

**Nunes Rent a Car Limited**

*Appellant*

v.

**(1) Union Bank of Jamaica  
formerly known as  
Jamaica Citizens Bank Limited**

**(2) Eagle Merchant Bank of Jamaica Limited**

*Respondents*

FROM

**THE COURT OF APPEAL OF  
JAMAICA**

-----  
JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 25<sup>th</sup> January 2006  
-----

*Present at the hearing:-*

Lord Rodger of Earlsferry  
Lord Walker of Gestingthorpe  
Lord Carswell  
Lord Mance  
Sir Martin Nourse

*[Delivered by Lord Walker of Gestingthorpe]*  
-----

1. This appeal is concerned with what should have been a simple commercial transaction - the sale of ten second-hand cars – which went badly wrong. It resulted in a four-cornered dispute conducted in a way which reflects little credit on most of those involved, and in protracted and expensive litigation which has taken twenty years to reach the Board.

2. The parties to the four-cornered dispute were two car-hire companies, Nunes Rent a Car Limited (“NRC”) and Quality Car Rentals Limited (“Quality”), and two banks, Union Bank of Jamaica Ltd, formerly Jamaica Citizens Bank Ltd (“JCB”) and Eagle Merchant Bank of Jamaica Ltd (“Eagle”). NRC was JCB’s customer and Quality was Eagle’s customer. The individuals most closely involved on behalf of NRC were Mr Wayne Nunes, its managing director, and his partner Ms Carol Nunes, who was a director also. The individual most closely involved on behalf of Quality was its managing director, Mr Daryl Vaz. At JCB the individuals most involved were Mrs Carmen Tucker-Brown, the Manager of JCB’s Premier Plaza branch; Miss Sonia Bond, the assistant branch manager; and Mr Phillip Bent, a loans assistant at the same branch. At Eagle the individual most involved was Mr Michael Salmon, the commercial credit manager.

3. The appellant NRC issued a writ against JCB on 28 November 1985, its primary purpose being to restrain JCB from enforcing its security over NRC’s premises. NRC issued a second writ more than four years later, on 12 February 1990, against JCB, Quality and Eagle, and (by its re-amended statement of claim) alleged wrongful sale of its premises by JCB, and claimed damages for conspiracy against all the defendants. The proceedings were consolidated. The trial before Orr J occupied forty days between March 1996 and February 1997. On 28 July 1999 the judge gave judgment for NRC against all the defendants in the sum of a little over \$500 million, with interest at 37%, and (on a counterclaim against NRC) gave judgment for Quality in the sum of a little over \$44,000. On 6 April 2001 the Court of Appeal (Forte P, Bingham and Langrin JJA) allowed the appeals of JCB and Eagle and set aside the order of Orr J on NRC’s claim. NRC now appeals to the Board, JCB and Eagle being the respondents. Quality did not take part in the appeal to the Court of Appeal and has not been a party before the Board.

4. At some stage before the judgment of the Court of Appeal both JCB and Eagle got into financial difficulties and their management was taken over by the Minister of Finance, acting under statutory powers. Their assets and liabilities were assumed by the government. It was not suggested that that has any direct bearing on the issues raised in this appeal, except to explain why the two respondents have appeared by the same counsel before the Board.

5. Of the individuals mentioned above, Mr Nunes, Mr Vaz and Mr Bent gave oral evidence at the trial. Ms Nunes, Mrs Tucker-Brown, Miss Bond and Mr Salmon did not give evidence. It has not been suggested that the relevant testimony was being deliberately withheld from the judge. It seems that both Mrs Tucker-Brown and Mr Salmon left Jamaica to work elsewhere before the trial. But the absence of oral evidence from these witnesses must have added to the judge's difficulties in making clear and comprehensive findings of fact. He must also have been hampered by the lapse of over ten years since the events about which he had to make findings, and the lengthy adjournments which occurred during the course of the trial.

6. The judge did therefore have a difficult task. But their Lordships have to observe that his judgment, which was reserved for over two years, has caused them considerable difficulty in determining what factual findings the judge intended to make. His judgment runs to nearly eighty pages. After a short summary of the relief claimed the judge devoted over fifty pages to successive summaries of the respective cases of the plaintiff and the first, second and third defendants. Then (after a short summary of the parties' submissions) there is a six-page section headed "Findings" (almost all of which was quoted verbatim by Langrin JA, with whom the other members of the Court agreed, in the Court of Appeal; it was not suggested that this gave the whole passage the status of concurrent findings of fact).

7. The lengthy summaries in the earlier part of the judgment are a mixture of salient points of the evidence given on behalf of the various parties, together with the text of numerous letters written at different times by the parties' officers or attorneys. Some of the letters were of a self-serving nature and some contained obvious errors (such as demonstrably incorrect dates). The judge refrained from making any assessment of the reliability of the witnesses, or stating which parts of their evidence he accepted. In the circumstances their Lordships have on the whole taken only what is in the section of the judgment headed "Findings" as the judge's own findings of fact. But some of these findings are terse to the point of ambiguity, and on other points the judge made no findings. On some of these points the Court of Appeal felt able to fill in gaps.

8. Lengthy though the trial was, and lengthy though the judgment is, the most important events took place on two days (separated by a weekend), that is Friday 28 June and Monday 1 July 1985. There are some other events and incidents which call for mention, but these two days are crucial.

9. The background to what happened was as follows. NRC was in the car-hire business, with Mr Nunes as its controlling mind. NRC had premises at 27 Lady Musgrave Road, Kingston which were mortgaged to JCB. It was an "all monies" charge but in April 1984 it was securing a loan of \$474,000 which was to be reduced at the rate of \$13,617 a month. NRC made irregular monthly payments, some smaller and some larger than the agreed sum, but by May 1985 the loan had been reduced to just over \$326,000. JCB also had a further security in the form of a bill of sale over 16 Toyota cars used in NRC's business.

10. Mr Nunes was planning to reorganise and expand his company's business. He wanted to sell its existing fleet of cars and buy new cars with a bank loan (which would not necessarily have come from JCB). That was the background to the agreement between NRC (in the person of Mr Nunes) and Quality (in the person of Mr Vaz) for NRC to sell and Quality to buy ten Toyota cars for \$445,000, delivery to be effected in two lots of five cars each, \$225,000 for the first five and \$220,000 for the second five. Quality's purchase was to be funded by a loan from Eagle, secured on the cars by means of, or in conjunction with, a rental agreement. The detailed terms of this contract (especially as to the passing of property between NRC and Quality) were neither pleaded nor argued at trial, and the Court of Appeal refused to hear arguments on new points which NRC wished to raise as to the effect of the Sale of Goods Act.

11. The Board did hear some argument as to the Sale of Goods Act but they can resolve this controversy without detailed reference to its provisions, since the documentary evidence and the undisputed facts point clearly to the parties' intention. The contract was for the sale of ten ascertained vehicles, even though a list of the registration numbers and chassis numbers of the second batch never found its way into the documents before the Court. But the cars which were to be sold were all subject to the bill of sale in favour of JCB, and some of the second batch were also out on hire. The essence of the bargain was for delivery in two batches against payment on delivery. There is an irresistible inference that the property in the cars was intended to pass simultaneously with payment and delivery, and not at any other time.

12. Had the parties' respective bankers fallen in with their customers' original intentions, Quality would no doubt have drawn down part only of its facility and Eagle would have sent a cheque for \$225,000 to JCB to be

credited to NRC's loan account; NRC would have delivered the first batch of five cars to Quality; and JCB would have released those cars from its bill of sale. That procedure would not have excluded the prospect of dispute and litigation, in the event of the first batch of cars proving defective, or the second batch not being delivered. But the dispute would have been limited to the contracting parties. As it was both banks became involved in a larger and more complicated dispute.

13. What happened was that Mr Salmon of Eagle advised Mr Vaz of Quality that it would be prudent for Quality to draw down the whole of its loan at once, because of the risk of official credit restrictions being imposed in the near future. Mr Vaz agreed to this suggestion, and on Thursday 27 June 1985 Eagle furnished Mr Vaz with a cheque for \$445,000, drawn by Eagle on Workers Savings & Loan Bank. The cheque was drawn in favour of JCB for the account of NRC. On 28 June Mr Vaz took the cheque to NRC's offices and there saw Mr Nunes and Ms Nunes.

14. It is common ground that Mr Vaz and Ms Nunes then took the cheque to JCB's Premier Plaza branch, with the intention of having \$225,000 credited to NRC's loan account, so as to reduce the debit balance on that account. This was to be in payment for the first batch of cars. The other \$220,000 was to be credited to an interest-bearing account on an eight-day deposit. The judge made a finding to that effect but omitted to state in whose name the deposit was to be made. Mr Nunes gave evidence that he intended the deposit to be in the name of NRC (or possibly in his own name) so that he could earn some interest. Mr Vaz gave quite different evidence, that he wanted the \$220,000 to be deposited in the name of Quality. Their Lordships regard Mr Nunes' evidence on this point as simply incredible. For Mr Vaz to allow the \$220,000 to pass out of his control would have been contrary to the whole idea of splitting the cheque; it would have been a prepayment for cars which had not yet been delivered, contrary to the essence of the bargain, that is cash on delivery, and it would have made no sense for NRC (or Mr Vaz personally) to earn some deposit interest while NRC was liable to pay interest (no doubt at a higher rate) on a larger debit balance on its loan account. Mr Nunes' evidence on this point is not only incredible, but also raises doubt as to the reliability of his evidence on other matters.

15. At the Premier Plaza branch Mr Vaz and Ms Nunes saw Mr Bent, who held the relatively junior post of loans assistant. He told them that he could

not authorise the splitting of the cheque and that they would have to talk to someone more senior. Later Miss Bond, the assistant manager, became free to see them but she too declined to accept the instructions, saying that it was not JCB's current policy to accept fixed deposits. The outcome was that Mr Vaz left the cheque at the bank in an envelope, apparently with the instructions to Mr Bent written on the outside of the envelope. They returned to NRC's office and saw Mr Nunes. Mr Nunes suggested in his evidence that the three of them then agreed that they would have to go along with JCB's refusal to accept their instructions. But that is contrary to the judge's finding, terse though it is ("the parties were not satisfied"). It is also contrary to the undisputed evidence of what happened on Monday, 1 July.

16. On that day Mr Nunes himself went to the bank and saw Mrs Tucker-Brown, the manager. His intention must have been to persuade her to comply with the instructions already given by Mr Vaz and Ms Nunes. The judge's finding on this was that Mrs Tucker-Brown

"reiterated the policy of the bank and added that her bank had an obligation to release the securities for the cars to Eagle. She maintained her position and Mr Nunes agreed to the disposal of the proceeds of the cheque as she had indicated."

17. It is to be observed that the judge made no finding as to whether Mr Vaz, as managing director of Quality, agreed to this course. His evidence was emphatic that he did not. He said that he had been promised that JCB would get in touch with him on the Monday morning, but they did not contact him. He tried to speak to Mrs Tucker-Brown on the telephone but was not put through to her. During the afternoon he managed to speak to Miss Bond who told him that the whole proceeds of the cheque had been credited to NRC's loan account, and that Quality could not give instructions because the cheque was made out to JCB. He demanded the return of the cheque but was told that that was not possible. Their Lordships regard the evidence of Mr Vaz on this point as credible and consistent with the documentary evidence.

18. There was a subsidiary issue, not resolved by the judge, as to whether on 1 July 1985 Mrs Tucker-Brown of JCB spoke to Mr Salmon of Eagle (as already noted, neither of them gave evidence at trial; both had sworn affidavits in interlocutory proceedings but said nothing relevant to this

point). It seems intrinsically quite likely that they did have a telephone conversation on that day. Bankers tend to speak the same language and Mrs Tucker-Brown would have understood that Eagle, having advanced the whole \$445,000, was anxious to get its security in place as soon as possible. But it is not necessary to make a finding on this point because on any view Eagle was in no position to give further instructions as to the disposal of the cheque, or to veto instructions given by NRC with the concurrence of Quality. It had encouraged Quality to draw down the whole facility at once, and Quality was liable to pay interest on the whole loan as from 27 June; Eagle had no right to prevent Quality arranging to earn some deposit interest pending completion of the sale of the second batch of cars.

19. The outcome was that on 1 July JCB credited \$445,000 to NRC's loan account, so putting it in credit in the sum of just under \$100,000. On 17 July Mr Nunes caused NRC to withdraw \$95,000, \$75,000 in a down payment on the purchase of new cars, and \$20,000 in cash. This was, as it happens, just about the time that JCB started to receive letters of complaint from Eagle, prompted by letters of complaint to Eagle from its customer, Quality. The first letter from Mr Salmon to JCB was dated 15 July 1985 and complained that only six cars had been delivered, with four still to be delivered. The letter stated that this affected Eagle's security and that it had no alternative but to request the refunding of \$165,000 (a sum later increased, in a letter dated 27 August, to \$220,000).

20. It is unnecessary to recount the ensuing correspondence in detail. As already noted, some of the letters have a self-serving flavour and others contain obvious errors (for instance Quality's attorneys repeatedly put the events of 28 June as having occurred on 5 July, persisting in this error even in its pleadings). It is sufficient to note that JCB made no reply to any of Eagle's letters for almost two months, and then on 16 September simply acknowledged the letters and said that it was passing them to its attorneys; that at about the same time Quality's attorneys started writing directly to JCB, so that it was under pressure from two quarters; and that from the beginning of July until mid-October the only trace of any written contact between NRC and JCB, or between NRC and Quality, was a single letter dated 16 August from NRC's attorney to JCB. This letter contained the following paragraphs:

"It is absolutely imperative that [NRC] have all their security released now that you have received all the monies owed. My

client cannot be blamed for the fact that they still have three cars to deliver to [Quality].

You will recall that they had not wished to sell and deliver all ten cars at once. The proposal which had been put to Mr Vaz was that five cars would first be sold and delivered to him, to be followed subsequently by the sale and delivery of another five.

It is readily apparent that due to circumstances beyond the control of [Quality] they wished the sale to be reflected as one transaction. In the result no definite date was fixed in the oral agreement between the parties for the delivery of the cars. On the contrary, it was agreed, because of circumstances which Mr Vaz understood from the outset, that they would be delivered 'within a reasonable time'. My clients now undertake to deliver the remaining three cars within the next twelve days – an exceptionally reasonable time.”

It is strange that NRC was giving an undertaking as to delivery of the outstanding cars to its own bankers, rather than to the purchaser or the purchaser's attorneys. But the matter was shortly to take a still stranger turn with the events of 9 and 10 October 1985.

21. Before coming to those events, however, it is appropriate to pause and consider the position in relation to the ten cars. There was a contract for the sale of ten ascertained cars in two batches, cash on delivery, with the property passing on delivery. Their Lordships are satisfied that each batch was to be regarded as an entire contract. The first batch was delivered and accepted (exactly when and where need not be pursued) although there were defects which led to Quality's successful counterclaim for about \$18,000 for repairs and about \$26,000 for loss of use. The counterclaim is no longer a live issue.

22. The true facts about the second batch of cars are more obscure and controversial. NRC's case at trial was that two cars had been delivered and had not proved seriously unroadworthy; and that Quality had been invited to collect the other three but had failed to do so. Quality's case was that the two cars which were delivered were unroadworthy (one had transmission problems and the other needed front end parts which could not be obtained



in Jamaica) and the other three were never delivered. The judge made no finding about this but the documentary evidence is consistent with Quality's case. Indeed, NRC in its re-amended statement of claim (paras 12 and 13) pleaded that it had completed delivery of seven cars (only). Forte P was in their Lordships' opinion correct to conclude (in relation to the second batch of cars):

“These cars, apart from two which were returned because of their unworthy condition, were never delivered and so [NRC], in the end, was never entitled to receive the \$220,000 which JCB deposited to the loan account of [NRC].”

Quality was entitled to treat the contract as discharged by NRC's breach, as it did by a letter dated 17 October 1985.

23. By the beginning of October 1985 both JCB and Eagle had instructed attorneys to advise on the matter. Mr Jones of Myers, Fletcher & Gordon was acting for JCB and Mr Deans of O G Harding & Co was acting for Eagle. Mr Nelson, a sole practitioner, was already acting for NRC and Mr Clough of Clough, Long & Co was already acting for Quality. Mr Deans' first letter to Mr Jones, dated 8 October 1985, addressed the matter crisply:

“It is our understanding that our clients' cheque for [\$445,000] was tendered by Mr Daryl Vaz, principal of [Quality] to your client and an officer of your client was instructed as follows:

(1) to apply the sum of \$225,000 for the payment of five motor cars; and

(2) the balance of \$220,000 to be placed on fixed deposit for eight days to the credit of [Quality] and/or Daryl Vaz.

Kindly confirm if your client received such instructions and if so please advise us of the following:

(a) What further instructions were received if any, after the eight day period had elapsed and from whom;

(b) Assuming that further instructions were given were those instructions carried out by your client; and

(c) If no further instructions were obtained, is the fixed deposit being held to the credit of [Quality] and/or Daryl Vaz.”

24. Mr Deans' letter is stamped as having been received on 10 October 1985. If that stamp is correct the letter had already been to some extent overtaken by events, since there was on 9 October a meeting attended by Mrs Tucker-Brown and Mr Jones on behalf of JCB, Mr Vaz and Mr Clough on behalf of Quality and Mr Paul Chen-Young (the Executive Chairman of Eagle) and Mr Salmon (but not apparently Mr Deans) on behalf of Eagle. Mr Nunes was not invited to the meeting, and did not even know it was being held. It seems surprising, to say the least, that JCB (which had more or less insisted on crediting the whole \$445,000 to NRC's loan account) attended a meeting to discuss the consequences without any notice to its customer's managing director, Mr Nunes. His perception that all the other parties were combining against NRC was the basis of the alleged conspiracy against that company.

25. What happened next was even more surprising. On 10 October Mr Clough prepared a letter, addressed to Mr Vaz and written as from NRC's office. Its text was as follows:

“Dear Mr Vaz,

This is to confirm that your instructions to [JCB] were:-

‘to take \$225,000 from the cheque of \$445,000 as payment for five cars and to put the remainder of the funds of \$220,000 on deposit for eight days at 21%.’

We gave [JCB] the same instructions as outlined above and at no time gave any other instructions.