ST. GEORGE WEST COUNTY

PORT OF SPAIN PETTY CIVIL COURT

RULING ON A SUBMISSION OF NO CASE TO ANSWER

CITATION: Alana Mills v. Andrew Safe

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 170 of 2011

DELIVERED ON: 10th May 2012

CORAM: Her Worship Magistrate Nalini Singh

St. George West County

Port of Spain Petty Civil Court Judge

REPRESENTATION:

Mr. Sterling John for Alana Mills

Mr. Trevor Clarke for Andrew Safe

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1. INTRODUCTION

1.1 By ordinary summons dated and filed on the 19th May 2011, the plaintiff, Alana Mills, alleged that the sum of $14,000.00 was owed to her by the defendant, Andrew Safe. According to the particulars of claim, the plaintiff gave to the defendant, this sum of money on a day unknown between the 20th December 2010 and the 31st March 2011, so he could purchase parts As well as source someone and pay them to carry out repairs to motor vehicle registration number PCH 9544 which was owned by one Anton Mills. The details of the claim are:

ITEMS	**COST**
CS3 TRANSMISSION	**$9,000.00**
CS3 HARNESS	**$400.00**
MECHANICAL SERVICES	**$4,000.00**
ELECTRICAL SERVICES	**$600.00**
TOTAL	**$14,000.00**

1.2 On the 29th December 2011, the plaintiff filed an amended particulars of claim in which the additional sum of $5,720.00 was claimed from the defendant. This additional sum comprised the following:

ITEMS	**COST**
COST TO HIRE NEW MECHANIC	**$3,800.00**
HARNESS	**$400.00**
COST OF NEW BATTERY	**$1,500.00**
CAR JACK	**$20.00**
TOTAL	**$5,720.00**

1.3 The plaintiff therefore claimed the total sum of $19,720.00 from the defendant. According to **section 8 of the Petty Civil Courts Act Chap. 4:21:**

> "8. (1) A Court shall have jurisdiction to hear and determine any action founded on contract or on tort where the debt, demand or damage claimed is not more than fifteen thousand dollars, whether on balance of account or otherwise".

Section 9 of the Petty Civil Courts Act Chap. 4:21 provides however that:

> "9. (1) Where a plaintiff has a cause of action for more than fifteen thousand dollars in which, if it were not for more than fifteen thousand dollars, a Court would have jurisdiction, the plaintiff may abandon the excess, and thereupon a Court shall have jurisdiction to hear and determine the action, so however that the plaintiff shall not recover in the action an amount exceeding fifteen thousand dollars.
>
> (2) Where a Court has jurisdiction to hear and determine an action by virtue of this section, the judgment of the Court in the action shall be in full discharge of all demands in respect of the cause of action and entry of the judgment shall be made accordingly".

The plaintiff elected to abandon the excess and so the Court was satisfied there was jurisdiction to hear and determine this cause of action which was for more than fifteen thousand dollars.

1.4 At the conclusion of the case for the plaintiff, Mr. Clarke invited the Court to entertain and uphold a submission that his client had no case to answer without being put to his election to call evidence. The hearing on this issue proceeded on the basis of written submissions.

1.5 The hearing on the issue was premised on the fact that the Court could determine whether the plaintiff had made out a case for the defendant to answer without the need for the defendant to be put to his election to call evidence.

1.6 Before coming to deal with the submission, I will describe the claim and the evidence given at the trial.

2. THE PARTICULARS OF CLAIM

2.1 According to the amended particulars of claim, in or about December 2010, the plaintiff entered into an oral agreement with the defendant. It was arranged that he would purchase an automatic CS3 transmission for motor vehicle registration number PCP 3087. It was also agreed that the defendant would source someone to install the CS3 transmission and he would supervise their work and all "necessary mechanical works" related to the installation of the CS3 transmission.

2.2 Pursuant to the agreement, the plaintiff gave to the defendant the sum of $9,000.00 for the purchase of the CS3 transmission, a further $4,000.00 to pay the mechanic and, the sum of $600.00 to cover electrical works incidental to the installation of the CS3 transmission.

2.3 It turned out that the CS3 transmission which was purchased by the defendant proved to be defective and was not equipped with brackets and other fittings which were needed to facilitate its installation.

2.4 The plaintiff requested the receipt of payment for the CS3 transmission from the defendant so she could have the item replaced. The defendant initially refused to hand over this document but did so after the plaintiff made a report to the police. A copy of the receipt was annexed to the amended particulars of claim and marked "A". On the face of this document, the name of the business was listed as "Dass Dan & Sons" and the address of this business place was stated simply as "Hiy Way". The result was that the plaintiff was unable to locate exactly where the CS3 transmission was purchased.

2.5 The vehicle which was originally housed in the yard of the defendant's home was moved onto the road outside his residence. In or about March 2011, the plaintiff removed the car from the road and caused it to be conveyed to a mechanic she sourced, to have the repairs completed. It was at this point that the back brackets, a harness, the car battery and the car jack were discovered missing from the car.

2.6 In the circumstances the plaintiff had to incur an additional cost of $3,800.00 to pay a mechanic, $400.00 to purchase a new harness, $1,500.00 to buy a new car battery and $20.00 to secure a new car jack. These expenses were separate and apart from the original sum of $14,000.00 which was initially advanced to the defendant.

2.7 It is on this basis that the plaintiff alleged that the defendant failed to honor the terms of their oral agreement to acquire a CS3 transmission, source someone to install the CS3 transmission and oversee the installation of the same as well as all works related thereto. In fact the defendant not only purchased a defective CS3 transmission but, he failed to ensure that a

functioning CS3 transmission was installed to render the car capable of working. For these reasons, the claim of $18,700.00 is made against the defendant.

3. THE EVIDENCE AT TRIAL

3.1 On the 27th February 2012 the trial into this matter commenced. Of the witnesses called by counsel for the plaintiff, I will examine the evidence of Alana Mills as it is material to a determination of the application at hand.

Evidence of Alana Mills

3.2 The evidence of Alana Mills in relevant part is this. She owned PCH 9544. She told the Court that she was in a relationship with the defendant for some seven months and in December 2010 she gave the vehicle to him so he could get someone to do work on it. She said that the transmission was giving trouble and the car was not working sufficiently. The agreement was that the vehicle would be housed in the defendant's yard and he would get someone to fix it. She stated further that on the 26th December 2010, she gave to the defendant $9,000.00 so he could buy the transmission for the vehicle. She also testified to giving to the defendant the sum of $4,000.00 so he could pay the person who was retained to work on the transmission in her vehicle. The Court also heard that the plaintiff gave to the defendant a further sum of $1,200.00 to pay for electrical work incidental to the installation of the transmission.

3.3 Alana Mills testified that when she received the car it was not working and she was not in a position to avail herself of the warranty covering the transmission. What she was able to do was convey her car to a new mechanic to get the work done on the car. When the car was

initially conveyed to the new mechanic, it was discovered that the car battery was missing, the transmission was not working and according to the plaintiff she had to spend $3,8000.00 to pay the new mechanic, an additional sum of $1,000.00 on electrical works and a further $300.00 for a new harness.

3.4 In cross examination it was admitted by the plaintiff that she had known the defendant for years before the incident as being someone around the family. She agreed that she had a good relationship with him and it was in light of the good relationship she had with him, she entrusted him with the duty of having her vehicle repaired. It was also stated by the plaintiff that the defendant told her that he could get an engine and a transmission for $9,000.00 and she gave him the $9,000.00.

4. THE SUBMISSIONS

Submission of the defendant

4.1 At the conclusion of this evidence, counsel for the defendant submitted that:

(a) The plaintiff had not proven that an essential ingredient existed at the time the alleged breach of contract occurred and,

(b) The evidence adduced by the plaintiff was so manifestly unreliable that it failed to meet the scintilla of evidence test.

4.2 These two points were developed in this way:

(a) The plaintiff has not proven that an essential ingredient existed at the time the alleged breach of contract occurred

Submission of the defendant

It emerged during the evidence in chief of the plaintiff that she was in a relationship with the defendant. The relationship lasted some seven months and it was during this time the agreement was entered into between the plaintiff and the defendant. Counsel submitted that on the authority of **Balfour v. Balfour [1919] 2KB 571,** once a court is confronted with a purely social agreement, no intention to create legal relations is anticipated and this presumption can only be rebutted by hard evidence which points to the fact that the parties designed a binding contract. Reliance was also placed on the case of **Rose & Frank Co. v. JR Crompton & Bros. Ltd. [1923] 2 KB 261** where in relevant part Atkin LJ stated that:

> "To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatively implied by the nature of the agreed promise or promises, as in the case of the offer and acceptance of hospitality, or of some agreements made in the course of family life between members of family as in *Balfour v. Balfour*. If the intention may be negatived impliedly it may be negatived expressly".

4.3 In light of this it was argued that since a relationship existed between the plaintiff and the defendant at the time the agreement was entered into, at its highest, the actions of the defendant

amount to no more than a boyfriend assisting his girlfriend at a time her vehicle was not working. Consequently, there was no intention to create legal relations.

4.4 It is submitted that this argument is reinforced by the evidence of the plaintiff and her witness to the effect that throughout the time the defendant was in possession of the vehicle, he purchased parts and paid for the labor out of his own pocket. As such the actions of the defendant amount to no more than actions in furtherance of the social relationship he shared with the plaintiff thus negating any proof of contractual intention.

Submissions of the plaintiff

4.5 The plaintiff submitted in response that the plaintiff allocated significant resources toward the repair of her vehicle which by itself is indicative of the importance which was placed on the proper execution of the agreement. In this vein it was submitted that the evidence never indicated anything other than the fact that the plaintiff had funded the repairs. As such it was submitted that it went without saying that in the event the repairs were not completed the plaintiff would seek redress in a court of law. Counsel referred the Court to the learning contained in **Chitty on Contracts (24th ed., 1977 para 117)** to the effect that:

> "An agreement, even though it is supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations. Of course, in the case of ordinary commercial transactions it is not normally necessary to prove that the parties in fact intended to create legal relations. The onus of proving that there was no such intent 'is on the part who asserts that no legal effect is intended, and the onus is a heavy one'. Where such evidence is

adduced, the courts normally apply an objective test; and they also attach weight to the importance of the agreement to the parties, and to the fact that one of them has acted in reliance on it".

Counsel for the plaintiff submitted that this learning made it clear that the burden of proving that there was no intention to create legal relations is borne by the party making the assertion and it is a heavy one which the defendant, on an objective assessment of the circumstances of this case, has failed to prove.

4.6 Reliance was then placed on the case of **J. Evans and Sons (Portsmouth) Ltd. v. Andrea Merzario Ltd. [1976] 1 WLR 1078.** On the facts of this case, the plaintiffs had imported machines from Italy for many years and for this purpose they used the services of the defendants, who were forwarding agents. The plaintiffs were orally promised by the defendants that their goods would continue to be stowed below deck. On one occasion, the plaintiff's container was stored on deck and it was lost when it slid overboard. The court of first instance held that the promise was not intended to be legally binding given that it was made during a courtesy call. The Court of Appeal held that the oral assurance that goods would be carried inside the ship was part of the contract and was held to override the written exclusion clause. Reliance was placed principally on the importance attached by the customer on the promise that his goods would be carried below deck and the fact that he would not have agreed to this mode of carriage but for this promise. Counsel for the plaintiff argued that a similar importance was attached to the proper execution of the agreement in the instant matter, and so intention is therefore evident.

(b) The evidence adduced by the plaintiff is so manifestly unreliable that it fails to meet the scintilla of evidence test.

Submission of the defendant

4.7 The point raised was that the evidence adduced by the plaintiff was manifestly unreliable resulting in it being unable to meet the scintilla of evidence test. In this regard certain discrepancies were highlighted. They are:

- The sum of $14,000 was initially claimed against the defendant as monies the defendant owed to the plaintiff in respect of the agreement. Leave was sought and obtained to file an amended particulars of claim and in this document, the sum claimed against the defendant in respect of the alleged breach increased by $4,720.00 to $18,720.00. Mr. Clarke submits that in attempting to provide a breakdown of this new claim in the amended particulars of claim document, the total was listed as $19,320.00 when in fact the figures furnished amounted to $18,720.00. According to Mr. Clarke, this discrepancy was not addressed by the plaintiff. This he submits is critical as special damages must be specifically pleaded. Reliance was placed on the cases of **British Transport Commission v. Gourley [1956] AC 185, Elva Dick Nicholas v. Jayson Hernandez & Capital Insurance Company Ltd. HCA No. S-1449 of 2004, Grant v. Motilal Moonan Limited & Rampersad Civ.App. No. 162 of 1985** as authority for this proposition.

- Another inconsistency which arose was between the evidence in chief of Alana Mills and what was contained in her pleadings regarding the identity of the owner of the vehicle. The plaintiff in her evidence in chief indicated that her brother was the owner

of the vehicle but at paragraph 1 of the amended particulars of claim, the plaintiff asserted that the CS3 transmission was intended for her car.

- The point was also made that the initial particulars of claim listed the registration number of the vehicle to be repaired as vehicle registration number PCH 9544 and this was confirmed by Alana Mills in her evidence in chief. The Court was referred to what was pleaded in the amended particulars, which referred instead to a vehicle bearing registration number PCP 3087.

- A discrepancy arose regarding the cost of the harness in that in the initial particulars of claim, the cost of the harness was stated to be $400.00 and this sum was mirrored in the amended particulars of claim yet, according to the evidence given by Alana Mills in her evidence in chief, she indicated that the cost of the harness was $300.00.

4.8 It was also submitted by counsel for the defendant that the evidence adduced by the plaintiff was manifestly unreliable resulting in no case being advanced because no documentary evidence was offered to the Court to support the claims of $3,800.00 which was alleged to have been spent to cover the labor costs of the new mechanic and $1,200.00 which was said to be costs incurred in repairing the air condition as well as a purchasing a coil pack.

Submissions of the plaintiff

4.9 The essence of the plaintiff's response is that there is sufficient evidence to make out a case for the defendant to answer and the defendant's submission should be overruled.

This has given rise to the following issues.

5. THE ISSUES

5.1 Four issues therefore arise for determination by me. They are:

(a) Whether the Court has a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence

(b) Whether there is a threshold test that is to be applied by a court exercising a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence

(c) Whether the arrangement between the plaintiff and the defendant evinces an intention to create legal relations.

(d) Whether the evidence adduced by the plaintiff is so manifestly unreliable that it fails to meet the scintilla of evidence test.

6. THE LAW

(a) Whether the Court has a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence:

6.1 The general rule is that a court ought not to rule on a submission of no case to answer unless the party making it elects to call no evidence. The cases which illustrate this point are **Alexander v. Rayson [1936] 1 KB 169, Laurie v. Raglan Building Co. Ltd. [1941] 3 All ER 332** and **Graham v. Chorley BC [2006] EWCA Civ 92.** Notwithstanding this established principle, there is an exception to the general application of this rule because in some instances, a

court has the discretion to rule on a submission of no case to answer notwithstanding the fact that the party making the submission has not been put to his election.

6.2 This line of thinking first became apparent with the case of **Mullan v. Birmingham City Council The Times 29 July 1999.** In this case, David Foskett QC, sitting as a Deputy High Court Judge, found that in the light of new case management powers given to the courts under the new regime and the overriding objective, judges now have a greater discretion to entertain and rule on a defendant's submission of no case to answer without requiring it not to call evidence. As he put it:

> "Given the requirements of the 'overriding objective' to deal with the case expeditiously and fairly, allotting to it an appropriate share of the court's resources and taking account of the need to allot resources to other cases and acting in a way designed to save expense, it did seem to me that I would be entitled to adopt a rather more flexible approach to the kind of submission made than might have been the case prior to the implementation of the Civil Procedure Rules.
>
> The court has considerable power under the Civil Procedure Rules to dictate how a case is to be managed both pre-trial and at the trial. Rule 3.1(2)(m) gives the court power:
>
> > "to take any . . . step or make any . . . order for the purpose of managing the case and furthering the overriding objective"

over and above the specific orders and directions specified earlier in that rule. In my judgment, therefore, the court does have the power to hear a submission of this nature without putting the defendant to its election".

6.3 Two other cases reflect this line of thinking. The first is **Boyce v. Wyatt Engineering [2001] EWCA Civ 692.** Mance LJ started off by first noting that where a judge decides not to put defendants to their election before dealing with a submission of no case to answer, there is a need for considerable caution for two reasons. One is that the judge would have to put his mind to the facts of only one side of the case, and if he overrules the submission of no case to answer, he will then be expected to hear further evidence and to retain and apply an open mind in relation to all the facts at the end of the trial which could prove an inherently difficult exercise. The second reason is that if no election is extracted before deciding on a submission of no case to answer, there is always the risk that if the claim is dismissed, and a successful appeal follows, a re-trial would inevitably be ordered at a greater cost than that which would have arisen if the other side had been heard during the first trial. This said, his Lordship went on to state at paragraph 5 that:

"There may be some cases, probably rare, in which nothing in the defendant's evidence could affect the view taken about the claimant's evidence or case, but this is not one of them, and care would be required in identifying them".

6.4 These sentiments were echoed in the case of **Bentley v. Jones Harris & Co. [2001] EWCA Civ 1724** where it was said that if a judge concluded that a claimant had no real prospect of success, or was bound to fail, on the judge's assessment of the evidence, the judge would be

entitled to give judgment for the defendant in the same way as if there had been an application for summary judgment and so it was held that in that matter, the judge had not been wrong to dismiss the claimant's case, based upon his findings arising out of the facts of the claimant's own evidence. This is what Lord Justice Latham said at paragraph 75:

> "… it will only be in a rare case that the judge should be asked to determine the issues before him before all the evidence has been completed. However, it seems to me that, if a judge concludes at the end of the claimant's evidence, whether on the application of the defendant or of his own motion, that the claimant has no real prospect of success or, in other words, is bound to fail, on his assessment of the evidence before him at that stage, he is in my view entitled to give judgment for the defendant, in the same way as if there had been an application at an earlier stage in the proceedings for summary judgment under CPR Part 24.2. In that way he will be giving effect, in the circumstances of a trial, to the overriding objective and in particular to the need to contain within limits the expenditure of time and costs on the particular case before him". *(emphasis mine)*

6.5 It also seems to be the case that if there is some flaw of fact which emerges for the first time during the trial which makes it entirely obvious that the claimant's case must fail and it may save significant costs if a determination is made at that stage then in these types of exceptional circumstances, a judge may rule on a submission of no case to answer without requiring an election. This was illustrated in the case of **Miller (t/a Waterloo Plant) v. Cawley [2002] EWCA Civ 1100.** In this case, the claimant claimed sums due for work done in 1998 on a property in which the defendant proposed to live. A preliminary issue arose as to whether or not

there was a contract between the claimant and the defendant. At the conclusion of the claimant's evidence counsel for the claimant asked the judge to indicate whether if a submission were to be made to him, he would invite the defendant to elect. The judge said that he would as there was authority which said that a judge should put a person submitting no case to answer on his election except in exceptional circumstances. The defendant elected that she and her witnesses would not give evidence. On the submission of no case the judge asked himself whether there was any or any real prospect of the claimant succeeding, or any case fit to go before a jury, or before himself wearing his jury hat. Having decided that there was such a prospect he simply stated, without any further consideration of the matter, that the claimant had proved the preliminary issue and that there was a contract with the defendant. The defendant appealed. It was held that where a defendant was put to his or her election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather, it was the straightforward issue, arising in any trial after all the evidence had been called, namely whether or not the claimant had established his or her case by the evidence called on the balance of probabilities. In the instant case, the judge having ruled correctly that the defendant should be put to her election, had applied a test which was too favourable to the claimant. It followed that the judgment entered against the defendant could not stand. The matter would be remitted for the judge to hear further submissions applying the correct test and to determine the outcome of the case. The appeal was accordingly allowed. Instructive is the learning set out at paragraph 12 by Lord Justice Mance:

> "<u>But it is clear that in some circumstances a submission of no case to answer at the close of a claimants' case can be appropriate and may, in the exercise of the</u>

judge's discretion, be entertained without the defendant being put to his or her election - cf both Bentley itself and Boyce v. Wyatt Engineering [2001] EWCA Civ 692, per Potter LJ at para. 36 (last 31 words). Some flaw of fact or law may, for example, have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage". *(emphasis mine)*

6.6 Two points therefore surface from a consideration of the foregoing. One is that in the light of new case management powers given to courts under the new regime and the overriding objective, judges now have a greater discretion to entertain and rule on a defendant's submission of no case to answer without requiring them not to call evidence. Secondly, if there is some flaw of fact which emerges for the first time during the trial which makes it entirely obvious that the claimant's case must fail and it may save significant costs if a determination is made at that stage, then, in these types of exceptional circumstances, a judge may rule on a submission of no case to answer without requiring an election.

6.7 Against this backdrop I conclude that the Court has a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence. Accordingly I turn now to the test which is to be used by a court who has so ruled.

(b) Whether there is a threshold test that is to be applied by a court exercising a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence

6.8 The law is that the test which is to be applied in circumstances where a court exercises its discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence is the prima facie or scintilla of evidence test. The case of **Benham Limited v. Kythira Investments Ltd and Another [2003] EWCA Civ 1794** is instructive on this issue. According to the facts of this case, the claimant was a well-known firm of estate agents. The defendants were property companies. The claimants claimed that they had acted as agents for the defendants in connection with certain property transactions and that they accordingly became entitled to commission in respect of them. The trial judge dismissed the claim at the close of the claimant's evidence. In doing so he acceded to the defendants' submission of no case to answer without first putting the defendants to their election. The judge accepted that although generally the defendant would be put to his election, the judge had a discretion not to do so in an exceptional case. He thought that such an exceptional case could arise when two conditions were satisfied: first that nothing in the defendant's evidence could affect the view taken of the claimant's evidence, and secondly that it was obvious that the claimant's case must fail.

6.9 The claimants appealed. The appeal was allowed. It was felt that the case crossed the evidential threshold required to defeat a no case submission. If the judge had asked himself the correct question with regard to the evidence adduced, he would have been bound to reject the defendants' no case submission. The point was made that rarely, if ever, should a judge trying a

civil action without a jury, entertain a submission of no case to answer. The test to be applied by the judge if he entertained a no case submission was whether or not on the evidence adduced by the claimant had a real prospect of success. The question to be asked in a case, such as the present, where the defendants' witnesses had material evidence to give on the critical issue in the action could be reformulated variously as follows: have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contended, sufficient evidence to call for an explanation from the defendants. That it might be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendants' evidence, or by adverse inferences to be drawn from the defendants not calling any evidence, would not allow it to be dismissed on a no case submission. The claim in the instant case could not be characterised as having only a fanciful, rather than a realistic, prospect of success. In the circumstances the case was remitted for retrial before a different judge. Lord Justice Brown had this to say at paragraphs 31-32:

> "[31] The linking of the two strains of authority in this way to my mind lends added weight to the need for caution at the half way stage of a trial. The disadvantages of entertaining a submission of no case to answer are plain and obvious and have been spelled out already in the cases. Essentially they are twofold. First, as Mance LJ explained both in Boyce and in Miller, the submission interrupts the trial process and requires the judge to make up his mind as to the facts on the basis of one side's evidence only and applying the lower test of a prima facie case with the result that, if he rejects the submission, he must then make up his mind afresh in the light of whatever further evidence has been called and on the application of a different test. This, to say the least, is not a very

satisfactory procedure. The second disadvantage, as again Mance LJ made plain in Boyce and Miller, is that if the judge both entertains and accedes to a submission of no case, his judgment may be reversed on appeal with all the expense and inconvenience resulting from the need to resume the hearing or, more probably, retry the action.

[32] Let me state my central conclusion as emphatically as I can. Rarely, if ever, should a judge trying a civil action without a jury entertain a submission of no case to answer. That clearly was this court's conclusion in Alexander v Rayson and I see no reason to take a different view today, the CPR notwithstanding. Almost without exception the dangers and difficulties involved will outweigh any supposed advantages. Just conceivably, as Mance LJ suggested at the end of para 12 of his judgment in Miller (see para 21), "some flaw of fact or law may . . . have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage". Plainly, however, that was not the case here and hardly ever will it be so. Any temptation to entertain a submission should almost invariably be resisted".

6.10 It follows that if a Judge concludes at the end of the plaintiff's evidence that he has a discretion to entertain a submission of no case to answer without putting the defendant to his election, the threshold test at that stage is: "have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contended,

sufficient evidence to call for an explanation from the defendant?". Once an assessment of the evidence reveals that there is a prima facie case or a scintilla of evidence to support each ingredient of the cause of action then the submission must be overruled. With this in mind I come now to deal frontally with the two matters raised by the defendant in developing his submission of no case to answer.

(c) Whether the arrangement between the plaintiff and the defendant evinces an intention to create legal relations

6.11 The law regarding the intention to create legal relations is this.

6.12 The intention to create legal relations is an essential ingredient of a contract. According to the **Halsbury's Laws of England Volume 9(1) (Reissue) at paragraph 718**:

> "It has probably now become a rule of English common law that an agreement will not be enforced unless it evinces an intention to create legal relations. It follows that it is not sufficient that there is an agreement supported by consideration, unless the parties also evince an intention to create legal (that is contractual) relations". (emphasis mine)

6.13 An intention to create legal relations is not presumed by the courts in social agreements. So at **paragraph 719 of Halsbury's Laws of England Volume 9(1) (Reissue)** it is stated that:

> "Whilst an intention on the part of the parties to an agreement to create legal relations is necessary before that agreement will be enforceable, such an intention will usually be inferred from the presence of consideration. But this is not always

the case, as where there is a mere family, domestic or social engagement. To aid them in their sometimes difficult task of ascertaining the intention of the parties, the courts have therefore become accustomed to divide the cases into two classes: (1) commercial agreements; (2) family, domestic or social agreements.

In the case of family, domestic or social agreements, it is presumed that there is no intention to create legal relations; but there is presumed to be such an intention in the case of commercial agreements". (emphasis mine)

6.14 This point has been made in a number of cases. In the case of **Balfour v. Balfour [1919] 2 KB 571 at page 578 Atkin LJ** had this to say:

"…it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract".

Similarly in **Wyatt v. Kreglinger & Fernau [1933] 1 KB 793 at page 806 Scrutton J** said:

"It has to be borne in mind that not every formal proposal and acceptance constitute a legal contract. 'Will you come to dinner on Tuesday?' 'I have pleasure in accepting your kind invitation' constitute a proposal and acceptance, but no legal contract, because the parties never intended it to be a legal contract. I once had the pleasure as a judge of the King's Bench Division of hearing an animated dispute as to whether a particular gentleman was entitled to a prize

under the terms of a golf competition held at the Devonshire Club at Eastbourne, and I decided - and no appeal was made against my decision - that no one concerned with that competition ever intended that there should be any legal results following from the conditions posted and the acceptance by the competitor of those conditions".

6.15 The presumption against the existence of intention to create legal relations in social agreements is a rebuttable one. This is made clear at **paragraph 726 of Halsbury's Laws of England Volume 9(1) (Reissue)** where it is said that:

"As in the case of agreements between spouses and between close relatives, there are many other social or domestic arrangements in which there is no intention to create legal relations. The ordinary example is where two parties agree to walk together, or where there is an offer and acceptance of hospitality. In such cases, it may be right to say that there is a presumption that there is no intention to create legal relations.

<u>There are many other cases, however, where there is prima facie an intention to create legal relations, either because the agreement is clearly of a commercial character, or the circumstances otherwise show that was the likely intention of the parties</u>". (emphasis mine)

It follows that once a social agreement is of a commercial nature or, the attending circumstances demonstrate that it is likely the agreement is intended to be legally binding, the presumption against the intention to create legal relations will be displaced. So in the case of **<u>Robertson</u> v.**

Anderson 2003 SLT 235 P sought a half share in a national bingo prize won by her friend D. P relied on an alleged long term agreement between the parties that they would equally divide any bingo winnings, in particular concerning the national prize, between them, which agreement was reaffirmed during the journey to the bingo on the night in question. D submitted among other things that the court ought not to find that an agreement to divide the winnings had been entered into as any such agreement was not intended to create a legally enforceable contract since the discussion took place in a social context between friends. It was held that where a promise or agreement was made in a purely social context, it would not in most cases be regarded as legally binding, but it was essential to look at the particular facts to discover whether they revealed an intention to conclude a contract. So at paragraph 13 of the judgment it was stated by Lord Reed in delivering the opinion of the court that:

> "Although no Scottish authority was cited to us on this aspect of the case, we note that the issue of contractual intention was considered in the case of *Dawson InterNational Plc v. Coats Paton Plc.* In his opinion in that case, Lord Prosser observed (at 1993 SLT, p 95):
>
> > 'Speaking generally, I would accept that when two parties are talking to one another about a matter which has commercial significance to both, a statement by one party that he will do some particular thing will normally be construed as obligatory, or as an offer, rather than a mere statement of intention, if the words and deeds of the other party indicate that the statement was so understood, and the obligation confirmed or the offer accepted so that parties appeared to regard the commercial 'deal' as concluded.

> But in considering whether there is indeed a contract between the parties, in any particular case, it will always be essential to look at the particular facts, with a view to discovering whether these facts, rather than some general rule of thumb, can be said to reveal consensus and an intention to conclude a contract'.
>
> That case concerned a matter of commercial significance. Where a promise or agreement is made in a purely social context (e.g. an agreement to attend a dinner party, or to play a game of golf), then in most cases the promise or agreement will not be regarded as legally binding. Whether the context is social or commercial, however -and, these not being watertight compartments, some cases will concern contexts which contain elements of both -it is, as Lord Prosser said, essential to look at the particular facts to discover whether those facts reveal an intention to conclude a contract".

On the circumstances of the case, it was found that the court of first instance was entitled to conclude that the agreement gave rise to legal consequences.

6.16 In determining the intention of the parties, the court is required to use an objective test. So at **paragraph 718 of Halsbury's Laws of England Volume 9(1) (Reissue)** it is said that:

> "In many instances there can be no doubt that a legal relationship was intended, and in others it will be equally clear that it was not; but there will also be cases where the matter remains in doubt, and the court is then faced with the task of determining the intention of the parties. Ordinarily, the test will be the objective".

6.17 The specific question to be asked is whether a reasonable man would regard the offer made to him as one which was intended to create legal relations. According to Sachs LJ at page 505 in **Connell v. Motor Insurer's Bureau [1969] 2 QB 494**:

> "I would adopt the views expressed in Cheshire and Fifoot on the Law of Contract, 6th ed. (1964), p. 94, where the proposition is put forward as follows:
>
> > 'The test of contractual intention is objective, not subjective. What matters is not what the parties had in their minds, but what inferences reasonable people would draw from their words or conduct' ".

6.18 The contention which is put forward by counsel for the defendant in the matter at hand is that when the arrangement to repair the car was made, neither the plaintiff nor the defendant intended to enter into a legally binding contract; the arrangement was simply a social arrangement whereby the defendant would help his girlfriend, the plaintiff, to repair her car. As such the arrangement is accordingly unenforceable for want of contractual intention and in the circumstances the submission of no case to answer ought to be upheld.

6.19 To determine whether this argument has merit to warrant upholding a submission of no case to answer, I must look at the evidence in the matter and determine whether from the words and/or conduct of the plaintiff and defendant in this case, it could be said that there is prima face evidence or a scintilla of evidence upon which reasonable people could draw the inference that the plaintiff and defendant intended the social arrangement to have contractual effect.

6.20 A perusal of the evidence shows that:

- A precise sum of money was given by the plaintiff to the defendant to enable the defendant to cover all costs incidental to having the car repaired. More specifically, the plaintiff gave to the defendant the sum of $9,000.00 to facilitate the purchase of a new CS3 transmission, $4,000.00 to enable the defendant to pay the person hired to install the new transmission and $1,200.00 to cover the electrical costs incidental to the installation of the transmission.

- The plaintiff left her car in the defendant's possession which he initially housed in the confines of his yard so it could be repaired there.

The acts of parting with physical possession of the car as well as just over $14,000.00 on the faith of a promise by the defendant is something which could be considered serious enough that it must have been obvious to the defendant that the plaintiff was relying upon what can be considered a definite agreement such that it could be inferred that there was an intention to create legal relations. As such I am inclined to agree with the submissions advanced by counsel for the plaintiff on this point.

6.21 The law is a court will be more ready to infer the existence of an intention to create legal relations where one of the parties does some act pursuant to the agreement. So in the case of **Madison Ashton v. Jeanne Pratt [2012] NSWSC 3 at para 35** Brereton J made the point that:

> "Subsequent conduct or communications may be considered when considering whether a binding agreement has been reached [Barrier Wharfs Ltd v. W Scott

Fell & Co Ltd (1908) 5 CLR 647; Film Bars Pty Ltd v. Pacific Film Laboratories Pty Ltd (1979) 1 BPR 9251, Bramples Holdings Ltd v. Bathurst City Council (2001) 53, NSWLR 153, 164 [26]; Pethybridge v. Stedikas Holdings Pty Ltd [2007] NSWCA 154, [59]; Darmanin, [221]-[222]] ".

6.22 There is also case law to the effect that if the act performed by one of the parties to the agreement is something that could be considered to be serious that it is unlikely that such a sacrifice would have been made upon reliance of a promise based on trust in the promisor to honour a promise of support, then an inference of intention will be more readily made by a court. This principle has been illustrated by a number of cases[1]. One in particular is the Privy Council case of **Schaefer v. Schumann [1972] AC 572.** On the facts of this case a testator who was in poor health promised his caregiver that if she remained employed with him until the date of his death he would devise to her, the house in which he was living as well as its contents. After making this promise to her, he stopped paying her any wages and instead, only paid her enough money to cover the household expenses. The housekeeper worked under this condition of employment which changed from working at weekly wage of $12 to serving for no wages on the footing that she would one day become owner of the house and its contents upon the testator's death under his will. The Privy Council found that the conduct of giving up one's salary pointed irresistibly to the inference of contractual intent in the circumstances.

6.23 With these principles in mind I am satisfied that the reasonable man could consider that the acts of the plaintiff in leaving her car in the possession of the defendant as well as paying to

[1] **Wakeling v. Ripley (1951) 51 SR (NSW) 183; Todd v. Nicol [1957] SASR 72; Parker v. Clark; Tanner v. Tanner [1975] 1 WLR 1346; Raffaele v. Raffaele [1962] WAR 29** and **Re Gonin (deceased) [1979] Ch 16.**

him over $14,000.00 to cover all costs incidental to effecting repairs –a sum which is by no means insubstantial, is prima facie evidence of, or, amounts to a scintilla of evidence of the intention to create legal relations.

6.24 In arriving at this conclusion I have also considered the matter of **Dugas v. Dugas 23 NBR (2d) 199.** This was a case where $200 which was termed by that court as "a substantial sum of money" was advanced by a father to his adult son to have a car repaired. It was held that the presumption of transactions between parents and children being gratuitous was displaced. At paragraph 15 of that judgment Hughes CJNB stated emphatically that:

> "While there is a presumption of fact that in certain transactions between near relatives the parties do not intend to create legal relations, I do not think there is any presumption that where a father loans a substantial sum of money to an adult son to have a car repaired or for other such purpose there is any presumption that the father has no legal rights to recover it".

It stands to reason that in the present case where the parties are dealing with each other at a greater distance than in *Dugas v. Dugas (supra)* and a larger sum of money is involved for the same purpose of effecting repairs to a car, contractual intention could properly be inferred by the reasonable man. Accordingly this submission fails. I turn next to the second argument raised in support of the application to uphold the submission of no case to answer.

(d) Whether the evidence adduced by the plaintiff is so manifestly unreliable that it fails to meet the scintilla of evidence test.

6.25 According to the case of *Benham Limited v. Kythira Investments Ltd and Another (supra)* if a Judge concludes at the end of the plaintiff's evidence that he has a discretion to entertain a submission of no case to answer without putting the defendant to his election, the threshold test at that stage is: "have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contended, sufficient evidence to call for an explanation from the defendant?".

6.26 The concept of the "prima facie case" was explored in the case of **Merpro Montassa Limited v. Conoco Specialty Products Ltd. 28 FCR 387** which in turn cited the following passage from the case of **May v. O'Sullivan (1955) 92 CLR 654** where their Lordships Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ at page 658 dealt with the meaning of a "prima facie case" in this manner:

> "When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the

tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in Wilson v Buttery [1926] SASR 150 at 153, 154 for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf Morgan v Babcock & Wilcox (1929) 43 CLR 163 at 178, per Isaacs J. But to say this is a very different thing from saying that the onus of proof shifts. A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made 'a prima facie case', but it does not follow that in the absence of a 'satisfactory answer' the defendant should be convicted". (emphasis mine)

6.27 After considering this passage, Heerey J in *Merpro Montassa Limited v. Conoco Specialty Products Ltd. (supra)* made the point that in his opinion, "(t)he same considerations apply, mutatis mutandis, in a civil case". He then went on to make the observation that their Lordships in *May v. O'Sullivan (supra)* at page 658 expressly approved part of a passage from **Wilson v. Buttery [1926] SASR 150 at page 153** where the South Australian Full Court, in discussing the requirements of a prima facie case, said "... we cannot find that there is any distinction between civil and criminal cases".

6.28 The matter was succinctly stated in the civil case of **Adam Vella v. Integral Energy [2011] FMCA 6** where at paragraph 4, Driver FM cited the case of **Bulong Nickel Pty Ltd. v. Bateman Project Engineering Pty Ltd. [2001] FCA 1900 (25 June 2001)** where at paragraph 34 of that judgment it was said that "(t)he phrase prima facie is derived from the latin words for first appearance. Broadly speaking it means that the applicant must show that a case supporting the claim for relief can be found in the material presented to the court…".

6.29 It seems to be the case that the term "scintilla of evidence" carries with it the same meaning as that which is associated with the term "prima facie case". So in the case of **Naxakis v. West General Hospital 197 CLR 269,** it was said by their Lordships Gleeson CJ, Gaudron, McHugh, Kirby and Callinan JJ at paragraph 55 that:

> "Originally, out of respect for the function of the jury (and possibly out of a feeling that it was beneath the dignity of judges of the common law to be concerned with fact-finding in even the smallest degree, the view developed that, if there were any evidence at all in support of the plaintiff's case, the judge was bound in law to leave the disputed issues of fact to the jury. This was sometimes described as the 'scintilla doctrine'. A 'scintilla' of evidence, meaning a mere atom or fragment, was enough to warrant taking the verdict of the jury in the cause. If a scintilla existed, the judge had no lawful authority to withdraw the matter from the jury's decision". (emphasis mine)

6.30 Having appraised myself of precisely what is meant by the terms "prima facie case" and "scintilla of evidence", I then directed my mind to the evidence led by the plaintiff and find that

at its lowest, an atom or a fragment of evidence has been led on every material ingredient of this cause of action which *could* warrant judgment for the plaintiff if believed on a balance of probabilities. Put another way, this Court finds that a case supporting the claim for relief can be found in the material presented to the court. The matters raised by Mr. Clarke do not affect my finding in this regard.

7. ORDER

7.1 I am of the view that on an assessment of the evidence led the ultimate question of whether the plaintiff has advanced a prima facie case or a scintilla of evidence of a breach of contract is a question correctly answered in the affirmative.

7.2 In these circumstances the Court orders that:

- The plaintiff has established a prima facie case or a scintilla of evidence that the defendant was in breach of contract.

- The submission of no case to answer fails.

8. POSTSCRIPT

8.1 The Court takes the opportunity to thank Mr. Sterling John and Mr. Trevor Clarke for their focused and cogent written submissions and bound bundles of authorities all of which were

of great assistance to the Court. This is especially in light of the fact that advocate attorney's-at-law fees are fixed as per the terms of the First Schedule of the **Petty Civil Courts Rules made under section 53 of the Petty Civil Courts Act Chap. 4:21.** Such assistance offered by them is greatly appreciated by the Court.

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Her Worship Magistrate Nalini Singh

Petty Civil Court Judge