

THE REPUBLIC OF TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2011-04453

BETWEEN

Anand Beharrylal

Claimant

AND

Dhanraj Soodeen

First Defendant

Ricky Ramoutar

Second Defendant

Before the Honourable Mr. Justice Ricky Rahim

Appearances:

Ms. S. Singh for the Claimant.

Mr. R. Gosine for the First Defendant.

No appearance of the Second Defendant or of anyone on his behalf.

Judgment

1. This is a claim for breach of contract arising out of a contract for the purchase of a Hino Truck, registration number TBZ 8871 by the Claimant.

The Claim

2. It is the Claimant's case that in or around January 2008, he contracted with the First Defendant for the purchase of a Hino Truck, registration number TBZ 8871 at the price of \$290,000.00. The said purchase price was paid by two cheques, one in the sum of \$150,000.00 and the other in the sum of \$140,000.00 both dated 11th February 2008. The First Defendant issued a receipt dated 11th February 2008 to the Claimant evidencing receipt of the said sum of \$290,000.00. It was further agreed between the two parties that the truck would be transferred to the Claimant at the end of a three year period.
3. Further, the Claimant claims that he agreed with the Second Defendant that the truck would be worked (by the Second Defendant) and the profits would be divided between the Claimant and himself. According to the Claimant, between 11th February 2008 and February 2011 the Second Defendant retained possession of the truck and save for approximately \$5,000.00, no other money on account of profits generated from the use of the truck was paid to the Claimant.
4. In or around October 2010, the Second Defendant informed the Claimant that the truck's engine needed to be repaired but due to the Claimant falling ill, he had no money to repair it.
5. The Claimant avers that in or around March 2011 the First Defendant in breach of the agreement transferred the legal ownership of the truck to the Second Defendant. Thereafter, the Second Defendant disposed of the said truck.

6. The Claimant further claims that the cost to rent a truck similar to that purchased is approximately \$15,000.00 per month. Contrary to the terms of the agreement between the Claimant and the Second Defendant, the Second Defendant never accounted to the Claimant for the profits generated by use of the truck.
7. The Claimant thus claims as against the First Defendant, the sum of \$290,000.00 or in the alternative, damages for breach of the oral contract made between himself and the First Defendant. The Claimant also claims damages as against the Second Defendant.

The First Defendant's Defence

8. While the First Defendant confirms that the said truck was in fact sold to the Claimant in or around February 2008 for the sum of \$290,000.00, the First Defendant denies that he transferred the truck to the Second Defendant. In this regard, the First Defendant avers that the Second Defendant represented to him that the Claimant was ready to have the truck transferred and that the Claimant was not well to attend the licensing office. The Second Defendant requested that the First Defendant sign a transfer form to expedite the transfer so that when the Claimant and the First Defendant attended the licensing office, the waiting period would be short.
9. According to the First Defendant, the procedure for transfer was that the purchaser and vendor had to attend the licensing office with the vehicle in order that the vehicle be inspected. Following the inspection both parties would sign the required forms in the presence of the licensing officer to effect the transfer. Thus, the First Defendant claims that at no time was the truck transferred as he was awaiting the Claimant to attend the licensing office to effect same.

The Second Defendant's Defence

10. The Second Defendant admits that the truck was purchased by the Claimant as alleged. Further, it is admitted that there was an agreement between himself and the Claimant in the terms alleged by the Claimant. In furtherance to this, the Second Defendant claims that the profits generated from jobs under the agreement, would be divided equally between himself and the Claimant. Additionally, it was agreed that any minor repairs and maintenance and expenses for the running of the truck were to be borne by the Second Defendant, while major expenses once necessary would be borne by the Claimant.
11. The Second Defendant avers that during the period 11th February 2008 to February 2011 he always paid to the Claimant 50% of the profits generated and gave to the Claimant approximately \$25,000.00.
12. Further, the Second Defendant claims that when he approached the Claimant in or around October 2010 to repair the truck's engine, and the Claimant could not do so due to his illness, he, upon the authorization of the Claimant, borrowed the sum of \$40,000.00 from Anand Low Price Supermarket Company Limited. The terms of that loan agreement was that interest in the sum of \$8000.00 would be added to the outstanding balance on the principal amount every month if the principal was not repaid within the first month of being borrowed.
13. Following this, it was agreed between the Claimant and the Second Defendant that the profits generated from jobs would go to the repayment of the loan until repaid in full. The Second Defendant was unable to book jobs between the period October 2010 to March 2011 and as a result the amount due and owing under the loan agreement accumulated to \$80,000.00.
14. The Second Defendant claims that after three years had passed from the purchase of the vehicle the Claimant became dissatisfied with the number of jobs obtained by the Second Defendant and decided to offer the truck to the Second Defendant for sale for the sum of \$150,000.00. As a consequence, the Claimant agreed to transfer the legal ownership of the truck to the Second Defendant in order for him to access a mortgage on the truck to facilitate

the payment of the \$150,000.00. However, before the Second Defendant was able to obtain the mortgage, Anand Low Price Supermarket Company Limited seized possession of the truck and continues to retain same until the loan is repaid. The Second Defendant was thus unable to obtain the mortgage to complete the sale from the Claimant.

15. While the Second Defendant admits that the cost to rent a similar truck could be approximately \$15,000.00 per month, the Second Defendant contends that the truck was never rented on a monthly basis but rather daily. Further, the Second Defendant avers that although it was rented daily, it was never rented 30 days consecutively and thus never generated \$15,000.00 per month.

Issues

16. The following facts are not in dispute:

- i. There was an oral contract between the Claimant and the First Defendant whereby it was agreed that the Claimant would pay to the First Defendant the sum of \$290,000.00 for the First Defendant's Motor Vehicle Registration Number TBZ-8871.
 - ii. The said motor vehicle would be transferred to the Claimant at the expiration of three (3) years from the date of purchase.
 - iii. There was an oral contract between the Claimant and the Second Defendant that the Second Defendant would take on jobs with the truck.
 - iv. To date, despite the breakdown of the agreement between the Claimant and the Second Defendant the truck has not been returned to the Claimant
17. Although the Claimant alleges that the First Defendant transferred the truck to the Second Defendant without his authorization and in breach of the agreement, it was submitted by counsel for the Claimant that the vehicle was in fact not transferred. Thus it was submitted that the transfer was still possible and the court ought to order that the First Defendant transfer the said truck to the Claimant.

18. The Claimant also claims that the Second Defendant in breach of the agreement withheld profits from the use of the truck and further that the Second Defendant disposed of the truck. However it is the Second Defendant's case that he paid the Claimant approximately \$25,000.00 in profits during the period 11th February 2008 to February 2011. Further, the Second Defendant avers that the Claimant agreed to sell the truck to him but that the truck was seized by Anand Low Price Supermarket Company Limited for nonpayment of the loan which the Second Defendant says was taken out with the consent of the Claimant.
19. It appears therefore that the claim against the First Defendant and the ability to transfer the truck to the Claimant is dependent on the court's findings of fact on the whereabouts of the truck. The court accepts the procedure proffered by the First Defendant for the transfer of the truck contained in section 19 (1)(c) and (e) the **Motor Vehicles and Road Traffic Act Chap 48:50**:

Section 19 (1) (c) states:

The registered owner and the person seeking registration as the registered owner shall both be present before the Licensing Authority together with the used motor vehicle that is the subject of the transfer at the time that transfer occurs."

Section 19 (1) (e) states:

Where a person referred to in paragraph (c) is unable to be present due to illness or disability, the Licensing Authority or an officer appointed by him, upon payment of a fee of one hundred dollars to be paid by or on behalf of the ill or disabled person, shall be required to visit the person and the vehicle for the purpose of effecting the transfer of registration.

20. Thus the issues to be determined in relation to the alleged breaches are:

- i. Whether the First Defendant has breached his agreement to transfer the truck to the Claimant and has in fact transferred same to the Second Defendant.
- ii. Whether the agreement between the Claimant and First Defendant to transfer the truck to the Claimant has been frustrated.
- iii. Whether the Second Defendant withheld profits from the Claimant or has breached the agreement by not returning the truck to the Claimant.

First issue

21. The determination of this issue is based on the evidence. The burden lies on the Claimant to prove that the truck was indeed transferred to the Second Defendant in breach of the agreement as alleged but the Claimant has brought no evidence of registration of the truck in order to prove same. The certificate of registration is proof of legal ownership of a motor vehicle. In its absence, it would be highly speculative of the court to find that the truck was transferred to the Second Defendant by the First Defendant. There simply is no proof of this. The fact that the First Defendant signed a blank transfer form is by itself insufficient both in law and fact to amount to a transfer to the Second Defendant. Firstly it does comply with the requirements of the legislation (paragraph 19 supra) and secondly according to the evidence, the form was blank giving no indication as to whom the truck was being transferred.

22. Further, it appears from the evidence of the First Defendant which the court believes, that at the time he signed the form the First Defendant's intention was to meet the Claimant at the licensing department in order to effect that transfer. The First Defendant provided an explanation in cross examination as to why he signed a blank transfer form and the court accepts same. The First Defendant testified in cross examination;

"I signed the form so they could take it to get the chassis number and engine number checked and then they would call me to present my identification to have the truck transferred."

In those circumstances it is clear that the First Defendant never intended to transfer to the Second Defendant but to the contrary, his intention was to transfer to the Claimant.

23. Therefore, the claimant having adduced no certificate into evidence the court cannot make a finding that the truck was transferred to the Second Defendant as alleged.

Second Issue

24. Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract: ***Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729 per Lord Radcliffe.**

25. Frustration of a contract does not merely suspend the parties' obligations, but discharges the parties from the obligation to perform their contractual duties: ***Common Law Series: The Law of Contract. Chapter 7 para 7.65.***

26. An event relied upon as frustrating the contract is 'something which happens in the world of fact': ***Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 276**

27. The contention that the truck was seized was that of the Second Defendant in his filed Defence. He averred that the truck was seized from him by the proprietors of a supermarket. However, the Second Defendant failed to file a Witness Statement and was not present during trial. There is therefore no evidence to support this averment.

28. The evidential burden (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but not necessarily proving a fact in issue. The burden rests upon the party who would fail if no evidence at all, or no further evidence,

as the case may be, was adduced by either side: **Halsbury's Laws of England Volume 11 (2009) 5th Edition, paras 769.**

29. Thus, the Second Defendant has failed manifestly to discharge the evidential burden required to prove that the truck has been seized.
30. The legal burden however remains on the Claimant to prove his case. He must prove that the failure to transfer was an actionable breach on the part of the First Defendant. In cross examination the Claimant testified that he did not know the whereabouts of the truck and that the Second Defendant had gotten "*rid*" of the truck. What is clear on the evidence is that the truck was handed over to the Claimant on the day of purchase by the First Defendant handing over the keys and possession to the Claimant who in turn of his own volition handed over same to the Second Defendant. However the truck has never been returned to the Claimant by the Second Defendant and there is no evidence in this case as to the whereabouts of the truck.
31. It means that the Claimant was handed possession of the truck by the First Defendant in keeping with his obligation to so do by virtue of the sale. The fact that the First Defendant is now unable to legally transfer the title to the truck in the manner provided for in law (*supra*) is no fault on his part and therefore does not amount to a breach. The contractual obligation to transfer the title has become incapable of being performed because of the circumstances, namely that the subject of the contract cannot be located. This appears to be due to the fault of neither the Claimant nor the First Defendant.
32. Further, according to s. 19(1)(c) of the **Motor Vehicles and Road Traffic Act** the registered owner and the person seeking registration must both be present before the Licensing Authority together with the used motor vehicle in order for transfer of the vehicle to be done. Thus, while the court cannot make a determination of the exact location of the truck, by reason of the truck's location being unascertainable at the trial of the matter, the First Defendant's contractual obligation to transfer the said truck has become incapable of being performed. But where the purchaser (Claimant) has taken possession of the truck prior to the

transfer of title it is equally his contractual obligation to make the vehicle available for inspection by the licensing authorities on the day of the transfer, in keeping with the law, in order to effect such transfer. So that the Claimant in these circumstances is also unable to perform his obligations because of events which have overtaken the parties, namely the disappearance of the truck. The contract has therefore been frustrated in so far as the ability of both parties to perform their obligations are concerned. The court finds therefore that the contract has become frustrated and as a result the First Defendant is discharged from his obligation thereunder.

Third Issue

33. The Claimant claimed in his statement of case that the arrangement was that the Second Defendant would work the truck and that the profits would be shared, (there is no pleading of a wage to the Second Defendant for working the truck). Further, the Claimant averred in the said statement of case that between 11th February 2008 and February 2011 the Second Defendant retained possession of the truck and save for approximately \$5,000.00, he received no other money on account of profits generated from the use of the truck. However, the Claimant has provided no evidence whatsoever to prove these averments.

34. In his witness statement, which served as his evidence in chief, the Claimant testified that the agreement was that he would pay the Second Defendant \$300.00 a day for working the truck. In cross examination, the Claimant testified that he did give the Second Defendant \$300.00 per day. But quite astoundingly, there is no evidence from the Claimant in his witness statement that there was any arrangement whatsoever for the sharing of profits. Further, and equally remarkable, there is no mention whatsoever of \$5,000.00 having been paid to him by the Second Defendant from profits made while working the truck. One would have expected, this being the fulcrum of his case against the Second Defendant that the Claimant would have not only set out in his evidence that such an arrangement in fact **existed** but also proof of the loss he would have suffered if that was indeed the case. To the contrary, one would not have expected that the arrangement testified to in his evidence would be wholly different both in substance and form from that as claimed.

35. Where the pleaded case is inconsistent with a witness' testimony, the fact of the inconsistency goes to the witness' credibility: *Alice Mohammed v Jeffrey Bacchus* C.A.CIV.106/200. The court is of the view that this inconsistency coupled with the overall lack of evidence by the Claimant has impacted gravely on his credibility.
36. In the circumstances, the court finds that the patent absence of this evidence from his witness statement and the inclusion of a different version of the arrangement between the Claimant and Second Defendant leads the court to the inescapable inference that there was no profit sharing arrangement as set out by the Claimant in the pleadings and therefore that the Second Defendant did not withhold any profits from the Claimant.
37. However, there is clear evidence that the Second Defendant was given possession of the truck in pursuance of an agreement to work the truck but has now, in breach of that agreement, stopped working the truck, has provided no explanation there for and has not returned the truck to the Claimant. He has also chosen not to give any evidence as to the whereabouts of the Claimant's truck in circumstances where an explanation as to the whereabouts of the truck is reasonably required. There being no evidence from the Second Defendant, it follows that there is also no evidence from him in relation to the agreement made between he and the Claimant. The court cannot rely on what he has said in the Defence in the absence of any evidence whatsoever to support those allegations. The facts on the evidence which remain uncontested are that the truck was not returned in breach of the agreement and according to the Claimant the Second Defendant "*got rid of the truck*".
38. In relation to the claim for loss of use, arising out of breach of the contract between the Claimant and the Second Defendant, although the Claimant averred in his statement of case that the cost to rent a truck is \$15,000.00, not an iota of evidence has been led in this regard. The court is of the view however that while the Claimant has been deprived of the use of the truck by the Second Defendant and he is entitled to general damages in that regard but as special damages, loss of use must be specifically proven and there is no such proof.

Disposition

39. The order of the court is therefore as follows:

a) In relation to the First Defendant;

- i. The Claim is dismissed.
- ii. The Claimant is to pay to the First Defendant the prescribed costs of the claim in the sum of \$50,500.00.

b) In relation to the Second Defendant;

- i. The Second Defendant shall pay to the Claimant general damages for breach of contract in the sum of \$290,000.00 together with interest at the rate of 5% per annum from the date of the institution of the claim to the date of judgment.
- ii. The Second Defendant shall pay to the Claimant the prescribed costs of the claim in the sum of \$50,500.00

Dated this 19th day of July, 2013.

Ricky Rahim

Judge