JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 24/89

CORAM: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.(AG.)

BETWEEN RALPH EDWARDS PLAINTIFF/APPLICANT

A N D LEONARD V. CHIN DEFENDANT/RESPONDENT

A. Mundell for Appellant

N. Wright for Respondent

April 8 and June 4, 1991

BINGHAM, J.(AG.)

This is an appeal against a judgment of Marsh J, in the Supreme Court on 23rd September, 1989 whereby he gave judgment for the defendant and made no order as to costs against the unsuccessful plaintiff.

On 8th April, at the end of the hearing of the arguments we dismissed the appeal with costs to the respondent and affirmed the decision of the learned judge. We promised then to reduce our reasons to writing at a later date and this we now do.

The following are the facts: Ralph Edwards, the appellant was in 1984 a member of the Stage Carriage and Mini-Bus Association which body has a franchise to operate buses in certain sections of the Corporate Area.

In January 1984, the association acquired a number of buses by way of a credit sale agreement from the Jamaica Omnibus Services Limited. The appellant acquired one of these Buses, a J50 Mini-Bus, from the association on credit. The purchase price was $34,000.00. He was required under the agreement with the association to pay monthly instalments of $73[illegible] He [illegible]t possession [illegible] the bus [illegible] January 1984

and operated it from then until June 1984. Although from his account he grossed about $900.00 daily during this period, he does not appear to have built up any capital reserve because when the bus needed major repairs in 1984 he was unable to meet those expenses.

The unchallenged evidence of the respondent was that the appellant had difficulty operating the bus from the out-set and that during the period when he had control of the vehicle he had problems in maintaining it in service on a regular basis on the Rock Hall route to which he was assigned. It was the respondent who on several occasions gratuitously assisted the appellant by favouring him with second-hand tyres (recaps) among other items.

The breakdown of the vehicle in June 1984, however, signalled the need for major repairs to be carried out, which, needless to say, were beyond the financial capacity of the appellant. In desperation he turned once more to his erstwhile benefactor, the respondent, who himself not only operated a fleet of vehicles but was also in competition with the appellant as he operated some buses transporting passengers on the same route No. 33 Kingston to Rock Hall. The repairs to the bus required in particular:-

1. a replacement of the engine
2. Repairs to the crank-shaft
3. Re-lining of the brakes

The respondent's evidence is that the bus was repaired at a cost of about $20,000.00. Although the appellant agreed that the cost of replacing the engine was $12,000.00 and conceded that he was prior to the repairs being carried out, indebted to the respondent to the tune of some $1,200.00 there is no mention made by him of any estimate as to what would have been the cost of the additional repairs.

The respondent agreed to assist the appellant in repairing the vehicle on condition that he took over control of the bus in order to ensure payment of the amount expended by him. The profits realised from the operation were to be utilised in meeting all outgoing expenses involved including the monthly instalments due to the association in respect of the bus. The appellant, faced with no other viable alternative willingly accepted the respondent's proposal. An agreement prepared in the respondent's office was duly agreed. It reads:

> " AGREEMENT RE LEYLAND BUS J50.
>
> CHASSIS NO. JYTE 070446
>
> ENGINE NO. 5327965
>
> REGISTRATION NO. NE 0573
>
> This agreement serves to confirm that I Ralph Edwards of..... agrees that the abovenamed bus allotted to me by STAGE CARRIAGE MINI BUS ASSOCIATION by way of HIRE PURCHASE AGREEMENT made on 16th April, 1984 and that I owe Mr. L.V. Chin of 119-121 Mountain View Avenue, Kingston 3, the sum of $12,322.90 and I am turning over the same (J50) bus to him to operate until I repay the said sum of $12,322.90 together with or any other debts that I may owe to Mr. Chin at (12½%) interest monthly. Mr. Chin agrees that providing the bus (J50) operates on a full seven (7) days a week he would give me an allowance of $300.00 per week to be added to the current account.
>
> The bus will be solely at Mr. Chin's disposal to operate on Rock Hall Route (Route 33). He will continue employing the present workers provided they can come to working terms.
>
> SGD. L.V. CHIN
>
> SGD. RALPH EDWARDS
>
> WITNESS BY DANIELS J.P. KINGSTON
>
> I Ryland Wilson, President of the STAGE CARRIAGE MINI BUS ASSOCIATION acknowledge that S.C.M.B.A. has no objection to the above arrangement.
>
> SGD. R.S. WILSON (PRESIDENT)
>
> STAGE CARRIAGE MINI BUS ASSOCIATION."

In consenting to this arrangement with the respondent the appellant sought no independent legal advice. Had he taken such a course provision would have been made for an itemised statement of the appellant's indebtedness at the time that the

respondent took over control of the vehicle. The result was that at the end of December 1984 when he sought to ascertain from the respondent the state of his indebtedness he was told that the amount was $40,000.00. The appellant then expressed the desire to get back his bus and the respondent agreed to let him have it back for $20,000.00 being one-half of the amount due to him. The latter by his seeming act of generosity was no doubt prepared to "cut his losses." The appellant contacted one Mrs. Christine Davis, a Business-woman who was also a transport operator and requested her assistance. Mrs. Davis, after obtaining legal advice, agreed to assist the appellant on condition that the bus be transferred into her name and controlled by her until the debt was liquidated. The sum of $20,000.00 was paid over to the respondent at his office by Mrs. Davis in the appellant's presence in April 1985. He was prepared to accede to such an agreement so long as the respondent no longer had control of the vehicle.

The appellant contends that during the period July 1984-May 1985 when the respondent was in control of the vehicle and operating it, the operations showed a profit. He, however is not able to say what was the net yield after clearing expenses over the period. As no Statements of Account were requested from the respondent, nor was any supplied, save and except one prepared by the respondent's Accountant/Book-keeper (Exhibit 10) which by its very nature was self-serving, the crucial question at the end of the day which fell to be determined was, what was the true state of the account as between the parties relating to the operation by the respondent of the Bus over the relevant period?

In the light of the appellant's contention his claim against the respondent is not contractual by nature. Rather it must be a claim for an account.

Accordingly, his claim was for damages for breach of contract being:-

1.	The value of the bus	$75,000.00
2.	Loss of income from July 1904 to date of Writ	455,000.00
		$530,000.00

This claim was in my view wholly misconceived.

By his defence the respondent sought to traverse the allegations made by the appellant and to raise the question of the unprofitability of the route without setting out any sum as being a basis for so contending. This one would have expected, ought to have alerted Counsel below at the interlocutory stage to resort to the method of discovery in unearthing material upon which to launch their claim. No such course, however, was resorted to and this left the issues to be determined by the learned trial judge at the hearing to be such as were based entirely upon speculation in so far as the appellant's case was concerned.

Before us Mr. Mundell for the appellant filed six supplementary grounds of appeal. He obtained leave to argue Ground 1. This stated:

> "I. That the learned trial judge failed to consider or give sufficient consideration that the gravamen of the Plaintiff's case was that the Defendant/Respondent was given control of the bus J50 to operate not for his Defendant/ Respondent own profit but to guarantee repayment of loans advanced to the Plaintiff/Appellant."

This ground as framed turned for its determination upon questions of fact as to -

> (i) whether the learned trial judge accepted the appellant's account that the bus was operated by the respondent at a profit sufficient to liquidate the loan made by him as well as clearing all other expenses and outgoings in relation to the bus or,

(ii) whether the judge accepted the respondent's account that the venture proved unprofitable as the route was uneconomical to operate and that in accepting $20,000.00 in settlement of the sum due to him, he was in fact cutting his losses.

In this regard, the learned trial judge having seen and heard all the witnesses found that "he accepted the defendant and his witnesses as witnesses of the truth." The inevitable conclusion is a failure of the appellant's claim which is not in any way affected by Mr. Mundell's self-consuming ground which has nothing to commend it.

Accordingly despite Mr. Mundell's efforts we were not persuaded to interfere with the findings of the trial judge. Hence the dismissal of the appeal and the consequential orders referred to earlier in this judgment.

WRIGHT, J.A. - I agree.

FORTE, J.A. - I concur.