IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

IN COMMON LAW

SUIT NO. C.L. 2105 of 1961

BETWEEN	LYDON ALLEN	PLAINTIFF
AND	OLDS DISCOUNT CO. OF JA. LTD.	DEFENDANT
AND	THOMAS DEWDNEY	ADDED DEFENDANT
AND	SINCLAIR'S GARAGE LTD.	THIRD PARTY
AND	VINCENT GAYNOR	FOURTH PARTY

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Mr. W. Frankson and Mr. Howard Hamilton for the Plaintiff
Mr. R. Alberga, Q.C. for the Defendant
Mr. D. Muirhead for the added Defendant
Mr. R.N. Henriques for the Third Party.

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- J U D G M E N T -

In this case, the Plaintiff seeks to recover damages from the Defendant, as a result of what he alleges to be the wrongful seizure by the Defendant, of a Ford Consul motor car which he claims to have purchased from the added Defendant on the 28th of March 1961.

It appears that this car was imported into Jamaica some time prior to the 17th of January 1958, on which date it was registered for the first time in the name of a Mrs. Alice Eldemire. The registration number then allocated was L.4967. Thereafter followed a series of transactions in the following order. On the 9th of August 1960, Alice Eldemire traded in this car to the Northern Industrial Garage Ltd., Montego Bay, who on that same day sold it to the Defendant. Yet another transaction took place on the 9th of August when the Defendant let the car on hire purchase to a Mr. Rupert Smith. Having signed the relevant hire purchase agreement, Smith applied for and obtained the issue of a new set of registration plates - L.6986. On the 3rd of January 1961, the Collector of Taxes for St. James registered a transfer from Smith to Vincent Gaynor, the fourth party, who is not now concerned with these proceedings, but on whose request the registration plates were again changed, this time to L.7263.

/In April.....

In April 1961, Sinclair's Garage Ltd., the third party, acquired the car from the fourth party for £175. A few days later, the third party sold it to the added Defendant for £50 and on the 28th of March 1961, the added Defendant, having expended some £28 on the car to make it roadworthy, sold it to the Plaintiff for £115. The Plaintiff says that the car was seized by the Defendant on the 6th of September 1961. This then is the not unfamiliar history of so many cars in this country.

On the 9th October 1961, the Plaintiff's solicitors wrote to the Defendant demanding the immediate return of this car and claiming that its conduct in seizing it was "illegal, unwarranted and unjustified". The Defendant replied on the 12th October stating, inter alia:

> "We would now bring to your attention that this vehicle, formerly licensed L-4967, was sold by Northern Industrial Garage to one Rupert Smith on the 9th August 1960. Since that time the registration number was changed to L-7263 and after many months of searching for the vehicle, same was finally repossessed, as there is still a balance of £325.6.2. outstanding on our books."

It is not in dispute that the transaction mentioned in this letter was really the hire purchase agreement between the Defendant and Rupert Smith.

In the result, the Plaintiff issued a writ against the Defendant on the 26th of October 1961 and in 1963 had the Defendant Dewdney added. The latter in turn brought in Sinclair's Garage Ltd. as the third party.

It is clear that the rights of the several parties herein must be determined by reference to the position as it existed on the 9th of August 1960 as between the Defendant and Rupert Smith. There is, I think, no dispute as to the facts. The problem, if any, arises as to position of Rupert Smith under the hire purchase agreement which contains more or less, the usual clauses.

I set out the relevant clauses:

/1.(a) The hirer.....

1. (a) The hirer will.....during the continuance of the hiring pay to the owners, without previous demand the monthly rent ... on the due dates..... specified.

(f) The hirer will not sell, assign, mortgage, charge, let, or otherwise dispose of the goods or of the benefit of this agreement or the option to purchase herein contained ..... The performance and observance of this clause by the hirer shall be a condition precedent to the owner's consent to the hirer's possession of the goods and if the hirer threatens or takes any step to commit a breach thereof the hiring hereby constituted shall ipso facto determine....

3. if the hirer duly perform and observe the terms and conditions of this agreement the hirer shall thereupon have the option of purchasing the goods for the sum of twenty shillings.

4. the hirer may determine the hiring at any time .....

6. if the hirer shall commit any breach of any of the terms and conditions hereof .... the owner may ..... determine the hiring .....and/or retake possession of the goods.....

In the face of these provisions, Mr. Henriques contends that when Smith took delivery of the car from the Defendant under the agreement, the former acquired a voidable title because he obtained possession with their consent. Mr. Henriques contends further that this case comes either within Section 23 of the Sale of Goods Law Cap. 349, or within Section 25(1) and/or Section 25(2).

In support of his contention based on Section 25(1), counsel sought to rely, quite strongly I think, on Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd. (1965) 2 A.E.R. 105. The Privy Council in this case held that the words "continues in possession" in Section 28(1) of the N.S.W. Sale of Goods Act 1923-53 (which is in identical terms with our Section 25(1) Cap. 349) were intended to refer to continuity of physical possession regardless of any private transactions between the vendor and purchaser which might alter

/the legal.....

the legal title under which possession was held, and it followed that when Motordom sold to the respondent the sixteen cars whose ownership was disputed and continued in possession of them, this continuity of possession enabled the appellant to invoke the provisions of the sub-section and successfully claim a good title to the cars. If the problem with which I was here concerned related to a sale by the Defendant to Smith of a car of which the Defendant thereafter continued in possession, I would have found an examination of the Pacific Case (supra) a most fascinating exercise. Unhappily, however, I am quite unable to see the relevance of that case and I derive no assistance therefrom, except to note that it very strongly disapproved of the decision in Eastern Distributors Ltd. v. Goldring (1957) 2 A.E.R. 525. In this latter case, the Court of Appeal had accepted and followed McKinnon J's. judgment in Staffs. Motor Guarantee Ltd. v. British Waggon Co. Ltd. (1934) 2 K.B. to the effect that a hire purchaser, who had sold a lorry to the finance company and then hired it from the company without having delivered up possession to the company, enjoyed the possession of a bailee under the hire purchase agreement and not the possession of a seller who had not yet delivered the article to the buyer. The Board held that the principle in Mitchell v. Jones (1905) 24 N.L.R. 932 was undoubtedly correct. I find it quite impossible to see the relevance of the subsection to the facts of this case.

As to the argument founded on Section 25(2), Mr. Henriques says that Smith was a person who, in terms of the section, had agreed to buy goods and obtained possession with the consent of the seller, and he therefore acquired a title which he could pass to a purchaser in good faith. I cannot believe that in this year of grace 1966, this argument can still be thought to be otherwise than utterly devoid of any merit whatsoever. I would have thought that eversince Helby v. Matthews (1895) A.C. 471, and Belsize Motor Supply Co. v. Cox (1914) 1 K.B. 244, no attempt would have been made to resurrect it. These cases show quite unmistakably that where a hirer under a hire purchase agreement has an option either to become a purchaser of the subject matter of the agreement in certain circumstances, or to return it to

/the owner,.....

the owner, such a hirer is not a person who has "agreed to buy" within the meaning of Section 25(2). And, unlike Mr. Henriques, I see no conflict between these cases and Lee v. Butler (1893) 2 Q.B. 318.

And now to Section 23. This provides that -

> "when the seller of goods has a voidable title thereto but this title has not been avoidaded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

Here again, it is by no means easy for me to see the relevance of this section. Assuming, in the complete absence of any evidence, that when Smith "disposed" of the car, he did so by a sale thereof, I find it quite impossible to discover any principle of law by which he could be held to have had a voidable title thereto which was not "avoided at the time of the sale". It would be a novel jurisprudential principle that would recognize the co-existence of an absolute title in one person and a voidable title in another in respect of the same subject matter.

Having now examined Mr, Henriques' submissions, I pass on to answer the real question which arises in this case, namely: when Smith disposed of the car to Vincent Gaynor - and here I rely entirely on the fact of a transfer of the registered ownership from the former to the latter - what did he purport to do? At this time, that is, on the 3rd January 1961, Smith was still bound by the provisions of his hire purchase agreement with the Defendant to whom he was then indebted in the sum of approximately £300. He therefore purported to do something in contravention of the precise terms of an agreement by which he was bound with the result that there was no title which he could pass to Vincent Gaynor. This defect in title would quite clearly follow the several subsequent transactions affecting the car, so that when on the 6th September 1961 the Defendant exercised its right to repossess this car, it was doing no more than it was manifestly entitled to do. It follows that the Plaintiff's claim against the Defendant must fail.

The Plaintiff's position is not, however, entirely hopeless. as he must succeed against the added Defendant from whom he bought the car. The added Defendant must in turn succeed against the third party.

/Now what.....

Now what is the extent of the Plaintiff's success against the added Defendant? He says he bought the car for £115 and spent some £150 on repairs. There is nothing in the evidence I have heard that lends itself to any other inference than that when the added Defendant sold this car to the Plaintiff, he sold it to the Plaintiff for the latter's personal use. The measure of damages clearly is the loss directly and naturally flowing in the ordinary course of events from the added Defendant's breach. The Plaintiff is entitled to the return of his £115 together with such reasonable sum as he would have expended in making the car usable. He says he replaced the radiator and steering, put on four tyres and two wheels, had some dents beaten out, and the upholstery fixed. The man who did these repairs is dead. I am afraid, however, that the Plaintiff has not satisfied me on the probabilities that he was either justified in spending this relatively large sum or that he did in fact spend it. I had the clear impression that his memory was thoroughly faulty and that he was not very au fait with the extent of the repairs in fact done. I am not disposed to allow him more than £50.

On the question of an indemnity as between the added Defendant and the third party, Mr. Muirhead contends that the former is entitled to recover from the latter the full amount including costs which the added Defendant is now called upon to pay to the Plaintiff.

There is no doubt that the added Defendant must, in the circumstances of this case, recover from the third party the costs which he is required to pay to the Plaintiff. Mr. Henriques freely concedes this. The real question is as to the extent of the added Defendant's rights against the third party. The principle involved here has been stated and re-stated in a number of decisions, and is, in my view, now beyond argument. In Yeoman Credit Ltd. v. Odgers (Vospers Motor House (Plymouth) Ltd. Third Party)(1962) 1 A.E.R. 789. Harman L.J. puts it this way, at p. 795:

> "When one turns, however, to the rights of the defendant against the third party, I am of the opinion that the judge proceeded on the right principle, namely, that the true damage was that which flowed from the breach of warranty."

/Indeed,.....

Indeed, the Sale of Goods Law explicitly recognizes this principle in Section 52(2) which says:

> "The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

It is, I believe, true to say that this provision, as well as that contained in Section 53, applies to breaches of warranty in a contract for the sale of goods, the general common law principle as to damages for breach of contract. Section 52(2) clearly reflects the first limb of the rule in Hadley v. Baxendale (1854) 9 Exch. 341. It is equally clear, as the authorities show, that the words "in the ordinary course of events" are intended to make the liability of the seller depend, not on the state of his mind, but on the facts of the particular case. It is on this background that one sees the necessary for Section 53 which embodies the second limb of the rule in Hadley & Baxendale. Under this part of the rule, a purchaser is required to prove that though his loss is exceptional and abnormal, yet its occurrence was within the contemplation of both parties, at the time when the contract was made, as the probable result of its breach.

Now, what is the position where goods are purchased by a buyer who subsequently re-sells? Can such a buyer recover from the seller as damages, the actual loss to which he has been put as a result of his liability to the person to whom he has sold? Clearly, no problem arises where the buyer's liability does not exceed the loss which he would have suffered if he had not sold the goods. See Randall v. Raper (1858) E.B. & E. 84. What if the buyer's liability exceeds his loss suffered if he had not resold? The authorities show that a buyer's resale contract cannot be used to minimise or increase his damages for the very good reason that such a resale is an incidental fact with which the seller in breach has nothing to do. Special damages would of course be recoverable in respect of the buyer's liability to a person to whom he has resold where the existence of a resale contract, either actual or contemplated, is known to the seller at the time of the sale, as in Hammond & Co. v. Bussey (1887) 20 Q.B.D. 79,

/or where,.....

or where, the buyer being to the knowledge of the seller a merchant or retailer, the seller must have contemplated that the goods were purchased for resale.

In Finlay & Co. v. N.V. Kwick Hoo Tong (1928) A.E.R. Rep. [illegible] Scrutton, L.J. referred to Williams Bros. Ltd. v. Ed. T. Agius Ltd. (1914) A.C. 510 and said at p. 114:-

> "I had been brought up, as most members of the Bar have been brought up, to understand that as a general rule you could not use a subcontract entered into by a buyer either to increase or to minimise the damages he claimed; it was an accidental matter with which the seller had nothing to do. I found it in Rodocanachi v. Milburn (1886) 18 Q.B.D. 67 which was a decision of the Court of Appeal .... and I found that the House of Lords affirmed it in Williams Bros. Ltd. v. Agius Ltd. (supra) ..... and the same principle was applied in Slater & Co. v. Hope & Smith Ltd. (1920) 2 K.B. 11 that unless you could get the seller contemplating, so that he makes himself liable to pay, the possibility of a subcontact under which a claim may be made on the buyer, you would have to disregard that subcontract ..... It was one of the many instances in English law where the measure of damages by law did not award the real loss that the plaintiff had suffered, but it was still a rule of English law."

I now examine briefly the relevant facts as I find them. The added Defendant purchased this car from the third party for £50 on the 21st March, 1966 because as he says "it was going cheap" and "for speculation". There is not the slightest suggestion that the added Defendant's purpose in buying this car was communicated to the third party. As far as the latter was concerned, the former may well have been buying this car for his personal use. The fact that he sold it seven days later at a relatively substantial profit cannot in the circumstances in any way affect the third party. It cannot be argued that the third party must have contemplated the possibility of a resale under which a claim could be made against Dewdney. It follows in my view, that in assessing the damages recoverable by the added Defendant against the third party, I must ignore the fact of the resale to the Plaintiff. I hold that the liability incurred by the added Defendant to the Plaintiff is not an item of damage that resulted directly and naturally, in the ordinary course of events, from the third party's breach.

/I must add.....

I must add that I see no conflict in principle between the conclusion at which I have arrived and that reached by MacKenna J. in Bowmaker (Commercial) Ltd. v. Day & Others (1965) 2 A.E.R. 856, so strongly urged by Mr. Muirhead. What is not clear, however, is the method of application of the principle. This would obviously depend on MacKenna J's. view of the circumstances attending the sale by the third party Mr. Burt to the first Defendant. As to this, the report of the case in the W.L.R. and in the A.E.R. is silent. I must conclude therefore that MacKenna J's. view of the facts justified his conclusion as to the extent of the indemnity to which he held the first Defendant entitled.

The next case relied on by Mr. Muirhead was Yeoman Credit Ltd. v. Odgers (supra). Here again is a case which reaffirms the principle that a hire's loss under an agreement is recoverable as damages from a third party by whom he was induced to enter that agreement and that the measure of that loss as against the third party was the damage flowing from the third party's breach of warranty. It certainly could not be argued that the liability of the defendant to the plaintiff in that case did not directly and naturally result from the third party's breach. The fact that the trial judge wrongly calculated the extent of the liability is immaterial. I do not therefore derive any more assistance from that case, though I am not in conflict with the decision.

I hold that the amount to which the added Defendant is entitled as flowing directly and in the ordinary course of events from the third party's breach is the price paid for the car together with the reasonable cost expended on making the car roadworthy.

I am constrained to observe that to hold otherwise would result in a very alarming and manifestly absurd situation. If Dewdney were fortunate enough to have found some misguided person to pay him, say £500 for that car, could he require Sinclair's Garage to pay him £500 The question has only to be stated to demonstrate the fallacy of such a situation which would clearly result in the added Defendant making a net profit of £422 which he would be entitled to retain.

/There will, ...

There will, in the result, be judgment for the Defendant against the Plaintiff with costs as between party and party to be taxed or agreed.

There will be judgment for the Plaintiff for £165 against the added Defendant with costs as between party and party to be taxed or agreed. There will be judgment for the added Defendant for £78 against the third party with costs as between party and party to be taxed or agreed, together with the costs payable to the Plaintiff by the added Defendant.

Dated the 14th day of June, 1966.

Chas H Graham-Perkins

(CHAS. H. GRAHAM-PERKINS)
PUISNE JUDGE (AG.)