

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No CV 2012-03569**

Between

**KERRON MOE**

Claimant

And

**GARY HARPER**

Defendant

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**

**APPEARANCES**

**Mr. St. Clair Michael O’Neil for the Claimant**

**Mr. Irshaad Andre Ali and Mr. Adam Razack for the Defendant**

**REASONS FOR DECISION**

**BACKGROUND**

1. The claimant is the son of the defendant. He sues his father in respect of an alleged agreement relating to a motor vehicle. He contends that it was an agreement for its sale to him by payment of installments over time. His father contends that it was a family arrangement under which his son was permitted the use of the vehicle in return for payments to assist in defraying its financing and insurance costs. The court invited the parties to consider mediation to avoid the less than satisfactory situation where family members were involved in litigation, and the effect on their future relationship of one party or the other succeeding. That invitation was apparently declined and the matter proceeded to be litigated as described hereunder. The claimant applied to strike out the defendant’s defence on the ground of illegality. He contended that the agreement was a

rental agreement, and therefore illegal under the **The Motor Vehicles and Road Traffic Act 48:50 (the Act)**

2. The defendant in turn applied to strike out the Claim and Statement of case on the ground that the agreement was in fact illegal, in that the claimant used the vehicle for hire as an unauthorized taxi.

## ISSUE

3. **Whether the agreement is unenforceable as a result of illegality**

## CONCLUSION

4. a. Whether there was a rental agreement in this case is a question of fact to be determined on evidence at trial. It is not sufficiently clear from the pleadings that the vehicle in question was rented, so as to render the agreement illegal as being in breach of provisions of the **Motor Vehicles and Road Traffic Act 48:50 (the Act)**

The pleadings are equivocal, and at this stage are equally consistent with a family arrangement for a fixed contribution for defraying of the costs of acquisition and maintenance of the said vehicle, as is the issue of whether there was even intention to create legal relations under the agreement.

b. Alternatively, if the agreement is determined on the pleadings to be a rental agreement, then what follows is not simply the striking out of the defence, allowing entry of judgment against the defendant. If in fact the basis of the striking out of the defence is that the agreement to which it refers is illegal, then the claimant similarly cannot found a cause of action on an illegal contract.

The claimant cannot have it both ways – i.e. claiming that the defence **must** be struck out as being based on an illegal contract, but at the same time seeking relief under the contract as so characterized.

For the court to accept that the claimant is entitled to enforce the agreement it must accept the claimant's characterization of the agreement as a legal sale agreement. It cannot first strike out the defence on the completely inconsistent basis that the agreement **is not** in fact a legal sale agreement, but rather an illegal rental agreement, and then grant the claimant specific performance of it on the basis that it **is** in fact a legal sale agreement. However, it cannot be categorically determined at this stage, on the pleadings, that the agreement is an illegal rental agreement.

c. However, the statement of case itself discloses that the agreement is actually illegal for another reason - namely that the Claimant himself used the vehicle for an illegal purpose, as a taxi. This was also in breach of the insurance it carried, which expressly stipulates that the vehicle was not covered for use for hire or reward. This appears directly from the statement of case and the attachments thereto. (See Certificate of Insurance 129939). In those circumstances the agreement is unenforceable by the Claimant.

## **DISPOSITION**

5. The court therefore held that the contract, being one for an admitted illegal purpose, was not one that could or should be enforced by the High Court. The Defendant succeeds on his application to strike out the Claim.

## **ORDER**

6.
  - i. The Claimant's action was dismissed with costs.
  - ii. The Claimant is to pay the Defendant's costs in the amount of \$10,648.00, being 55% of the costs prescribed by the Civil Proceedings Rules in respect of a claim for \$76,800.00

## **ANALYSIS AND REASONING**

### **Facts**

6. By Claim Form and Statement of Case filed on the 29<sup>th</sup> day of August, 2012, the Claimant claimed the following reliefs;

- *A Declaration that an Agreement existed between the Claimant and the Defendant with respect to motor vehicle registered as PCJ 3973 (hereinafter referred to as ‘the said Motor Vehicle’);*
- ***Specific Performance** of the said Agreement evidenced partly or orally and partly by acts of performance, in particular the payment of the sum of seventy thousand dollars (\$70,000.00) representing the purchase price of the said Motor Vehicle;*
- *An order that the Defendant transfer the said motor vehicle to the Claimant forthwith;*
- *Damages for breach of contract of the said agreement made between the Claimant and the Defendant in lieu of Specific Performance;*
- *Damages for loss of earnings at a rate of \$1,000.00 per week from the 28<sup>th</sup> day of May 2012 and continuing;*
- *An order that the Defendant refund the Claimant the sum of six thousand eight hundred dollars (\$6,800.00) representing monies paid in excess of that agreed by the parties;*

## **The Defendant’s Defence**

### **The arrangement as stated by the Defendant**

7. According to Paragraph 6 of the Defendant’s defence:

*“The Defendant also avers that as he had another vehicle for his personal use and in an effort to obtain an additional income to supplement his salary and to service his loan with the Credit Union with respect to the said vehicle, decided to let his nephew Andy Harper use the said vehicle for his use on the condition that he pay to the Defendant the sum of two thousand dollars (\$2,000.00) every fortnight...”*

8. Paragraph 7 of the said Defence:

*“That the Defendant avers that prior to his arrangement with his Nephew, he had entered into a similar arrangement with his brother Hayden Morrison relating to a Mitsubishi Lancer motor vehicle he still owns and that arrangement as well as all his other arrangements relating to the vehicles he owned were **always to let out his vehicle to these persons in return for a contribution from these persons for being allowed to use the vehicles and it was never an arrangement to sell the vehicles**”*

9. Paragraph 9 of the Defence

*‘...that since the Claimant is his son and he had no use for the said vehicle after taking possession of it from his Nephew, the Defendant on or about January, 2010 decided to enter into a similar arrangement with the Claimant as he had done previously with his Nephew and the other vehicles he owns and had owned’.*

#### **The Defendant’s case as set out in his Defence**

10.

1. The Defendant at Paragraphs 10 to 13 clearly states that the only arrangement entered into between the Claimant and the Defendant was for the use of the vehicle for a contribution of \$1000.00 per week for as long as the Claimant had use of the said vehicle and at no time was the payment of the sum of \$70,000.00 and/or any other sum paid by the Claimant to the Defendant meant to represent any payment toward the purchase of the vehicle.
2. At paragraph 13 of the Defendant’s Defence it is stated “.....*the contribution of the sum of One Thousand Dollars (\$1000.00) by the Claimant to the Defendant was a **very informal arrangement between them**, that allowed the Claimant to utilise the said vehicle for his own purposes and allow the Defendant to obtain a contribution for the said use that would supplement the servicing of the loan on the said vehicle and to utilise for his personal expenses....*”
3. The Defendant states at Paragraphs 15 to 19 of his Defence that he was responsible for the insurance and maintenance and upkeep of the vehicle.

### Whether rented car

11. Section 7 (1) of the **Motor Vehicles and Road Traffic Regulations** (the regulations) made under **The Motor Vehicles and Road Traffic Act 48:50 (the Act)** provides:

*‘The identification mark to be carried by a registered motor vehicle or trailer in pursuance of section 12 of the Act, shall consist of two plates which must confirm as to size, lettering, numbering and otherwise with the following provisions:*

*(a) (i) each plate must be rectangular and bear upon it the index mark of “P” for private motor vehicles, “T” for goods vehicles, “R” for rented cars, “H” for public service vehicles, “X” for any other vehicles...’*

12. It is not in dispute that the vehicle is registered as **PCJ 3973**.

13. In order to change the use of a motor vehicle, **section 18** of the Act provides:

***18. (1) Where the owner of a motor vehicle which is registered for use for a particular purpose intends to use that vehicle for some other purpose he shall, before using the vehicle for that other purpose, apply to the Licensing Authority for registration of the vehicle for use for that other purpose; and the application shall, subject to subsection (2), be dealt with as if the vehicle had not previously been registered, but—***

*(a) the fee payable for such registration shall be the fee prescribed for an amendment of the Register;*

*(b) except as provided by subsection (2), motor vehicles tax shall not be payable before such registration.*

14. It was submitted that unless the use of vehicle was lawfully changed and registered, the Defendant could not lawfully engage in the business of renting it to individuals.

15. It is further submitted that, if the agreement between the parties was as stated by the Defendant, his actions (entering into an agreement for the rental of a private vehicle), would be contrary to section 21 of the Act:

**Section 21 (1)** of the Act provides:

*21. (1) Save as is otherwise provided in this Act, if—*

*(a) ...*

*(b) any motor vehicle or trailer is **used upon any road for a purpose which is not authorised by the registration issued in respect thereof** or is altered in a manner which may conflict with the purpose or use for which it is registered, without permission from the Licensing Authority or is in contravention of any provisions of this Act; or*

*(c) ... the owner or the driver or other person in charge of the motor vehicle, as the case may be, who contravenes—*

*(i) ...*

*(ii) paragraph (b) or (c), is liable to a fine of eight thousand dollars.*

16. It was submitted that from the above it can be **deduced** that the Defendant is therefore putting forward the defence that the agreement between himself and the Claimant was not for the **sale** of the vehicle, but that the agreement that existed between them was for its **rental**.

17. It was submitted that any rental such agreement would be illegal as the vehicle was not one registered for such a use, and therefore his defence relied upon an illegal agreement.

18. In fact however, it is not sufficiently clear from the defence that the agreement is unequivocally a rental agreement. The assertion that such an arrangement would have to be *deduced* confirms this. There is no sufficient material to establish as a question of fact at this stage that the agreement was in fact a rental agreement.

19. In fact the defendant further contends that it was an informal family arrangement, with the defendant permitting use of the vehicle but requiring a contribution toward the financing and insurance costs.

20. In light of the above it is clear that the issues of whether the Defendant has relied on an illegal rental agreement in his Defence and, additionally whether there was even a contract for sale of the vehicle to the Claimant by the Defendant are issues of fact, to be decided at trial.

21. Accordingly the defence cannot be struck out at this stage on the basis of a finding that the agreement was for rental, and the claimant's application to strike out the defence at this stage does not succeed.

22. However even if it had been established that the agreement were a rental agreement, and that it were illegal, it would give rise to the incongruity of, on the one hand, the Claimant's being permitted to strike out the defence on the ground that the defendant has characterised the agreement as an illegal rental agreement, but the Claimant seeking to specifically enforce the same agreement.

23. He can only enforce the agreement if in fact it is not an illegal agreement. The court would in effect be ruling that the agreement is both an illegal rental agreement, **and** a legal agreement upon which the claimant can rely and in respect of which he can seek specific performance.

## **ILLEGALITY – LAW**

24. It is so well established that a court should not lend its aid to an illegal transaction that it should not be necessary to cite authority. Curiously, the under mentioned authorities, which are accepted by the court, were cited by attorney at law for the claimant, who nonetheless persisted in attempting to draw a distinction between transactions which were illegal at the time they were entered into, and transactions which only became so subsequently.



25. The submission was made, in effect, that if, as allegedly occurred, the vehicle had been subsequently utilized as a taxi, in breach of the Act, and in breach of its insurance conditions, this would not have rendered the agreement illegal, as there was no such intention to use the vehicle at the time that the transaction was entered into. This would not preclude the court from granting the claimant the relief that he claimed, namely, *inter alia*, specific performance of that agreement. This has only to be stated for its absurdity to be obvious. The High Court should never be asked, as it has been in this case, to enforce an illegal contract. As the authorities cited by the claimant himself emphasise, as a matter of law and policy, the court does not sit to enforce illegal contracts.

26. In the case of **Mahmoud v Ispahani [1921] 2 KB 716** Scranton L.J. at page 729 stated:

*“...the court is **bound**, once it knows of the contract is illegal, to take the objection and to **refuse to enforce the contract**, whether its knowledge comes in the statement of the party who was guilty of the illegality or whether its knowledge comes from outside sources. **The court does not sit to enforce illegal contracts**. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract.”*

27. Denning L.J. stated at page 37-38 in **Marles v Philip Trant & Sons Ltd. [1954] 1 QB 29** when he said:

*A distinction must be drawn, I think, between an illegality which destroys the cause of action and an illegality which affects only the damages recoverable. So far as the cause of action itself is concerned, the principle is well settled that, **if the plaintiff requires any aid from an illegal transaction to establish his cause of action, then he shall not have any aid from the court.***

28. **Scott v Brown, Doering McNab and Company [1892] 2 Q.B. 724 at 728** per Lindley L.J.:

*No court ought to **enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or***

*transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.*

29. In the case of **Snell v Unity Finance Company Limited [1964] 2 QB 203 at 213**, Wilmer L.J. in delivering his judgment accepted the principle with regard to unlawful contracts to be as stated by Lord Mansfield in the case of *Holman v Johnson* (1775) 1 Cowp. 341 where he stated:

*"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of **policy**, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. **No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.** If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or **the transgression of a positive law of this country**, there the court says **he has no right to be assisted**. It is upon that ground the court goes; not for the sake of the defendant, but because they will **not lend their aid to such a plaintiff**. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis*."*

30. Furthermore, in **Chitty on Contracts 24th Edition, Volume 1 General Principles Sweet & Maxwell (1977)** at paragraph 906 page 416, it is stated:

*Illegality may affect a contract in at least the following ways:*

- (i) *When a contract cannot be performed in accordance with its terms without a breach of the criminal law, statutory or otherwise, the contract is unenforceable for illegality.*
- (ii) *The court will deny its assistance to a party who entered into a contract in order to effect some illegal purpose, whether that purpose is illegal at common law or by legislation, and that notwithstanding the fact that the contract could be performed for an innocent purpose.--*

### **WHETHER THE CLAIMANT HAS SOUGHT TO RELY ON AN ILLEGAL CONTRACT**

#### **31. The Claimant's pleadings**

- i. The Claimant at Paragraph 1 of his Statement of Case has stated that he is “.....a taxi driver and the son of the Defendant”.
- ii. The Claimant at Paragraph 12 of his Statement of Case has stated he “.....is a taxi driver who works the Picton Port of Spain route and **earns approximately \$1000.00 per week.**
- iii. The Claimant at Paragraph 11 of his Statement of Case has stated “.....the Defendant took possession of the said Motor Vehicle.
- iv. The Claimant has sought at item 5 of the reliefs, **damages for loss of earnings at a rate of \$1000.00 per week** from the 28<sup>th</sup> day of May 2012 and continuing.

32. It is clear from the pleadings of the Claimant, that the Claimant used the vehicle as a taxi and is alleging that he suffered loss of earnings of \$1000.00 per week as a result of the Defendant taking possession of the vehicle. This was in fact conceded by the claimant's attorney at law in the course of his oral submissions.

#### **Using Motor Vehicle PCJ 3973 as a taxi**

33. At Part 3, Section 21(5) of the Act it is stated:

*“ No motor vehicle shall be used as a taxi which is not duly registered as such under this Act; and if this subsection is contravened, the owner and the driver of the motor vehicle shall be guilty of an offence against this Act; but it shall be a defence on the part*

*of the owner to prove that the contravention was without his knowledge and that he had taken all reasonable steps to avoid such contravention.”*

34. Section 18 (1):

*18. (1) Where the owner of a motor vehicle which is **registered for use for a particular purpose intends to use that vehicle for some other purpose** he shall, **before** using the vehicle for that other purpose, **apply to the Licensing Authority for registration of the vehicle for use for that other purpose**; and the application shall, subject to subsection (2), be dealt with as if the vehicle had not previously been registered, but—*

*(a) ..*

*(b) ...*

35. **Section 21 (1)** of the Act provides:

*21. (1) Save as is otherwise provided in this Act, if—*

*(a) ...*

*(b) any motor vehicle or trailer is **used upon any road for a purpose which is not authorised by the registration issued** in respect thereof or is altered in a manner which may conflict with the purpose or use for which it is registered, without permission from the Licensing Authority or is in contravention of any provisions of this Act; or*

*(c) .... the owner or the driver or other person in charge of the motor vehicle, as the case may be, who contravenes—*

*(i) ...*

*(ii) paragraph (b) or (c), is liable to a fine of eight thousand dollars.*

36. The Claimant was in contravention of Section 18(1) of the Act by utilizing the vehicle as a taxi. He also violated the terms of the insurance on the vehicle and placed other users of the road, and his passengers, at risk of sustaining losses arising from motor vehicular accident which were not covered by compulsory motor vehicle insurance.

37. As such it was the Claimant who was seeking to rely on an illegal contract to obtain relief, including specific performance of that contract, from the Court

38. The claimant was provided with the opportunity to elaborate upon his written submissions. In the course of doing so he clearly conceded that the vehicle the subject of the contract was in fact being used for hire, as indicated by the pleadings, where the claimant indicated that he was a taxi driver and that deprivation of the vehicle was causing him loss of earnings / income in the sum of \$1000.00 per week.

39. He contended however that the contract was not thereby rendered illegal and unenforceable as there was no evidence or pleading that at the time of entering the agreement there was an intention that the vehicle would be used for an illegal purpose – namely use for hire as an unauthorized taxi. The fact that such an intention and use arose **subsequent** to the agreement placed it in a different category – one that the courts were not precluded from enforcing.

40. The matter was stood down to enable counsel to provide support for this unusual proposition. At the appointed time counsel was not present. Five minutes later he was still not present. The matter was therefore adjourned for decision.

41. On the date set for decision counsel requested the yet further opportunity to address the court on the materials he had unearthed in support of the above proposition. This was afforded, materials were supplied, and the authority in support considered.

42. The court concluded that it was not authority for any such proposition, and even if it were, it was contrary to established principle and not of such weight that required that it be followed.

## CONCLUSION

43. a. Whether there was a rental agreement in this case is a question of fact to be determined on evidence at trial. It is not sufficiently clear from the pleadings that the

vehicle in question was rented, so as to render the agreement illegal as being in breach of provisions of the **Motor Vehicles and Road Traffic Act 48:50 (the Act)**. The pleadings are equivocal, and at this stage are equally consistent with a family arrangement for a fixed contribution for defraying of the costs of acquisition and maintenance of the said vehicle, as is the issue of whether there was even intention to create legal relations under the agreement.

b. Alternatively, if the agreement is determined on the pleadings to be a rental agreement, then what follows is not simply the striking out of the defence, allowing entry of judgment against the defendant. If in fact the basis of the striking out of the defence is that the agreement to which it refers is illegal, then the claimant similarly cannot found a cause of action on an illegal contract.

The claimant cannot have it both ways – i.e. claiming that the defence **must** be struck out as being based on an illegal contract, but at the same time seeking relief under the contract as so characterized.

For the court to accept that the claimant is entitled to enforce the agreement it must accept the claimant's characterization of the agreement as a legal sale agreement. It cannot first strike out the defence on the completely inconsistent basis that the agreement **is not** in fact a legal sale agreement, but rather an illegal rental agreement, and then grant the claimant specific performance of it on the basis that it **is** in fact a legal sale agreement. However, it cannot be categorically determined at this stage, on the pleadings, that the agreement is an illegal rental agreement.

c. However, the statement of case itself discloses that the agreement is actually illegal for another reason - namely that the Claimant himself used the vehicle for an illegal purpose, as a taxi. This was also in breach of the insurance it carried, which expressly stipulates that the vehicle was not covered for use for hire or reward. This appears directly from the statement of case and the attachments thereto. (See **Certificate of Insurance 129939**). In those circumstances the agreement is unenforceable by the Claimant.

## **DISPOSITION**

44. The court therefore held that the contract, being one for an admitted illegal purpose, was not one that could or should be enforced by the High Court.

The Defendant succeeds on his application to strike out the Claim.

## **ORDER**

45. i. The Claimant's action was dismissed with costs.

ii. The Claimant is to pay the Defendant's costs The Claimant is to pay the Defendant's costs in the amount of \$10,648.00, being 55% of the costs prescribed by the Civil Proceedings Rules in respect of a claim for \$76,800.00.

Dated this 23<sup>rd</sup> day of April, 2013

.....

Judge

Peter A. Rajkumar