

Sup. Ct. Summary Judgment - Summons for - S. 79(1) & 2 - read the Procedure Code - Sale of car by defendant to Plaintiff - Plaintiff had NMCS bond - can from there probably have a court order by criminal court that car be returned to owner - Suit by Plaintiff against Defendants - whether any defence to act on - whether should require leave to defend, Principles reviewed. Application for summary judgment dismissed. Defendant's grounds unconditional leave to defend. (1/39/93)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. B346/93

BETWEEN	BRYAD ENGINEERING LIMITED	PLAINTIFF
A N D	CARLAND INVESTMENTS LIMITED	1ST DEFENDANT
A N D	TARIQ MALIK	2ND DEFENDANT

W.K. Chin-See Q.C. and Garth McBean for Plaintiff
instructed by Messrs. Dunn Cox & Orrett -
Attorneys-at-Law

David Muirhead Q.C. and Gregory Lopez for Defendants
instructed by Lopez & Lopez, Attorneys-at-Law

Heard 22nd and 24th February, and April 6, 1994

IN CHAMBERS

RECKORD J.

This is a summons for summary judgment brought by the Plaintiff against both defendants pursuant to Section 79(1) of the Judicature Civil Procedure Code.

The Statement of Claim filed in support of the Writ reads as follows from paragraph 3.

By an oral agreement made in March 1993 between the Plaintiff and the Defendants, the Defendants agreed to sell and the Plaintiff agreed to buy a 1991 Mercedes Benz motor car for a price of \$2,350,000.00

It was an implied term of the said agreement that the Defendants had or, alternatively at the time of the delivery of the said motor car to the Plaintiff the Defendants would have the right to sell the said motor car.

Further, implied warranties of the said agreement by the Defendants were as follows:

- (a) That the Plaintiff would have and enjoy quiet possession of the said motor car.

Civil Record

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- (b) That the said motor car should be free from any charge or encumbrance in favour of any third party.

On or about the 22nd day of March 1993 the Defendants delivered the said motor car to the Plaintiff who then paid the price thereof namely \$2,350,000.00.

In breach of the said conditions and warranties:-

- (a) The Defendants had no right at any time to sell the said motor car.
- (b) The Plaintiff did not have or enjoy quiet possession of the said car after the said sale.

P A R T I C U L A R S

The said motor car was at all material times the property of one Percival Thomas and/or Leyman Strachan. On or about the 31st day of August 1993 the Plaintiff was obliged to deliver up possession of the same to the police who subsequently arrested and charged one Carolyn Warren who was on the 17th day of September 1993 convicted for the offence of Larceny of the said motor car.

On the 17th day of September 1993 the said Court before which the said Carolyn Warren appeared ordered the return of the said motor car to the said Percival Thomas.

By reason of the matters aforesaid the Plaintiff has lost the said 1991 Mercedes Benz motor car and has suffered loss and damage.

Alternatively in the premises the consideration for the payment of the said sum has wholly failed and the defendants have had and received the said sum to the use of the plaintiff.

PARTICULARS OF SPECIAL DAMAGE

Purchase price for 1991 Mercedes Benz Motor Car

\$2,350,000.00

And the Plaintiff claims:-

- (1) Damages
- (2) Repayment of the said sum of \$2,350,000.00
- (3) Interest
- (4) Cost

Plaintiff's Case

It was submitted on behalf of the Plaintiff that all the conditions to come within the provisions of Section 79(1) of the Civil Procedure Code have been satisfied and unless the defendant shows he has on the merit a good defence to the action, then leave to enter summary judgment should be granted. Plaintiff's claim is based on Section 13, a, b and c of the Sale of Goods Act.

13. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is ---

- (a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (c) an implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

See Kowland v. Divall (1923) 2 Q.B. 350

Microbeads AC and another v. Vinhurst Road Markings Ltd (1975) 1 W.L.R. 529

Benjamin's Sales of Goods (1961) 2nd Ed. para. 262

The Defendants had relied upon false documentation provided by Carolyn Warren who could not convey title. She pleaded guilty to larceny. The Defendants could not convey title to the Plaintiff. Paragraphs 1 - 6 of the Statement of Claim have been admitted by the defence.

The allegations of conspiracy contained in paragraph 9 of the Defence do not affect the plaintiff. The other issues raised in the defence e.g. the proceedings in the R.M. Court Kingston against Carolyn Warren and the issue before the Full Court were not raised by the Plaintiff. Issue of title cannot be determined on Certiorari.

The Plaintiff has properly brought a case for breach of ~~the~~ strict conditions of Section 13(a) of the Sale of Goods Act to which there is absolutely no defence. This Court should therefore grant leave to the Plaintiff to enter summary judgment for the refund of the purchase price of \$2.35M on the basis that the consideration has wholly failed with such interest as the Court thinks fit, this being a matter of commercial nature - say 15 - 20%.

Admittedly, the Defendants are out of pocket to some extent in this case but they have not suffered as the Plaintiff has. They have the benefit of the Plaintiff's money. The only sufferer is the Plaintiff and Plaintiff ask for redress.

"It may be the seller is innocent himself,
but when one or other must suffer the loss
should fall on the seller" (per Lord Denning
MR in Microbeads v. Vinhurst (Supra)

If the Court is not mindful to give judgment under Section 13(a) of the Sale of Goods Act, judgment should be given under Section 13(b) with damages to be assessed for breach of warranty to have and enjoy quiet possession.

If leave to defend is being given then it should be on condition that the defendants obtain an order from the Full Court quashing the Order of the learned Resident Magistrate and making an Order giving the Plaintiff title and possession of the vehicle.

The Defendants' Case

Mr. Muirhead for the Defendants referred to the Sale of Goods Act and in particular Sections 23 and 24 which read as follows:

23. When the seller of goods has voidable title thereto but this title has not been avoided 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.

24. (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representatives, notwithstanding any intermediate dealing with them.

(2) Notwithstanding any enactment to the contrary where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

He submitted that a plea of guilty to a charge of larceny was not encompassed by Section 24. The law should not be used as an instrument of fraud but to ensure that justice is done. It would be a most unhappy day if Section 24 could be circumvented by a mere plea of guilty and thereby deprive innocent, reputable and responsible citizens of rights clearly acquired and lawfully transferred. The words "Prosecuted to conviction" means that the evidence must be such that a conviction can in law properly be made and sustained. If facts establish fraudulent conversion a plea of guilty of larceny cannot trigger Section 24.

This Court should not wish to pre-empt the order for Certiorari and should abide the outcome of the Full Court.

On the merits of the case the Defendants should be given leave to defend. There is a point of law as to the proper construction of Section 24. The power to give summary judgment is intended only to apply to cases where there is no reasonable doubt that the Plaintiff is entitled to judgment. The Defendant ought not to be shut out from defending unless it is very clear that he has no case in the action.

In Rowland v. Divall (Supra) There was no contest that the car had in fact been stolen. (Microbeads (Supra)) is inapplicable and inappropriate.

The dispute in the instant case is not on the facts but on the law. Carolyn Warren, on the facts, represented herself to be the owner. In ordinary civil proceedings she would be estopped from asserting otherwise.

See Fuller and Co. Ltd. vs. T.J. Brooks Ltd. T.L.R. Vol. 46 Page 233

The Civil Court "is not bound by the finding of the jury in criminal case even if that finding were clear."

Plea of guilty - effect of plea - See Archbold 41st Edition para. 4 - 58.

Carolyn Warren was charged on information for fraudulent conversion. On the facts presented she could not be convicted for the offence of larceny -

See Sec. 66(1) of the Larceny Act.

Third parties who were bona fide purchasers for value without notice had acquired rights in the vehicle and therefore these rights cannot be lightly be set aside by a mere plea of guilty to an offence charged and accordingly the Court should be satisfied firstly on the evidence upon a proper adjudication that the facts could in law provide the basis for a conviction on the offence charged - (See Oaten v. Outy 88 L.J. reports K.B. page 1072 at 1080).

The words "Without proceedings to convictions" do provide the Court as to the proper construction to be placed on the words "Prosecuted to conviction" in the Sale of Goods Act. What is the effect of plea of guilty? If it cannot be supported then the law as to the effect of such conviction does not apply. Where facts alleged could in law support a conviction for the offence charged and a defendant pleads guilty and is sentenced then that ranks as a conviction. Primary meaning of the word "conviction" denotes a judicial determination of a case and it is usual that that arises after evidence and adjudication by the Courts.

The conditions required under Order 14 (White Book) for defendant to be given unconditional leave to defend have been satisfied.

See Halsburys. 4th Edition Vol. 41 para. 744 - 753 - Transfer of title in the Sale of Goods Act - Halsburys 1930 Edition - Volume 17. The indictment charged Carolyn Warren with larceny of car property of Percival Morris, yet the Resident Magistrate ordered that the car be returned to Percival Thomas. Because of the issues raised in the defence no condition should be laid down in granting leave to defend. The issue of Certiorari is an additional reason and not the substantial reason for seeking leave to defend.

In reply, Mr. Chin-See submitted that it was the indictment and not the information in the criminal case which determines whether charge should be fraudulent conversion or larceny. In the absence of clear evidence no one can go beyond the Order made in the Criminal Court e.g. the defendant did not appreciate nature of the charge or that the Resident Magistrate did not have facts on which he made the order for the indictment for larceny. The presumption 'Omnia Praesumuntur rite et Solemniter esse acta' applied. The Defendant was represented by Counsel and the plea of guilty of larceny was entered. For the words "prosecuted to conviction" -

See Archbold - 36 Edition 1966, para: 1092 P. 401

See also Niblett Ltd. v. Confectioners' Materials Co. Ltd. (1921 AER Rep. P. 459).

CONCLUSIONS

Section 79(1) of the Civil Procedure Code under which this summons is brought reads as follows:

79.(1) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.

The Supreme Court practice (The White Book) under Order 14 of the Rules of the Supreme Court (England) carries numerous cases in which these provisions have been dealt with. A few examples will suffice.

In Saw v. Hakin 5 TLR 72, it was said that "As a general principle where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even fair probability that he has a bona fide defence he ought to have leave to defend".

In Jones v. Stone (1894) A.C. 122 the Court held that "leave to defend must be given unless there is no dispute as to facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgment".

In Crawford v. Gilmore, 30 L.R. 11, 238. it was held "Summary judgment under this order should not be granted when serious conflict as to matter of fact or any real difficulty as to matter of law arises."

In Shephard v. Wilkinson 6 L.R. 13, the court said "The Summary jurisdiction conferred by this order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion."

"The defence set up need only show that there is a triable issue or question or that for some other reason there ought to be a trial; and leave to defend ought to be given unless there is clearly no defence on law as could have been raised on the former demurrer to the plea and no possibility of a real defence on the question of fact" (See Jacobs v. Rothe's Distillery Co. (1901) 35 L.T. 262 G.L.).

The Plaintiff must not only show that there is no defence to the action but also show that there is no fairly arguable point to be argued on behalf of the defendant.

The issues in this case are quite clear. The Plaintiff complains that through a defect in the Defendants' title it has lost the car it purported to buy from the Defendants and this in breach of the provisions of Section 13 of the Sale of Goods Act. On the other hand the defendants stoutly maintain that they were bona fide purchasers for value of the said car having bought the same in good faith and without notice of any alleged defect in the title of Carolyn Warren and as such acquired a good title to the car as provided by Section 23 of the said Act.

Having acquired a good title to this motor car they sold same to Plaintiff but through some unexplained and questionable proceedings in the R.M. Court at Sutton Street, Kingston an order was made in that Court depriving the Plaintiff of the ownership and possession of the said car much to the surprise and embarrassment of the Defendants.

The defendants have filed a defence and affidavit in support and are anxious to have the issues determined at a trial. Can it fairly be said that they have no arguable points to argue? I think not. I think they have serious questions of law to be resolved. The defendants should have their day in Court.

Accordingly, the application by the plaintiff for summary judgment is refused and the summons is dismissed. The defendants are given unconditional leave to defend.

Costs to the defendants to be taxed if not agreed

Cases referred to

- (1) Rowland v Divall (1923) 2 Q.B. 500
- (2) Microbeads AC and others v Venhurst Road Markings Ltd
1 A 2
- (3) Buller and Co. Ltd vs. T.J. Brackley Ltd. TLR vol 46
235
- (4) Dalen v Ouly 88 LT rep K.B. 1072
77
- (5) Niblett Ltd v Confectioners' Material Co Ltd (1921) All ER 107
- (6) Saw v Harkin 5 TLR 72
- (7) Jones v Stone (1892) A.C. 122
- (8) Crawford v Gilmore 30 LR 238
- (9) Shepherd v Wilkinson 2 6 TLR 13
- (10) Jacobus Brothers Distilling Co (1901) 85 LT 262 6-6