of any repairs she funded as she retained the car and sold it on. This Court is not in a position to find that the ignition problems which cost \$1000 to repair were in fact caused by the Respondent, as the evidence is not sufficiently clear.

40. This claim was not explicitly raised by the Appellant at trial but she did remark under cross-examination that she could have sued the Respondent. I see no basis for suggesting that she waived the right to have this sale price loss taken into account. In my judgment it would be inequitable for this loss not to be taken into account when considering whether or not the Respondent ought to recover her deposit in full.
41. I find that the award of \$5000 in respect the repayment of the deposit must be set aside and replaced with an Order that the payment by the Appellant to the Respondent should be in the net amount of \$1500, as the Appellant has a valid cross-claim or set-off against the Respondent in the amount of \$3500 for loss flowing from the Respondent's wrongful repudiation of the Contract.
42. But for the Respondent's wrongful repudiation of the Contract, the Appellant would have received \$9500 for the car rather than the \$6000 she was forced to accept, in extremis.

### **Conclusion**

43. The appeal is allowed and the Judgment of the Magistrates' Court ordering the Appellant to pay the Respondent \$7000 plus \$70 in respect of filing fees is set aside and varied so as to require the Appellant to pay the Respondent the sum of \$1570 plus interest at the statutory rate from September 21, 2012 (the date of Judgment in the Magistrates' Court) until payment.
44. The final result is a net 'win' for the Respondent in financial terms although the Appellant's appeal has succeeded in part and to a more significant financial extent. Unless either party applies by letter to the Registrar to be heard as to costs within 21 days, I would make no order as to the costs of the appeal.
45. It is difficult to imagine a case involving such comparatively modest sums of money, argued at trial by litigants in person, which could generate as many complicated legal issues as the present dispute has done. The traditional role of the common law judge is to decide cases on the basis of the arguments advanced by the parties. The lot of a judge adjudicating a contested contractual dispute presented by litigants in person will rarely be an easy one.

Dated this 22<sup>nd</sup> day of August, 2014

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IAN RC KAWALEY CJ