



[2012] JMSC Civil 14

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

**CLAIM NO. HCV 5215 OF 2008**

<b>BETWEEN</b>	<b>ADRIAN BLAKE</b>	<b>CLAIMANT/ANCILLARY DEFENDANT</b>
<b>A N D</b>	<b>MARK ROBINSON</b>	<b>1<sup>ST</sup> DEFENDANT/ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>R&amp;B AUTOZONE LTD.</b>	<b>2<sup>ND</sup> DEFENDANT/ANCILLARY CLAIMANT</b>

**Franz Jobson & Lawrence Phillpotts-Brown instructed by Clough, Long & Company for the Claimant**

**Philmore Scott & Camille Neal instructed by Philmore Scott & Associates for the Defendant.**

**HEARD: OCTOBER 18, 2011 & FEBRUARY 13, 2012**

**CORAM: ANDERSON, K. (J.)**

[1] This matter concerns the alleged purchase of a motorbike by the Claimant from the Defendant and the failure or refusal of the Defendant to hand over to the Claimant import documents for the said bike, in order that the Claimant can thereby be enable to have that motorbike registered in his own name. The Defendant has Counter Claimed, seeking damages arising from that which he contends, is the failure of the Claimant to pay the required purchase sum for the said motorbike, which is presently and has indeed for some time now, been in the Claimant's possession. By Order of this Court which was made after the respective cases of both sides had been closed, R&B AutoZone Limited was added as a Claimant in respect of the Counter Claim. Additionally, the Defence was amended primarily so as to reflect that it is R&B AutoZone Limited that is the owner of the relevant motorbike and that R&B AutoZone Limited has deliberately refused to have the import documents for the said motorbike handed over to the

Claimant, as the Claimant has not paid for the purchase of that motorbike. The Defendant has alleged in his Defence, that R & B AutoZone Limited only allowed the Claimant access to the motorbike, such that he now has possession of same, arising from the personal acquaintance as between the Claimant and the Defendant and an alleged mutual understanding that the Claimant would, not long after such access to the said motorbike was provided to him, pay in full for same.

[2] It has not been disputed by Mark Robinson in his evidence as given, that he is not the owner and was never the owner of the relevant motorbike. The motorbike was imported by R & B AutoZone Limited which is a company that the Defendant is the majority shareholder of. In answer to a question posed to him by the Court during the Trial, the Defendant expressly made this clear. No challenge was posed by the Claimant's counsel, to the Defendant's evidence in this regard, this although opportunity was afforded to the Claimant's counsel by this Court to have done so, if he had so wished, as the respective parties were invited by the Court, upon the conclusion of the Court's questioning of the said witness, to ask any questions that they respectively wished, arising out of the Court's questions of the said witness (being the Defendant). Additionally, a customs import document for the said motorbike was admitted into evidence as an exhibit at Trial and that document also makes it clear that the Defendant is not the owner, nor importer of the said motorbike. The owner and importer thereof, is R & B AutoZone Limited. I accept this evidence.

[3] In the circumstances, I am duty-bound to conclude that the Defendant's Counterclaim, or in other words the Counterclaim by Mark Robinson as against Adrian Blake, must fail. That Counterclaim was clearly not instituted by the appropriate party and thus, the Defendant's counsel, albeit very, 'late in the day,' applied for and obtained the permission of this Court to have R & B AutoZone added as a Claimant in respect of the Counterclaim. The merits of the Counterclaim as made by R & B AutoZone Limited are dealt with below.

[4] Insofar as the original Claim as filed by the Claimant against the Defendant is concerned, once again it follows inevitably, that the same must fail, insofar as the Defendant cannot lawfully be expected to transfer ownership of a motorbike which he does not own. Whilst the Defendant may be the controlling mind behind R & B AutoZone Limited – as indeed was that which the Defendant essentially agreed to during his testimony, nonetheless, the company which he is the majority shareholder of, this being R & B AutoZone Limited, is a separate legal entity and therefore a Claim would have had to have been filed against R & B AutoZone Limited, rather than as against Mark Robinson, in order to have any valid prospect of success. This not having been done with respect to the Claim as originally filed, such Claim which was brought only as against Mark Robinson, just as the Counterclaim of Mark Robinson (the Defendant), must, or necessity, fail. That is not however, the end of this matter, insofar as this Court is concerned, since there still exists the Counter-Claim instituted by R & B AutoZone Limited and added to that, the Claimant applied in Chambers, on the same date when the Application for amendments were made by the Defendant (as aforementioned) to amend the Claimant's Claim Form and Particulars of Claim, and allowed for the company – R & B AutoZone Limited to be added as a Second Defendant in respect of the Claim. Those amendments as then sought and which were allowed by this Court, are discussed below.

[5] The amendments to the Claimant's Claim Form and Particulars of Claim and the addition of a party as a Defendant, were essentially as follows:

- (i). R & B AutoZone Limited was added as a Defendant in respect of this Claim; and
- (ii) Whenever the word 'Defendant' appears in the Claim Form and Particulars of Claim, there is to be substituted in place thereof, the word – 'Defendants'; and
- (iii) In paragraphs 15 and 16 of the Particulars of Claim, the words – 'First Defendant', shall replace and be substituted

for the word 'Defendant', following on these amendments having been so granted, I will hereafter in this Judgment, refer to Mark Robinson, as 'the First Defendant' and R & B AutoZone Ltd., as 'the Second Defendant.'

[6] The Claimant's witness statement was, after objection had been made by learned defence counsel to various aspects thereof, edited by the Court before the remaining aspects of same were accepted as the Claimant's evidence-in-chief. The Court ruled in that regard, that paragraph 5 would be deleted in its entirety and other paragraphs would also either be deleted in their entirety or alternatively, that deletions from those other paragraphs would be made. In paragraph 6, the words – 'that subsequent to the internal transfer made by the Claimant to the Defendant's account', were deleted. In paragraph 7, the words – 'after the transfer were deleted. Paragraph 10 was deleted in its entirety. In paragraph 13, the words – 'I filed a report with the police at the Constabulary Station at 142 Maxfield Avenue, Kingston 10,' were deleted. I will just briefly state why it was that either these paragraphs or portions of paragraphs of the Claimant's witness statement were deleted. It is because there was a failure to disclose the documents referred to in those respective paragraphs in a List of Documents. Defence counsel submitted at Trial that no List of Documents had, even by then, been served on their office. This was accepted by the Claimant's Counsel and it must be stated here that it was surprising to this Court that the List of Documents was never, it seems, actually served on the First Defendant's Counsel who is, of course, also the Counsel for the Second Defendant. There was a List of Documents filed by the Claimant on November 13, 2009. The copy of same which currently exists on the Court file with this Court's date stamp impressed on it, is unsigned. Also, in that List, whilst the internal transfer document and the motor vehicle import documents have been referred to, no police report is referred to therein, nor has any letter from the Defendant been disclosed anywhere therein. Some of these documents were appended to the Claimant's witness statement, but some were not. In addition, the document

referred to as 'Exhibit A' in paragraph 3 of the Claimant's witness statement, has not actually been appended to the Claimant's witness statement. Even if all of the Claimant's available documents had been so appended to the Claimant's witness statement, this would not, to my mind, have obviated the necessity for the Claimant to have served a comprehensive List of Documents upon the Defendants prior to Trial, as all such documents were clearly obtained by the Claimant in advance of the Trial's commencement. That, 'necessity' as I have termed it, arises from the clear provisions of **Rule 28.14 (1) of the Civil Procedure Rules, which provides that – 'A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial.'** Accordingly, I concluded that insofar as no List of Documents had been served by the Claimant on the Defendant, the relevant documents were not properly made available for inspection and as such, the Claimant could not, in his witness statement, rely on the contents of those documents.

[7] From the evidence which was presented before me at Trial it appears that the agreement between the relevant parties for the purchase of the Honda 600 RR 2007 Motorbike was an oral one. In that regard, the Claimant testified that as far as he knows, Mr. Robinson, the First Defendant as the operator of R & B AutoZone Limited, sells motorbikes and cars. The Claimant actually obtained the key for the relevant motorbike from a secretary employed to R & B AutoZone Limited and got the motorbike from the place where the vehicles and motorbikes sold by R & B AutoZone Limited – the Second Defendant, are kept. Surprisingly however, whilst testifying under cross-examination, the Claimant said that he does not agree that the motorcycle is owned by R & B AutoZone Limited. Very shortly thereafter though, while continuing his testimony under cross-examination, the Claimant stated that he got access to the motorbike because he paid for it. He then went on with his testimony, as follows- 'As you said, it is an auto dealer and to access motorbikes you have to pay for it. You are not going to get it out unless you pay for it. That is what it is.' From that testimony as

quoted, it does appear to this Court that the Claimant at all times knew that he was purchasing the relevant motorbike from the Second Defendant and that the purchase transaction was being conducted in the expected and typical business - like manner, insofar as the Claimant would be able to use the motorbike and take away the motorbike for his personal use, once he paid for the same. Whilst the Claimant knew the Defendant, I do not accept the First Defendant's testimony that the motorbike was loaned to the Claimant and that the Claimant was told that he could keep/use that motorbike until his problems with his Olint account, in which he had the funds which he would use to pay for the purchase of the said motorbike, were sorted out. The Claimant testified during re-examination, that the payment transaction took place a few minutes after 6P.m. and he was given the motorcycle, but the First Defendant's secretary had by then, left for the day. In goodwill, he said that he would return for the 'papers' (those presumably being the transfer of ownership papers) as he expressed to the First Defendant, the urgency in licensing the motorcycle for use in rallies. He then got the key for the motorcycle and rode it home. In response to questions put to him by the Court, the Claimant testified that the purchase price agreed to the motorcycle, was U.S. \$8500 (J\$650, 000 at that time). It was agreed between the parties that the payment would be made in United States currency. The Claimant testified during cross-examination, that he did not get a receipt arising from the transfer of the funds to the first Defendant.

[8] The first Defendant's version of events is, as is to be expected, different in certain material respects. Whilst the First Defendant agrees that he was at the time when the relevant motorbike was being sold to the Claimant, acquainted with the Claimant and also, that the motorbike was to have been sold to the Claimant for J\$650,000.00 he does not agree that he was ever paid this sum by the First Claimant, either in United States currency or the Jamaican equivalent thereof. In his witness statement, the First Defendant stated that the Claimant had expressed an interest in purchasing the relevant motorbike and had informed that he would pay for the same through his Olint account. The Claimant, he

alleges, then stated to him that in order for payment to be received, the First Defendant must supply him with his Olint account (This Court understood this phraseology as meaning – supply the Claimant with information as to the First Defendant's Olint account number). In response to that request as allegedly made of him by the Claimant the First Defendant informed the Claimant that he did not have any such account with Olint and that it was his understanding that Olint was in trouble. The Claimant, he says, then assured him that the problem was temporary and that by the latter part of 2007 the problem would be resolved. The First Defendant alleges that he and the Claimant then approached a mutual friend of ours – this being a Mr. Earl Barnett, and asked him to facilitate the transfer of the equivalent of \$650,000.00 Jamaican Dollars to an Olint account. In his witness statement, the First Defendant has not expressly stated what he knows as to the outcome of the transfer that was to have been made by the Claimant to an Olint account. The 'long and short of it' however, appears to be that, according to the First Defendant's evidence-in-chief as per his witness statement, the relevant transfer of funds was never in fact made and thus it was further agreed between the parties that the import documents for the motorbike would be withheld until full payment was made and that if the transfer via Olint was not resolved by May, 2008, then the Claimant would pay the sum of \$650,000.00 Jamaican Dollars for the motorbike. That sum was however, never received by the First Defendant and accordingly, the import documents for the motorbike have been withheld until now and in addition, the company which the First Defendant is one of the principals of and which is in fact the owner of the relevant motorbike, is Counter-Claiming, for the sum of \$650,000.00.

[9] I do not accept the First Defendant's version of events, in material respects. These are my reasons for so concluding: - Under questioning from this Court, the first Defendant testified that at the same time when he and Mr. Barnett and the Claimant were in the office together – this being an office at R & B AutoZone Limited, Mr. Barnett told him that the Olint accounts were frozen. If this were truly so, why then would the First Defendant have thereafter handed

over the bike to the Claimant with the expectation or hope that the problems with Olint either could or would be resolved by May of 2008? What could or would have led to that expectation? Certainly it could not have been an assurance from the Claimant, who did not it seems, if the First Defendant's version of events is to be believed, even know that his Olint account was frozen? If he did not even know that, how could anyone expect that he would know that the problems with Olint would have been resolved and/or by when the same would have been resolved? Furthermore, this very important detail as to the First Defendant having been informed by Mr. Barnett whilst they were in the office along with the Claimant, that the Olint accounts were frozen, was never stated by the First Defendant in his evidence-in-chief, either as per his witness statement or via any amplification thereof. In this Court's view, that important detail was not so mentioned, because it is a fabrication of recent vintage. Additionally though, whilst testifying under cross-examination, the First Defendant had testified directly to the contrary of that which he had testified to in answer to the question on from the Court as to how it is that he came to know that the Olint accounts were frozen. Under cross-examination the First Defendant testified that – **“In my office via computer, with Mr. Blake and Mr. Barnett present, Mr. Barnett and Mr. Blake did not effect transfer of the funds from Mr. Blake's account to Mr. Barnett's account. Both accounts were frozen. I know this because I read the Gleaner.”** Thus, on the First Defendant's own evidence, on one version, he knows that the Olint accounts were frozen, because he reads the Gleaner. 'The Gleaner' is well known in Jamaica, as being a daily newspaper. On another version, he knows this because he was told same by Mr. Barnett, while the three men were in the office together. One or both these versions clearly must be a fabrication and this Court believes that both are fabrications. Also, why would the First Defendant, if he had not been paid by the Claimant on that day, have, as he testified, during cross-examination, permitted the Claimant to take away the motorbike for 'viewing'? If the money was not paid by May, 2008 bearing in mind that the financial transaction of the transfer of funds for the purchase of the relevant motorbike was to have occurred in 2007, then by May,



2008, that motorbike would have been second-hand and thus, not worth then, the same value as when the Claimant obtained it. Why then, would the First Defendant, without having had, at that time, any assurance of payment via Olint, and knowing at that time, as he said he did, that the Olint accounts were frozen, have enabled and facilitated the Claimant leaving the offices of R & B AutoZone Limited with the relevant motorbike, particularly if it was just so as to facilitate the viewing thereof by the Claimant? I find the First Defendant's version of events in this regard, also highly improbable.

[10] This Court, on the other hand, insofar as the material respects thereof are concerned, accepts the Claimant's evidence that he paid for the relevant motorbike via transfer from his Olint TCI ( This acronym 'TCI' I understand to be referring to Turks and Caicos Islands). Of course therefore, whilst Olint Jamaica's accounts may have been frozen at that time and the Defendant's counsel has passed on to this Court, legal authority in this regard, this does not mean that the payment could not or was not made from an Olint Turks and Caicos Islands account, at the material time. The Claimant testified under cross-examination therefore, that it is not to his knowledge, that on May 9, 2008, Olint TCI was not permitted to trade, by virtue of a Cease and Desist Order which the Financial Services Commission ('F.S.C.') had obtained in 2007. Of course though an 'F.S.C.' Order in Jamaica clearly could not and would not automatically have been binding in the Turks and Caicos Islands at the material time. In fact, it may be that under no circumstances, could it have been binding at all. Thus, in the absence of there having been any evidence provided to this Court to make it apparent that the relevant funds for purchase of the motorbike, could or would not have been paid by the Claimant, this Court is not prepared to make that finding and to the contrary, accepts that the Claimant made payment to the Defendant via that account of his. Having, as this Court has now determined, made such payment, it certainly would have been useful if the Claimant had had a receipt evidencing same. The Claimant has testified that he did not receive a receipt from the First Defendant, but that the receipt was, 'generated from the

transaction itself.' By this testimony, I understood the Claimant to mean that he was of the view that having received the motorbike, that in and of itself constituted profound evidence that he had paid for the same. This is not, from a Jamaican viewpoint, by any means an uncommon view and thus, this Court accepts the Claimant's evidence in that regard.

[11] **In the circumstances therefore, my Orders are as follows:-**

- (i). The 2<sup>nd</sup> Defendant shall provide to the Claimant forthwith, the import documents for the Honda 600 RR 2007 motorbike with Chasis number – JH 2 PC 40057M 002723 and shall forthwith execute in favour of the Claimant, a transfer of ownership of same.**
- (ii). The Claimant's Claim against the First Defendant is dismissed.**
- (iii). The 1<sup>st</sup> Defendant's Counterclaim is dismissed.**
- (iv). The 2<sup>nd</sup> Defendant's Counterclaim is dismissed.**
- (v). Each party shall bear their own costs.**

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**Honourable Kirk Anderson (J.)**