

1005

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. C.L. 1995/S-043.

BETWEEN	MAXINE SMITH	1ST PLAINTIFF
A N D	ARLENE ISRAEL	2ND PLAINTIFF
A N D	CARS-R-US LTD.	1ST DEFENDANT
A N D	INTERNATION TRUST & MERCHANT BANK LTD.	2ND DEFENDANT
A N D	PACIFIC MOTORS LTD.	THIRD PARTY TO 2ND DEFENDANT
A N D	INTERCONTINENTAL MERCHANT BANK LTD.	THIRD PARTY TO FIRST DEFENDANT

Mr. Hector Robinson instructed by Patterson Phillipson and Graham  
for Plaintiffs.

Mr. Patrick Bailey for First Defendant

Mr. Lowell Morgan instructed by Nunes Scholefield and Deleon for  
Second Defendant.

HEARD: 30th June, 1st, 2nd July & 30th November, 1999

REID, J.

The Plaintiffs, sisters, agreed to purchase from First Defendant a Nissan Urvan Fifteen Seater Minibus and took possession of same on or about the 17th day of August, 1994. The First Defendant, a Registered Company, conducts the business of buying and selling motor vehicles. On or about the 17th day of November, 1994, the Second Defendant through its agent seized the aforesaid motor vehicle purportedly under powers contained in a Bill of Sale which had been executed between that Company and a predecessor in title of the first named defendant

In their Statement of Claim the Plaintiffs aver that they had paid the full purchase price of \$700,000.00 to the First Defendant relying on the warranty given by the latter that it had a proper title and able to confer same to the purchasers. The Statement of Claim reads at paragraph 6:-

"If, which is not admitted at the material time the said Bill of Sale was valid and enforceable against the title of the said motor bus the first named Defendant was in breach of its warranty as to title.

7. Alternatively if the said Bill of Sale was at the material time invalid and unenforceable, the seizure and detention of the said motor bus by the Second Defendant was wrongful.

The particulars of special damages pleaded included the value of motor vehicle as well as the loss of prospective profits arising from detinue of the chattel.

On 9th March, 1995, the First Defendant, CAR-R-US Limited entered an appearance and by a defence amended further in June, 1999 averred the acquisition of the motor bus from Intercontinental Merchant Bank Limited, a Bank duly incorporated by Law, with its principal place of business at 20 Dominica Drive, Kingston 5, in St. Andrew. This Bank (for convenience hereinafter called IMB Ltd.) had advanced moneys to one Harry Victor, the purported owner of the vehicle, the latter signing a Bill of Sale in favour of the Bank. IMB Limited exercised its powers of sale and had sold the vehicle to the First Defendant whose duly authorized agent Suzanne Scott, acted on its behalf. The First Defendant maintained that it had acquired a good title in the ordinary course of business and was a bona fide purchaser for value without notice of defect, if any, in the title. The First Defendant would contend that the seizure of the motor vehicle by IMB Limited was a wrongful act inasmuch as:

"The First Defendant acquired a good title from intercontinental Merchant Bank Limited which had a duly recorded Bill of Sale prior to the Bill of Sale, if any, obtained by the Second Defendant".

The first Defendant would deny the Plaintiffs' claim to relief inasmuch as the former had acted in good faith and all obligations to the Plaintiffs, express or implied, had been fully discharged and fully consummated as required by the sale agreement.

The second Defendant International Trust and Merchant Bank Limited (hereinafter referred to as IT & MB Ltd.) in its Defence filed, aver acquisition by an assignment and transfer under an instrument in writing from one Horace Mead, described as the "lawful owner of the said Nissan Urvan Minibus, 1993 - Chassis No. "WJGE 4-009151...Engine No. 7D-25-168874". It would also be contended that by virtue of the good title so acquired, the First Defendant did not have a proper title to deliver to the Plaintiffs, who, accordingly, were not entitled to the relief claimed. On 25th May, 1999, the First Defendant obtained leave to issue and serve Third Party proceedings claiming an entitlement to indemnity from IMB Ltd. in the event that the First Defendant should be found liable in damages to the Plaintiffs.

On 4th November, 1998, IT & MB Limited, (the Second Defendant) obtained leave to serve Third Party Proceedings for an indemnity from Pacific Motors Limited of Number 11 Lower Elleston Road, Kington 16. Pacific Motors Limited the Third Party had neither entered an appearance nor was represented in the trial. Suffice it to say, although a representative attended on behalf of IMB Ltd., there was no participation by that Third Party in the Trial.

At the hearing of the action a number of written exhibits were relied on, and, by consent, tendered in two separate bundles. What emerges is that there had been two irreconcilable entries in the Central Motor Vehicle Registry of Jamaica resulting in the issue of concurrent titles for the same motor vehicle through the fraudulent activities of persons not parties to these proceedings. The motor vehicle in question was one of a number of units, particulars of which appear on a C-78 Import Entry Form under the Customs Act with the Nissan Trading Company Limited of Tokyo Japan as consignor to Pacific Motors Limited.

PURCHASE by HARRY VICTOR

On 14th July, 1993, a person purporting to be Harry Victor completed and presented an application form for the registration and licensing of one Fifteen-Seater, White, 1993 Nissan Urvan as a new motor vehicle. At the office of the Collector of Taxes, the applicant was granted temporary registration and registration plates TP 4220 were issued. Attached to the application for registration was a copy of the Import Entry which bore a designating asterisk at item number 7. Also submitted was an invoice number 05964 from Pacific Motors Limited to Harry Victor. This document dated 14th July, 1993 (see exhibit 2 page 4) records the following:-

"1 1993 Nissan Urvan Minibus 25000.  
Chassis No. WJGE 24-009151  
Engine No. TD 25-168874. Colour White"

The above particulars in manuscript include also the purchase price of \$603,000.00. On 28th July, 1993 a Certificate of Title, numbered MVC 2435 93 was issued (see exhibit 2, page 22). On 23rd

August, 1993 the said Harry Victor purported to execute a Bill of Sale in favour of IMB Limited whose credit officer Althea Richards signed for the Bank and, that very day, enclosed a cheque drawn on Century National Bank in the sum of \$500,000.00 to Pacific Motors Limited in "full settlement" of the purchase price (exhibit 2, page 15).

On 16th August, 1993, this Bill of Sale was recorded at the Island Record Office and the particulars of the second schedule of that document correspond to those on the invoice (Supra).

#### Plaintiffs' Acquisition by Purchase

The purchase by the Plaintiffs from First Defendant arose consequent on the exercise by IMB Limited of its powers of sale. A letter addressed by the Bank to the Collector of Taxes (exhibit 1, page 24) gave an indemnity to the latter. On the 17th August, 1994, the Plaintiffs executed a Bill of Sale to the Bank of Nova Scotia Jamaica Limited, to secure the sum of \$420,000.00 on the security of -

One Nissan Urvan Minibus registered TP 6423:  
Chassis No. WJGE 24009151.

#### Second Defendant's Security

At the trial, a Mr. Delroy Slowley, former Credit Manager at IT & MB Limited testified to the execution by himself and one Horace Mead of the Bill of Sale on 27th August, 1993. It was recorded at the Island Record Office on 14th September, 1993, therein the particulars record a motor vehicle with chassis No. WJGE 24009151. The said Horace Mead (with whom the witness had dealt in a separate transaction on a prior occasion) had in July, 1993, presented a driver's licence

pursuant to this purchase made on the strength of the Pacific Motors Invoice. The Bill of Sale specified two motor vehicles, one of which (the subject of this suit) was described as "new". The letter from IT & IMB Limited (exhibit 1, page 6) under the hand of Paul Robinson, the Credit Officer, and remitting to Pacific Motors Ltd. the purchase price of \$600,000.00 is captioned:-

"Sale of 1993 Nissan Irvan Bus - chassis # WJGE 4 - 009151  
Engine # TD 25 - 168874 to Horace Mead". (See exhibit 2, pg 6)

Mr. Slowley concedes that as a Banker he would regard the correct documentation of Engine and Chassis numbers as vital when taking security on a purchase such as this, and deserving of the utmost careful scrutiny.

Mrs. Dawn Patricia Forrester-Salmon, the Manager of the Central Motor Vehicle Registry, in the Inland Revenue Department at Constant Spring where records are kept of all motor vehicles licensed and registered in the country was called to testify at the behest of the Second Defendant. She produced the documents for registration presented by Horace Mead, namely:

- (a) Photocopy of the motor vehicle Certificate of Fitness (Road Worthiness)
- (b) A photocopy of Pacific Motors Limited Invoice
- (c) A copy of the Import Entry on which the particular motor vehicle, as well as others were consigned to Pacific Motors Ltd.

On the strength of the application (exhibit 2, page 14) a Certificate of Title (exhibit 2, page 28) was issued, the motor vehicle being described as 'new'. At the Kingston Office of the Motor Vehicle registry located at 1-3 King Street, an application in the name of Harry Victor had been presented with supporting documents:-

- (a) Duplicate Certificate of Fitness (Road Worthiness)
- (b) Copy of an Invoice from Pacific Motors Ltd.
- (c) Duplicate Certificate of Motor Vehicle policy of Insurance with United General Insurance Limited.

Convenient it is to note that the handwritten application (exhibit 2, page 6) bears an unmistakable similarity to that of the accompanying Pacific Motors Limited invoice. With it was presented a carbon copy (blue) of the Motor Vehicle Certificate of Fitness (unlike the Horace Mead application to which a photocopy Certificate of Fitness was attached). The chassis number of the Harry Victor application corresponds accurately to the Pacific Limited Invoice but in the Horace Mead application the integer "2" following the capitals "WJGE" is omitted.

In answer to Mr. Bailey, Mrs. Forrester-Salmon stated that she regards as a prerequisite to any transfer of motor vehicle ownership to be recorded, the resolution of any discrepancy as to Chassis number on the accompanying documentation. It has been her experience that the complete replacement of a motor vehicle engine sometimes occurs and for that reason the correct documentation of the Chassis number is paramount. The title to the motor vehicle in the Harry Victor application was issued on 28th July, 1993 under an emergency directive. In the process of motor vehicle tax collection the practice occurs of the issue of temporary registration plates upon payment of the prescribed fee, the issue of the permanent plates abiding the road permit from the Transport Authority which would first provide the applicant with a temporary document for presentation to the Collector of Taxes. On the strength of this temporary document the Collector of Taxes would issue the "red plates" so that the Transport Authority would have the record complete with the issue of the proper road licence for the vehicles prescribed route.

If the Transport Authority declines to issue a permit, the applicant could not operate as a public passenger carrier, but opt for a private motor car licence instead.

On the reverse side of the Motor Vehicle Certificate of Title issued in the name of Harry Victor (exhibit 2, page 22) appears the notation of a discharge of lien, as well as an indemnity to the Collector of Taxes consequent on the transfer to the Plaintiffs. The Collector of Taxes had never called on the indemnity provided by IMB Limited.

In answer to Mr. Robinson, she concedes that the Inland Revenue Department is not an arm of the Transport Authority and it is the latter Department which determines the conditions of grant for a public passenger carriage licence.

Mr. Andrew Christopher Thomas, a Banker employed to IT & MB Limited, had, as recently as the day preceding his testimony in this matter, visited the premises of Sappleton and Son at number 58 Waltham Park Road, Kingston, and there inspected the motor vehicle in question. The state of the coach-work and interior upholstery of passenger seats as well as the road wheels he describes as "good". The Chassis number appearing thereon, he recorded: WJGE - 24009151. Only then did he discover the discrepancy with what is recorded in the Bill of Sale. His Fourteen years in banking conduces to emphasis on accurate recording of data for the purposes of taking security. As events stand, the Bank cannot, unassisted, effect a transfer of title of the motor vehicle to a Third Party. When taking such security, the proper practice is to conduct a physical examination of the vehicle's Chassis number before disbursing a loan. The present instance reflects a manifest oversight.



On the final date of this trial time did not permit submissions in Court and written submissions were promised. My assignment for the remainder of the term in rural assizes precluded the earlier consideration of the written submissions filed in the Registry. Submitted as they were, without the opportunity of responses, did not make for the assistance that would have been afforded in open Court and I proposed to reopen the matter at the commencement of the Michalemas Term. In the event, I decline so to do, trusting that my evaluation hereunder will address such responses that might have been made.

**First Defendant's Submissions:**

Mr. Bailey for the First Defendant was content to rely on the "route" of title without calling any evidence. He submitted that the First Defendant's contractual obligations to the Plaintiffs had been fully discharged. No evidence, he said, had been advanced which might effectively impeach the Plaintiffs' title and mode of acquisition. On the evidence, the Chassis number of the motor vehicle correctly reads: "WJGE 24009151". The Pacific Motors Limited Invoice to Horace Victor Mead shows the selling price as \$603,000.00. The payment of \$603,000.00 by IT & MB Limited represents almost a hundred percent financing of a movable asset liable to depreciation; this did not reflect shrewd business practice. By comparison, IMB Limited on a similar invoice had made a loan of \$500,000.00 and the Bank of Nova Scotia Jamaica Limited with similar caution had advanced the sum of \$420,000.00 towards the Plaintiffs' purchase at a cost of \$700,000.00. The validity of the Bill of Sale to IMB Limited

(exhibit 2, pages 16 to 19 inclusive) duly recorded on 16th August, 1993, had neither been challenged nor impeached. The events culminating in the transfer of title via acquisition by the First Defendant, operated to vest ownership in the Plaintiffs. See Motor Vehicle Certificate of Title LA 036979 (exhibit 1, page 25). The impeccable testimony of Mrs. Forrester-Salmon confirms this in every material particular. Her unchallenged testimony asserts, inter alia, that the proper officer in the Motor Vehicle Registry who dealt with the application must have satisfied himself/herself as to the identity of Harry Victor prior to issuing a Certificate of Registration and Title. Moreover, urged Mr. Bailey, the Bill of Sale to IMB Limited was first in time, preceding as it did, that Bill of Sale purportedly given by Horace Mead to IMB Limited (dated 27th August, 1993 and recorded on 14th September, 1993). In any event, submits Mr. Bailey, IT & MB Limited, had an insurmountable hurdle in that the Bill of Sale from Horace Mead was fatally flawed with the vehicle's Chassis number as WJGE - 4009151. No explanation had been offered for the discrepancy. The omission of the integer "2" effectively stultified the power to transfer title and, ipso facto, has resulted in an unlawful seizure by IT & MB Limited. Fraud, as clearly occurred, must have been contrived by or with participation of Horace Mead with whom the Second Defendant dealt directly.

Inexorably it followed that judgment for the Plaintiffs must be entered, but the First Defendant be absolved from liability with costs secured under a Sanderson type order.

**Second Defendant's Submissions:**

Mr. Morgan for the Second Defendant submitted that two invoices in details almost identical, each bearing the number 05964 with remittances of \$600,000.00 and \$500,000.00 respectively to Pacific Motors Limited and emanating from unconnected sources, pointed to fraudulent negotiations conducted by Pacific Motors Limited and involving either or both persons Horace Mead and Harry Victor. Such state of fraud precluded the passing of a title to either Harry Victor or to Horace Mead. The failure of acquisition of a good title by Harry Victor, precluded the Plaintiffs as well as IMB Limited from obtaining a good title. Consequently, neither had the right to possession of the motor vehicle!! According, no act of detinue by second Defendant IT & MB Limited occurred as the seizure of the vehicle would not have been unlawful. This is how Learned Counsel would gloss on the discrepancy in the Chassis number appearing on the Bill of Sale. He further submitted that any consideration of this, is to disregard the fact that the fraud which had been perpetrated, had led to the registration of the same vehicle twice and withal, almost simultaneously. Accordingly, Pacific Motors Limited who had been named in Third Party proceedings ought to be made to pay the damages. In one breath Learned Counsel appears to concede that damages must accrue to the Plaintiffs, albeit not by way of liability of Second Defendant. If the foregoing did not find favour with the Court, the Plaintiffs, he urged, had furnished no evidence of steps taken by them to mitigate their loss. If, as Mr. Carol Smith, husband of the Plaintiff had in the duration of a single week's endeavour secured the purchase of the motor

vehicle in question, a renewed effort on his part after the seizure might likewise have procured a replacement. Unreasonable and grossly overstated, was the Plaintiffs' claim for loss of profit which should be rejected. Although the earnings from the abortive plying for reward were logged in an exercise book, at no time had this been exhibited to assist the Court. Moreover, such evidence as Mr. Smith gave, pointed only to an operation as a public passenger carriage without a licence from the Transport Authority of Jamaica. Any award based on such computation could only give legitimacy to an illegal transaction and, apart from the sum \$700,000.00 the value of the vehicle, damages should be nominal only, reflecting no more than two months' loss of use at \$10,000.00 per month. Such award should be made directly against the Third Party, Pacific Motors Limited, who did not see fit to contest these proceedings.

#### Submissions on behalf of the Plaintiffs

Mr. Robinson in his submissions sought to rely on the evidence as it unfolded, and pointed to the higher priority of the Bill of Sale via which the First Defendant conveyed a proper title to the Plaintiffs. Additionally, he prayed in aid the flawed Bill of Sale on which the Second Defendant relied. The testimony of both Mrs. Forrester-Salmon and Mr. Allan Thomas, supported the inescapable conclusion that the Second Defendant was not armed with a valid instrument by which to authorise seizure of the motor vehicle.

On the question of damages, he urged that the Plaintiffs had maintained their continuing assertion of property in the Nissan Urvan. In an attempt to mitigate their loss they had agreed from

as early as 28th August, 1995, that the vehicle be sold and the proceeds of sale placed on deposit to await the outcome of the trial. (see Letter from Attorneys for the Plaintiffs to Attorney for the Second Defendant, exhibit 1, page 40).

Any Order for the return of the motor vehicle in its present condition to the Plaintiffs would be an act of injustice. The only just order would be to place the Plaintiff as nearly in the same position as would be the case if the Second Defendant had taken steps to effect a sale in 1995. Mr. Robinson relying on the depreciated value as at March, 1996, viz \$400,00.00, the amount for which the Second Defendant had been willing to sell (see exhibit 1, page 41), offered a computation which, however applied, would work back to an award of the original price \$700,000.00. I regard the submissions on behalf of Second Defendant, supra, as reflecting, in principle, concurrence on this point. Nevertheless, consideration must be had of the strenuous plying schedule of the vehicle up to the time of seizure. In the absence of evidence of the rate of deterioration of marketable value, it is common knowledge that a motor vehicle 'stripped' of its newness undergoes a progressive diminution in value even if a levelling-off obtains at a certain stage. Accordingly, I would assess its value at the time of seizure at \$650,000.00. For the continuing detention of a potentially profit earning asset, damages ought to accrue to the owners, submitted Mr. Robinson and he gleaned support from dicta in the case of: Hillesden Securities Limited v. Ryjak Limited (1973) 2 All E.R. 184. The purpose of the purchase was clearly for operation

as a public passenger carrier. To this end, all had been done, namely the application for a Road Licence as well as a documentation of the proposed route, (exhibit 4).

Mr. Carol Smith had testified that the Transport Authority had advised him that the vehicle could be operated as a public passenger carrier pending the issue of the licence. No confirmation of this in writing had been produced. Should there be no award of loss of income up to when seizure occurred, the Plaintiffs should not be disentitled to an award for loss of income resulting from the detention, submitted Mr. Robinson. An award based on the cost of reasonable hire for the period, he urged, would be analogous to mesne profits accruing to a land owner on account of the wrongful occupation by another. If the deduction there be from the Plaintiffs' award, it should only represent the eight-month hiatus up to the grant of the Road Licence. The invocation of the 'ex turpi causa' rule by the Second Defendant should not operate exclusively and detrimentally to the Plaintiffs' rights. In the Hillesden Securities case cited above, Parker J. had relied on a dictum of Denning L.J. (as he then was) in the case of Strand Electric & Engineering Company Ltd. v. Brisford Entertainments Ltd. (1952) 1. All E.R. 796 at 801. There the Learned Lord Justice had said:

"If the good are retained by the wrongdoer up till Judgment, the hiring charge up to that time, and in addition, the owner will get the return of the goods or their value up to judgment.

The testimony of Mr. Smith while not availing for an award for the duration of the eight-month period up to seizure, will nevertheless provide a useful yardstick by which to compute profits which would have accrued, had the Transport Authority granted a

licence. The tabulation of earnings by Mr. Robinson accords substantially with the evidence offered by Mr. Smith except that account must be taken of the lower tariff of fares from school children. The gross monthly takings in fares I would reduce from \$112,320.00 to \$100,000.00. Mr. Smith, when asked by Mr. Bailey whether he would pay himself from fares earned, replied:

"That minibus is actually mine, I don't take any pay".

Under further cross examination he said that he would take money to his wife, money used to purchase food for his family. As a driver, he said, he would charge \$2,000.00 per week for such service. In any computation of expenses, account should be taken of the remuneration to a driver; accordingly, I would increase the monthly expenses from \$59,460.00 to \$67,460.00. The net profit thus computed would be \$32,540.00. From this I would deduct a further \$2,540.00 to cover other contingencies such as hiring of a relief driver and thus arrive at a monthly multiplicand of \$30,000.00. The eight-month period while not qualifying for an award as shown, still deserves consideration. In that period the Plaintiffs could have opted for a private motor car licence or could have sold the vehicle. On this account I would award the sum \$100,000.00.

#### Second Defendant's Prayer for Indemnity

Even if an instant check by Pacific Motors had revealed two separate sums paid on the same numbered invoice, a detriment to Second Defendant would, nevertheless, have accrued already. Furthermore, there is no evidence that the payment of the sum of \$600,000.00 by Second Defendant had, in fact, been made on the

presentation of an 'original' invoice as opposed to a photofacsimile thereof. It is one thing to speak of a loss resulting from a breach of contract on a wholly failed consideration. The present action against the Second Defendant is one for wrongful seizure and arises principally from the want of care on the part of the Second Defendant when taking security on a chattel. Put shortly, the resulting injuria to the Plaintiffs is referable solely to the tortious conduct of the Second Defendant, and so the right to an indemnity in the circumstances, is entirely misconceived.

In fine, the awards to the Plaintiff is as follows:-

Value of motor vehicle	\$ 650,000.00
Damages (first eight months detinue)	\$ 100,000.00
Detinue thereafter, up to 13th July, 1999, 48 months at \$30,000.00	\$1,440,000.00
From 14th July, 1999 to 20th November, 1999 (4½ months)	\$ 135,000.00
Total	<hr/> \$2,325,000.00 <hr/>

- (1) On the sum of \$2,190,000.00 there will be interest at the rate of 6% per annum from the 17th November, 1994 to 13th July, 1999. From 14th July, 1999 to 20th November, 1999 interest at the rate of 12% per annum on the entire sum. Such judgment to be against the Second Defendant with costs to be taxed, if not agreed.
- (2) Judgment for First Defendant against the Plaintiffs with costs to be agreed or taxed; such costs to be paid by and recoverable from Second Defendant.
- (3) It is further ordered that the Plaintiffs shall sign all documents and do all thing necessary to enable the Second Defendant to effect a sale of the Nissan Urvan minibus, bearing chassis number WJGE-24009151.