

**JUDGMENT**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 0289 OF 2003

BETWEEN	MARTIN HENRY	CLAIMANT
AND	MICHAEL CARTY	1 <sup>ST</sup> DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	2 <sup>ND</sup> DEFENDANT
AND	CORPORAL ROHAN WHITE	3 <sup>RD</sup> DEFENDANT
AND	DONNA JONES	4 <sup>TH</sup> DEFENDANT

Mr. E. Gentles instructed by Gentles & Willis for the Claimant.

Mrs M. Shaw-Currie instructed by Townsend Whyte & Porter for the 1<sup>st</sup> Defendant.

Mr. B. Moodie and Ms. L. White instructed by the Director of State Proceedings for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Mr. M. Nicholson instructed by Nicholson Phillips for the 4<sup>th</sup> Defendant.

**Heard: 1<sup>st</sup> and 2<sup>nd</sup> May 2007 and 23<sup>rd</sup> November 2007.**

**Mangatal J:**

1. This trial took place on the 1<sup>st</sup> and 2<sup>nd</sup> May 2007. On the 2<sup>nd</sup> after all of the evidence to be taken was completed, I ordered that the parties file their written submissions and copies of any authorities relied on by the 9<sup>th</sup> May 2007.

2. On the first day before the trial commenced Mr. Gentles on behalf of the Claimant applied to have the Defence of the 4<sup>th</sup> Defendant struck out on the basis there had been total non-compliance by the 4<sup>th</sup> Defendant with the case management orders; there was no standard

disclosure, no witness statement and no listing questionnaire filed. The 4<sup>th</sup> Defendant was in fact present in Court and Mr. Nicholson on her behalf, asked me to not only refrain from striking out the Defence, but also asked that the 4<sup>th</sup> defendant be allowed to give evidence, albeit there was such whole-scale non-compliance with the case management orders. Mr. Nicholson said that his client had been abroad and he did not get to contact her. He went on to surmise that the 4<sup>th</sup> Defendant also did not contact her Attorneys-at-Law because it was probably felt that the application to have the 4<sup>th</sup> Defendant removed from the Suit would succeed. It should be noted that Mr. Justice Sykes, who conducted a thoughtful and comprehensive case management conference, inclusive of the application to strike out the claim against the 4<sup>th</sup> Defendant, dismissed the 4<sup>th</sup> Defendant's application at the case management conference from as far back as 8<sup>th</sup> September 2004. It is therefore difficult to accept that the 4<sup>th</sup> Defendant could for over two years since my learned brother's ruling be harbouring the misconception that her name might still be struck out of the Claim before trial.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had filed their listing questionnaire out of time, which filing I ordered to stand in good stead.

4. As regards the question of the 4<sup>th</sup> Defendant giving evidence, Mr. Gentles was opposed to such a course. However, Mrs. Shaw-Currie on behalf of the 1<sup>st</sup> Defendant and Mr. Moodie on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants indicated respectively, that the Claimant himself has a case to prove of conspiracy between the 1<sup>st</sup> Defendant and the 4<sup>th</sup> Defendant, and may actually need the 4<sup>th</sup> Defendant to give evidence. Further, Mr. Moodie argued that it has to be proved who the rightful owner of the property is. Both Mrs. Shaw-Currie and Mr. Moodie therefore had no objection to the 4<sup>th</sup> defendant giving evidence in light of the way the Claim was pleaded.

5. My ruling was that this was an unusual situation in which, although the non-compliance with the case management orders was

stark, having regard to the manner in which the issues were joined, I did not think it appropriate or in the interests of justice to strike out the 4<sup>th</sup> Defendant's Defence. However, it would not be just to allow the 4<sup>th</sup> defendant to give oral evidence in the circumstances, particularly having regard to the terms of Rule 29.11 of the Civil Procedure Rules 2002 "the C.P.R.". Rule 29.11 states:

*29.11 (1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*

*(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.*

6. The 4<sup>th</sup> Defendant provided no good reason whatsoever for not applying for relief previously.

7. On the first day of trial Mr. Moodie also applied to have the witness statement of Corporal Rohan White dated 2<sup>nd</sup> June 2005, admitted into evidence as a Hearsay Statement on the basis that Corporal White is now dead. Based on the Notice and Supporting Affidavit filed by the Director of State Proceedings, I gave permission for the witness statement to be put into evidence as a hearsay statement pursuant to Section 31 E of the Evidence Act and Part 29 of the C. P.R.

### **The Claimant's Case**

8. The Claimant Mr. Henry's case is that he is a businessman who is presently the proprietor of Liquid and More, a business situated at Main Street, Manchester. Mr. Henry states that he at all material times was the lawful occupier and in lawful possession of premises at Main Street, Christiana, Manchester. He occupied those premises in the capacity of Tenant of the 4<sup>th</sup> Defendant. Mr. Henry says that he operated at these premises his business of selling dry goods, chemicals and toilet materials. Mr. Henry's wife is Claudia Henry. She was Claudia

Hutchinson before marriage and she used to assist him in the business. The 1<sup>st</sup> Defendant Mr. Carty is Mr. Henry's brother (or half-brother according to Mr. Carty).

9. Between 1998 and 2001 Mr. Henry worked as a store manager with Bestway Wholesale. His wife was also employed to Bestway. As store manager he earned \$15,000.00 per month and he says that his wife earned between \$15,000.00 and \$21,000.00 per month. Mr. Henry and his wife discussed the possibility of opening a business of their own and they started saving towards a business similar to Bestway Wholesale.

10. Mr. Henry while he was employed to Bestway had frequent contact with distributors and built up a very good rapport and credit rating with them.

11. According to Mr. Henry he started operating the business in October 2001 under the name Progressive Wholesale and Distributors Limited at Main Street, Christiana at premises owned by the 4<sup>th</sup> Defendant.

12. Mr. Henry says that he was in negotiation with the 4<sup>th</sup> Defendant and she advised him that the monthly rental was \$30,000.00. Mr. Henry requested the 1<sup>st</sup> Defendant Mr. Carty to speak to the 4<sup>th</sup> Defendant about the rent because he knew that Mr. Carty was very good at convincing people. Mr. Carty subsequently told him that the 4<sup>th</sup> defendant agreed to reduce the rent to \$23,000.00 per month.

13. On the 4<sup>th</sup> of October 2001 Mr. Henry says that he agreed with the 4<sup>th</sup> Defendant for the rental of the premises and on the 9<sup>th</sup> of October 2001 he paid to the 4<sup>th</sup> Defendant \$69,000.00. This sum represented one month's rent and two month's security deposit. Mr. Henry says that he subsequently rented a second shop from the 4<sup>th</sup> Defendant for use as a storeroom and the rent for this was \$10,000.00 per month making the total monthly rent \$33,000.00.

14. According to Mr. Henry before the business started he had discussed the subject with Mr. Carty and Mr. Carty agreed to give him a

loan to be used in the business. Mr. Henry claims that at no time did he discuss or agree for Mr. Carty to be part owner of the business. When he borrowed the money from Mr. Carty they had no arrangements about the terms of repayment.

15. According to Mr. Henry, he used the name Progressive Wholesale and Distributors Limited as Mr. Carty had a business Progressive Automotive Systems (Car Rental )Limited and because it was agreed that Mr. Henry could use the name. In paragraph 16 of his witness statement Mr. Henry continues "Also I did not want to use my name because of the competition with Bestway Wholesale to which I was employed."

16. Mr. Henry states that in keeping with this agreement he opened an account at the Bank of Nova Scotia, Christiana in the name of Progressive Wholesale and Distributors Limited and on this account Mr. Henry signed as the Manager and Mr. Carty as Director. According to Mr. Henry this was the same reason that he used the name in the business.

17. Sometime during the year 2001 Mr. Henry states that he did receive various sums of money from Mr. Carty totaling \$236,933.44. In addition to those sums of money Mr. Henry says there was \$500,000.00 including the sum of \$200,000.00 which he had.

18. Mr. Henry says that there was never any agreement for him to work for Mr. Carty and there was no agreement for him to draw cheques to pay creditors, suppliers, ancillary and support staff. They had no arrangement for Mr. Henry to pay himself a salary or to make daily lodgments to the Bank. I note however that in cross-examination Mr. Henry stated that from cash generated from the Wholesale business he paid utility bills for Mr. Carty and these utility bills came from or related to the main branch of Progressive Automotive business. He paid these bills for approximately 4-5 months.

19. Mr. Henry in his witness statement said that at the time he started the business he accepted the advice of the Collector of Taxes and

operated as a sole trader. In cross-examination however Mr. Henry said that he was never so advised.

20. In March 2003 Mr. Henry states that the business had stock valued at about \$4,000,000.00. There was a computer system which stored all the information relating to the business and there were 275 gallons of bleach stored outside the shop in drums.

21. Mr. Henry started a branch of the business in Santa Cruz, St. Elizabeth but this branch did not do well and was closed in July 2002.

22. On Saturday 22<sup>nd</sup> February 2003 he was at his business place when Mr. Carty and the 3<sup>rd</sup> Defendant came there. The 3<sup>rd</sup> Defendant was dressed in Police Uniform with the number 6734 affixed. This conflicts with what the 3<sup>rd</sup> Defendant says in his Witness Statement as Corporal White states that he was dressed in plainclothes. The 3<sup>rd</sup> Defendant handed Mr. Henry a letter written by an Attorney-at-Law which purported to terminate Mr. Henry's contract of employment as manager of the store.

23. Mr. Henry claims that he pointed out to the 3<sup>rd</sup> Defendant that he knew of no such relationship and the business was solely his. Both the 3<sup>rd</sup> Defendant and Mr. Carty demanded of Mr. Henry and his employees that they leave the building.

24. On the way out of the building Mr. Henry took a container in which he had some documents for the business. The 3<sup>rd</sup> Defendant held him and physically took Mr. Henry to the Christiana Police Station threatening to charge him in respect of a penknife which he had on him which he used in the business. In holding him Mr. Henry claims that the 3<sup>rd</sup> Defendant caused his testicles to be squeezed and Mr. Henry had to seek medical attention. I note that there was no medical evidence or documentation presented in support of Mr. Henry's claim.

25. Mr. Carty with the assistance of the 3<sup>rd</sup> Defendant padlocked the door to the store and the grills and removed the keys. Mr. Henry says that it was impossible for him to gain access to the premises and that the

premises remained locked for 7 days until Mr. Henry was advised by his Attorneys to remove the locks and reopen the business.

26. On average the business netted a daily profit in 2003 of about \$62,000.00. For the 7 days the business remained closed Mr. Henry says he lost \$434,000.00.

27. Mr. Henry in his witness statement said that he remained at the police station for a little over 2 hours. He was inside the guard room with his freedom restricted as he was told by the 3<sup>rd</sup> Defendant that he was detained. In cross-examination he said that it was just over an hour, which period tallies more closely with that stated by the 3<sup>rd</sup> Defendant in his Witness Statement.

28. Mr. Henry says that the police at Christiana asked Mr. Carty for proof that he rented the store from the 4<sup>th</sup> Defendant and Mr. Carty left and returned with a document. Mr. Henry was seeing or hearing about this document for the first time. Mr. Henry is of the view that this document was prepared on the 22<sup>nd</sup> of February 2003 as the 4<sup>th</sup> Defendant knew that Mr. Henry was the one who had rented the stores from her.

29. Mr. Henry says he remained at the police station until the police told him to go as the 3<sup>rd</sup> Defendant had left quietly without preferring any charges against him.

30. Mr. Henry also states that Mr. Carty had a 1990 Mazda pick up which was registered in the name "Roy Phillip Denton". On Mr. Carty's request Denton sold the vehicle in December 2001. Mr. Carty visited Mr. Henry's home where in the presence of his friend Winston Miller Mr. Henry handed to Mr. Carty \$215,000.00 cash as the proceeds of sale of the vehicle. In cross-examination Mr. Henry said that it was he who gave a receipt to the purchaser. I comment that this is one of many instances in this case where there is mention of some other person involved in the transaction as a middle man or intermediary. It seems strange to me that Mr. Henry would be issuing a receipt to the purchaser. If the vehicle was

in the name of this Roy Denton and Roy Denton sold the vehicle to the purchasers, why wouldn't the receipt be issued by Denton? I comment further on this aspect of the case later in my judgment.

31. Since the commencement of the instant law suit, the 4<sup>th</sup> Defendant has given Mr. Henry notice to vacate the premises and he has since done so. Mr. Henry moved to another premises along Main Street, Christiana, where he operates business under the name Liquid & More.

32. Mrs. Claudia Henry also gave evidence. She says that she had been employed to Bestway Wholesale during the period March 1999 to January 2002 as a store manager. She earned about \$15,000.00 to \$21,000.00 per month. She and Mr. Henry decided to open a business of their own so they started to save towards the business later known as Progressive Wholesale and Distributors. Mrs. Henry states that on or about the month of March 2001, Mr. Henry and herself began seeking vacant premises to start the business. According to Mrs. Henry, on or about the 30<sup>th</sup> of March 2001 she withdrew the sum of two hundred thousand dollars from her savings account at the Bank of Nova Scotia and this money was later placed in the business. Item 21 of the agreed bundle of documents put in by the parties bears the description "copy of entry from BNS Christiana dated 08.04.03 showing withdrawal from Account owned by Claudia Hutchinson". Having poured over the document, it is not clear to me that this document demonstrates a withdrawal on 30<sup>th</sup> March 2001. However, this has not been treated as of great moment in arriving at my decision since it would not be the turning point in resolution of issues in the case.

33. Mrs. Henry says that there was never any agreement that the 1<sup>st</sup> Defendant would be a part owner in the business or that Mr. Henry would be paying the monthly rent on behalf of the 1<sup>st</sup> Defendant. She agrees that the 1<sup>st</sup> Defendant, although he resided in the United States, did speak to the 4<sup>th</sup> Defendant about her reducing the rent but there was



no understanding that the 1<sup>st</sup> Defendant would have any share in the business.

34. Interestingly, and here there is some inconsistency with what Mr. Henry says, in her witness statement at paragraph 13 Mrs. Henry says that Mr. Henry paid the sum of \$69,000.00 representing one month's rent and two months security deposit for the premises to be rented from the 4<sup>th</sup> Defendant on the 4<sup>th</sup> October 2001 and he received the receipt for payment of the rent on the 9<sup>th</sup> October 2001 along with the keys for the premises(my emphasis). She insists that this money was paid directly to the 4<sup>th</sup> Defendant at her home in Christiana on the 4<sup>th</sup> October 2001. In his witness statement Mr. Henry says that he paid the sum of \$69,000.00 to the 4<sup>th</sup> Defendant on the 9<sup>th</sup> October 2001. He also says so in cross-examination. This discrepancy gains some of its potential significance from the fact that it is admitted that Mr. Carty sent the sum of \$80,820.00 to Mr. Henry on the 5<sup>th</sup> October 2001, (a date after the 4<sup>th</sup> October but prior to the 9<sup>th</sup> October 2001) in two tranches, one by one Michael White and one sent by one John Henry in equal sums of \$40,410.00 each.

35. In her witness statement Mrs. Henry continues at paragraph 14 that the money to pay the rent was taken from cash belonging to Mr. Henry and herself and paid over to the 4<sup>th</sup> Defendant in the presence of Roy Denton. Mrs. Henry says that the sum used to pay the rent was never a part of any money which was sent to Mr. Henry by Mr. Carty. It is admitted by both the Henrys that between the 5<sup>th</sup> October and the 30<sup>th</sup> October 2001, the 1<sup>st</sup> Defendant sent various sums to Mr. Henry which Mr. Henry says were sent as a loan but with no repayment date being discussed.

36. Mrs. Henry started working at Progressive Wholesale sometime in January 2002 after she was made redundant at Bestway Wholesale and since then she worked in the business as a cashier and bookkeeper. Mrs.

Henry also says that she received a sum of fifty seven thousand dollars as redundancy pay and she also placed that sum in the business.

37. On the 9<sup>th</sup> January 2002 Mr. Henry advised Mrs. Henry that he had informed Mr. Carty, who was vacationing in Jamaica that he wanted to open a bank account in the business name Progressive Wholesale and Distributors. On that date the bank account was opened and Mrs. Henry joined Mr. Henry and Mr. Carty at the Christiana branch of Bank of Nova Scotia accompanied by the 4<sup>th</sup> Defendant. According to Mrs. Henry, while they were at the bank she introduced the 4<sup>th</sup> Defendant to Mr. Carty and it is there that they met for the first time, although they had spoken on the phone previously. One wonders why there would be any need for the 4<sup>th</sup> Defendant to come to the Bank to meet Mr. Carty at such an auspicious occasion as the opening of a Bank Account for the business, or at all for that matter, if the business was only that of Mr. Henry and not Mr. Carty's.

38. While they were all at the bank according to Mrs. Henry, Mr. Henry informed the 1<sup>st</sup> Defendant that he wanted Mrs. Henry's name to be included in the account. Mr. Carty told Mr. Henry in Mrs. Henry's presence that she would not have to be included on the account as she would be the person to write the cheques (I am not sure if she meant would not be), and this decision came as a surprise to her. Since she was not happy with that decision Mrs. Henry left the bank and returned to the business premises. Shortly after Mr. Henry came to the business premises and asked Mrs. Henry for \$20,000.00 which she verily believes Mr. Henry used to open the account. I note that in his evidence Mr. Henry says nothing about either requesting that Mrs. Henry's name be included in the account or about any explanation by Mr. Carty as to why it should not be included.

39. Interestingly in her witness statement Mrs. Henry says that Mr. Henry informed her and she verily believed, that during the discussions between himself and the 1<sup>st</sup> Defendant sometime in the month of

November 2002, the 1<sup>st</sup> Defendant informed Mr. Henry that he, the 1<sup>st</sup> Defendant, was willing to inject large sums of money into the account at Bank of Nova Scotia, Christiana Branch, a proposal that Mr. Henry disagreed with. Since Mr. Henry turned down this proposal, the relationship deteriorated between Mr. Henry and the 1<sup>st</sup> Defendant. Mr. Henry informed her and she verily believed that he turned down the proposal on the basis that he was not comfortable as he did not know the source of the funds. Although much of this is really hearsay evidence on Mrs. Henry's part, there is an abundance of evidence in this case about funds and cash transactions involving a number of different named persons not before the Court.

40. Mrs. Henry also claims to have witnessed the handing over to the 1<sup>st</sup> Defendant by Mr. Henry of the sum of \$215,000.00 in respect of the Mazda pickup in the presence of Winston Miller on the 25<sup>th</sup> December 2001.

41. In paragraph 28 of her Witness Statement Mrs. Henry states "Both the Claimant and the 1<sup>st</sup> Defendant had frequent discussions as to the progress of the business, and this was so based on the relationship between the two". In cross-examination she stated that they had frequent discussions, but it had more to do with Mr. Carty as a brother asking how Mr. Henry's business was doing, and not because Mr. Carty had any interest in the business. I bear in mind and contrast that in his evidence in cross-examination Mr. Henry stated that he could not recall if he saw or communicated with Mr. Carty in 2000. He also stated that he tried to contact his brother Mr. Carty in 2001 but the number he had for him did not work and he had to ask his mother for the number. He said that he could not recall when before 2001 he had last called Mr. Carty on the number that he had, but that it was a long time before. All of this does not suggest a hitherto close relationship, full of brotherly concern, between Mr. Henry and Mr. Carty.

**The First Defendant's case**

42. Mr. Carty's evidence is that he is a businessman and Mr. Henry is his half brother. He is the proprietor of a business called Progressive Wholesale and Distributors which he says is a branch of another business owned by him called Progressive Automotive Systems. Progressive Automotive Systems was registered under the Business Names Act on the 6<sup>th</sup> of August 2000. Mr. Carty states that in or about 2000 he had discussions with Mr. Henry regarding a desire on Mr. Carty's part to open a business where Mr. Carty's mother and other family members reside in Christiana. Mr. Henry encouraged Mr. Carty to open a business similar to the one in which Mr. Henry worked and indicated that he would be prepared to work for the 1<sup>st</sup> Defendant. Before and after the formation of Progressive Wholesale and Distributors in October of 2001, Mr. Carty travelled regularly outside of Jamaica so he instructed Mr. Henry to purchase a number of items and generally to prepare premises for trading. Mr. Carty states that he wired monies on a regular basis to Mr. Henry and the business caused him to incur substantial expense in the region of approximately \$1,200,000.00 which he sourced from his own savings. Mr. Carty says that Mr. Henry worked for him in the capacity of a Manager and he was paid the monthly sum of \$18,000.00. The agreed bundle contains a number of exhibits of receipts from Western Union evidencing sums sent in the names of various persons on behalf of Mr. Carty to Mr. Henry. Mr. Carty in cross-examination said that some of the sums were sent by way of remittances from Western Union and some were sent, handed over by Mr. Carty's Uncle Winston Miller. Mr. Carty claims to have kept receipts other than those before the court for a while but that he does not now have same. He also claimed that most of the documents relating to the sums given to Mr. Henry by his Uncle Winston Miller were taken out when Mr. Henry, according to Mr. Carty, burglarized the business.

43. Mr. Carty was given the number for the 4<sup>th</sup> Defendant by Mr. Henry but he says that it was he who made contact with the 4<sup>th</sup> Defendant who was the owner of commercial property on Main Street Christiana with a view to renting those premises from her for the business. Mr. Carty claims that he entered into an agreement with the 4<sup>th</sup> Defendant for \$23,000.00 monthly. The first rental was due on November 1 2001 and he wired the amount due to Mr. Henry. Mr. Carty returned to Jamaica in December 2001 and on the 9<sup>th</sup> January 2002 he utilized the sum of \$20,000.00 to open a business current account at the Bank of Nova Scotia Jamaica Limited in the name of Progressive Wholesale and Distributors. Both he and Mr. Henry signed the form for Business Customer Details and Mr. Carty had Mr. Henry made a signatory to the account as he was to be a salaried Manager in the business. The documentary evidence Exhibit 28 of the agreed bundle supports the position, and it is not in issue between the parties, that Mr. Carty was placed on the account named as Director and Mr. Henry was placed on the account as manager. Interestingly, and here again is another name issue in this case, Mr. Henry's name is in two places on the Business Customer Details form stated to be Michael Henry and not Martin Henry.

44. Mr. Carty states that Mr. Henry at no time made any financial contribution to the start up or subsequent financial operation of the business. Mr. Carty called Mr. Henry on a weekly basis for updates on how the business was progressing.

45. Mr. Carty states that in or about January 2002 he left with Mr. Henry a 1992 Mazda pick up owned by Mr. Carty for use by Mr. Henry in respect of business related activities. He says that Mr. Henry subsequently advised him that he had sold the pick up for the sum of \$250,000.00 but that Mr. Henry never accounted to him or showed him any documents confirming the actual amounts obtained from the sale of the pick up.

46. Mr. Carty and Mr. Henry discussed the expansion of the business by opening a branch in Saint Elizabeth. Mr. Carty says that he sent \$500,000.00 to Mr. Henry in respect of setting up that business.

47. Over time Mr. Carty started to get reports about the business which were of concern to him and in September 2002 he came to Jamaica primarily to ascertain the actual status of the business in Christiana. Mr. Carty examined the available business documents and observed several discrepancies in the accounting records.

48. Mr. Carty and Mr. Henry had a quarrel about Mr. Henry's management of the business, in particular Mr. Henry's exclusion of Mr. Carty's input as owner. Mr. Carty contacted an Accountant about doing an audit and returned to the United States. In the meantime the working relationship between Mr. Carty and Mr. Henry deteriorated.

49. Mr. Carty returned to Jamaica in February 2003 with the intention of terminating Mr. Henry's employment in his business. Mr. Carty then discovered that Mr. Henry's then common law wife Maxine was also working in the business as its bookkeeper and also claiming to be the owner of three-quarter of the business. Mrs. Henry has denied that she told Mr. Carty she had an interest in the business.

50. Upon hearing this Mr. Carty consulted an Attorney and as a result of this consultation Mr. Carty says that he attended the business premises on the 22<sup>nd</sup> day of February 2003 in the company of the 3<sup>rd</sup> Defendant. At that time Mr. Carty handed Mr. Henry a letter terminating his services as manager of the business.

51. As soon as Mr. Carty handed Mr. Henry the letter and began securing certain company items Mr. Henry became boisterous and they both had an altercation. According to Mr. Carty Mr. Henry attacked him in the presence of the 3<sup>rd</sup> Defendant.

52. As a consequence of the altercation they were both directed to go to the police station. Mr. Carty then describes a process whereby he locked the business premises, then the premises locks' were

subsequently changed by Mr. Henry and Mr. Carty says he was threatened by Sergeant Knight attached to the Christiana Police Station. Mr. Carty says he was unable to access the business premises and by the time he was able to, Mr. Henry had removed all the cash generated and business records.

53. Although Mr. Carty claims in paragraph 88 of his Witness Statement that he "suffered certain financial loss" from the actions of Mr. Henry, there is no Claim or Counter Claim by Mr. Carty for any financial loss or to trace or claim any sums which he claims to have invested.

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Case**

54. As I stated in paragraph 7 above, the Witness Statement of Rohan White was admitted into evidence as a Hearsay Statement pursuant to Section 31 E of the Evidence Act and Part 29 of the C.P.R. I bear in mind that Mr. White could not be present in Court to give viva voce evidence, and I have therefore not had the opportunity of assessing his demeanour and countenance. In addition, I take account of the fact that his evidence has not been subjected to cross-examination in order to test its veracity. I will have to bear these factors in mind and decide what weight to attach to Mr. White's Witness Statement.

55. Briefly, Mr. White's Witness Statement reveals that he was at the material time in February 2003 a Corporal of Police stationed at the Special Anti-Crime Task Force. He had known Mr. Carty for several years before February 2003. In February 2003 Mr. Carty indicated to Corporal White that he intended to serve a Notice of Dismissal on his brother Martin Henry who was the manager of a wholesale shop owned by Mr. Carty in Christiana. Mr. Carty indicated that he wanted Corporal White to accompany him to serve this Notice as Mr. Henry was an aggressive person and Mr. Carty feared that the situation might become volatile.

56. On Saturday the 22<sup>nd</sup> of February 2003 Corporal White accompanied Mr. Carty to the Wholesale shop in Manchester along with Mr. Carty's brother Wayne Smith. On arrival Mr. Henry and his then

girlfriend Claudia Hutchinson were seen. Corporal White was dressed in plain clothes so he identified himself to Mr. Henry with his identification Booklet. Mr. Carty then informed Mr. Henry that he had a notice to serve on him, handed Mr. Henry the document and asked him to read and sign it.

57. Corporal White states that upon being handed this document Mr. Henry became boisterous and an argument developed between Mr. Henry and Mr. Carty. During the course of the argument Mr. Henry pulled a knife from his waist and attacked Mr. Carty and a fight then ensued. Corporal White separated the men, held onto Mr. Henry by the waist of his pants as in his view Mr. Henry was the aggressor and was still attempting to attack Mr. Carty. Corporal White then took the knife from Mr. Henry and indicated to him that he intended to charge him with being armed with an offensive weapon.

58. Corporal White asked both men to accompany him to the Christiana Police Station where Corporal White identified himself to one Sergeant Chambers and indicated why they were at the station. While they were all at the station, Mr. Carty pleaded with Corporal White not to charge Mr. Henry as they were brothers and he just wanted to get Mr. Henry out of his shop. Corporal White decided not to charge Mr. Henry and released him. They were at the police station for about one hour.

59. Corporal White states that after leaving the station he, Mr. Carty and Mr. Carty's brother Wayne Smith went back to the shop where Mr. Carty and his brother closed the shop and placed locks on the door. They then departed from Christiana and headed back to Kingston.

#### **The 4<sup>th</sup> Defendant's Case**

60. The 4<sup>th</sup> Defendant in her Defence states that the 1<sup>st</sup> Defendant is the person with whom she entered into a lease agreement and the 1<sup>st</sup> Defendant Mr. Carty was the lawful tenant of her premises. Alternatively, it is pleaded that if there was an implied/oral agreement between Mr.



Henry the Claimant and the 4<sup>th</sup> Defendant, the said agreement came to an end upon the entry into the written agreement between Mr. Carty and the 4<sup>th</sup> Defendant and thereafter Mr. Henry occupied the premises as the servant, agent or employee of Mr. Carty.

61. This is in my view a strange case. On the one hand there are receipts exhibits 7, 8 and 9 from the 4<sup>th</sup> Defendant regarding rent issued in the name of Mr. Henry. There is also a letter from the 4<sup>th</sup> Defendant to the National Water Commission, exhibit 11, giving permission to Mr. Henry to transfer the name on the water bill. On the other hand there is letter dated November 1 2001, which Mr. Carty under cross-examination was very unclear as to when exactly he received, where the 4<sup>th</sup> Defendant states that she leased the property to Mr. Carty. There are a number of discrepancies and inconsistencies on the case of Mr. Henry as well as on the case of the 1<sup>st</sup> and 4<sup>th</sup> Defendant which I have already alluded to in reviewing the respective cases. It is strange that Mr. Carty, who for all intents and purposes had not had a close relationship to Mr. Henry should have agreed to lend money with no discussion of terms of payment. If Mr. Carty had no share in the business why was Mr. Henry paying from the income of the business bills for Mr. Carty's Automotive Business?

62. On the 1<sup>st</sup> Defendant's case the documents regarding receipts for rental and letter to the National Water Commission go against him. If it was indeed Mr. Carty's business it is difficult to understand why he has made no claim against Mr. Henry in respect of it.

63. This is one of those cases where it is clear that the Court is not being given the full and frank picture as to the relationship, dealings and goings on between Mr. Henry, Mr. Carty and the 4<sup>th</sup> Defendant. This is all set against the backdrop of evidence of numerous cash transactions involving persons of various names. The impression I am left with is that all is not forthcoming and the full story remains untold by the main players in this drama, the brothers Henry and Carty. This assessment

also affects issues of credibility and demeanour and thus I also find it hard to accept Mr. Henry's account of the events involving the 3<sup>rd</sup> Defendant which allegedly took place on the 22<sup>nd</sup> of February 2003.

64. As a result the evidence has been left in a uniquely unsatisfactory state and I am unable conscientiously to make a finding one way or another with regard to the facts averred by the respective parties. However, the burden of proof in this case is on Mr. Henry the Claimant to prove his case on a balance of probabilities. He has failed to meet the requisite standard. This is in my view a case such as **Morris v London Iron & Steel Co. Ltd.** [1987] 2 All E.R. 496 where the burden of proof determines which party should succeed. Consequently the Defendants are entitled to succeed. There will therefore be judgment for the Defendants against the Claimant with full costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Defendants, and half costs to the 4<sup>th</sup> Defendant who failed to comply with case management orders, to be taxed if not agreed.