

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. Cv 2942 of 1997

BETWEEN

WAYNE ABRAHAM

PLAINTIFF

AND

BRIMONT LIMITED

DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE STOLLMAYER

Appearances:

Mr. G. Louison for the plaintiff

Mr. F. Seepersad for the defendant

J U D G M E N T

At the heart of this action lies the question of ownership of a Toyota Royal Saloon motor car registration number PAT 3247 and whether the amount of \$115,000.00 paid by the defendant to the plaintiff on 15th November, 1994 represented the purchase price of that vehicle or a loan by the defendant to the plaintiff. As what might perhaps be regarded a subsidiary issue, there is the question of whether the taking of that motor car from the plaintiff's premises at 4 Eggleton Road, Maraval, on 7th August, 1997 by the servants/agents of the defendant was valid and proper.

The circumstances in which these proceedings were commenced can be described briefly as follows. The plaintiff and Brian Montrichard have been friends for some twenty to twenty-five years and have had both social and business dealings with each other over that period of time. The plaintiff is a businessman, importing household appliances for resale and during the period 1990 to 1996 was the Managing Director and one of the shareholders of a limited liability company called Ola Gift Palace Ltd. (“OGP”). Brian Montrichard (“Montrichard”) is the Chairman of the defendant company which engages the business of lending, hire purchase, mortgage bills of sale and investments. The defendant company has been in existence since 1980. The plaintiff and Montrichard, it should be mentioned, are both members of several gaming establishments in this country and in particular, “Xante” and “Xanadu”. Apart from being the Chairman of the defendant company, where he guides the company’s operations, Montrichard approves loans and has *“the run of the vault”* (which he says describes his authority “succinctly”) with one other member of the Board, namely, his wife Suzanne. Montrichard and his wife are the two shareholders of a company called Arial Gaming Ltd. which is a management company engaged in the business of managing gaming clubs, two of which are “Xante” and “Xanadu”. Arial Gaming Ltd. is to all intents and purposes run by Montrichard and has an office in the same building, and next to, “Xanadu”. The defendant, it should be noted, is also the owner

of a limited liability company called Credit Chex Ltd., which operates as a debt collection agency, amongst other activities.

Sometime in late October or early November, 1994 the plaintiff and Montrichard spoke with respect to financing being made available, ostensibly for the plaintiff's business activities, but which may have included the business operations of OGP as the plaintiff says, although Montrichard denies this. On 15th November, 1994 the plaintiff received two cheques totalling \$115,000.00 issued by the defendant and signed certain documents at the defendant's offices in Port of Spain. Those documents were a hire purchase agreement (Exhibit "AS 1") and an application form. Three days later, on 18th November, 1994, the plaintiff returned to the defendant's offices at the request of Mrs. Anna Sheppard, an employee of the defendant, and signed a promissory note (Exhibit "WA 5") also for \$115,000.00. I will return to the details of this transaction presently.

Thereafter, the plaintiff made certain payment towards the monies due to the defendant, but defaulted and in August of 1995 handed over the motor vehicle PAT 3247 to the defendant voluntarily following certain discussions which had taken place. The business, and in all probability the social, relationship between the plaintiff and Montrichard deteriorated thereafter in the light of the defendant not receiving the monies which it was due and the defendant then wrote to the plaintiff on 17th January, 1996, (Exhibit "AS

3”). Two more letters followed. The first was from Credit Chex Ltd. on behalf of the defendant on 22nd April, 1997 and, finally, from the defendant to the plaintiff on 20th June, 1997. All three letters refer to the plaintiff’s indebtedness to the defendant but only the third (that of 20th June 1977) makes reference to a hire purchase agreement. The other two letters refer to a loan.

Amongst the payments received by the defendant on account of the monies it was due was an amount of \$6,000 which it received on 3rd March, 1997. This payment, says the defendant came from the plaintiff or on behalf of the plaintiff and was made at the defendant’s offices. The plaintiff says that on the night of the 2nd March 1997 he was the winner of a door prize at “Xanadu” which amounted to \$10,000.00 approximately, but when his daughter, Nicole Abraham, collected the envelope from “Xanadu” it was found to be \$6,000.00 “short”.

Very early on the morning of 7th August 1997 a group of men arrived at the plaintiff’s residence. They were led by Benson HARRIPERSAD and were acting on behalf of the defendant. After the plaintiff refused to hand over the keys to the vehicle, it was towed away by a wrecker. HARRIPERSAD did not give to the plaintiff a copy of the instructions which he said he had or of the hire purchase agreement, nor did he tell the plaintiff how much money was due

or give him the opportunity to pay off what might have been due to the defendant.

At the outset of the trial the parties agreed that the following issues fell for determination: (1) did the plaintiff act on behalf of OGP or on his own behalf; (2) did the plaintiff agreed to sell the car to the defendant; (3) was there a loan; (4) if there was a loan, was it a loan to the plaintiff or to OGP; (5) was there a valid hire purchase agreement; (6) if there was a valid hire purchase agreement, was it an agreement with the plaintiff or with OGP; (7) if there was a valid hire purchase agreement, was it properly terminated; (8) did the plaintiff return the car voluntarily or was it repossessed on 7th August 1997; (9) if the car was repossessed, was the repossession valid and proper; (10) if the repossession was not valid and proper, was it malicious or actuated by spite or ill-will; (11) was there an appropriation of \$6,000.00 on or about 3rd March, 1997; and (12) if there was an appropriation on that date, was it lawful.

I will deal first with the nature of the transaction which was entered into on 15th November, 1994 because a number of consequences will flow from the determination of that issue. It should first be noted that the evidence by the plaintiff and by Montrichard for the defendant is almost directly contradictory. The plaintiff said that the transaction was a loan of

\$115,000.00 to be repaid in “*six months to one year*” with interest of \$13,000.00 i.e. , one and a half per cent to two per cent per month. In cross-examination he said “*we discussed specific payment. I do not have the figures. I can’t remember I paid money to the defendant on account of this loan. I can’t remember the exact dates. I know I was paying monies in accordance with what was agreed because I was paying as my memory guided me*”.

Monrichard says that the plaintiff agreed to sell the car to the defendant for \$115,000.00 and to enter into a hire purchase agreement for the repurchase of the car at a cash price of the same amount of \$115,000.00 and hire charges of \$13,800.00. He said that the plaintiff was to take the car on hire for six months paying five monthly installments of \$2,300.00 each and a final payment of \$117,320.00, together with a “purchase fee” of \$1.00.

It is a matter of some regret that the evidence of both the plaintiff and Monrichard was not all that it might have been. The plaintiff demonstrated on occasion a vagueness as to what might be regarded as the normal, usual, details of a business transaction and could produce no documentary evidence in support of his claim save for a certified copy of a certificate of ownership for PAT 3247 and the mortgage bill of sale which he executed on 2nd November, 1995 in favour of Bank of Commerce Trinidad and

Tobago Limited. That mortgage bill of sale was registered as number 14070 of 1995 and was to secure the sum of \$60,000.00 the plaintiff had borrowed from that bank. Montrichard's evidence, on the other hand, suffered from on occasion, a vagueness of a more convenient nature and also from his tendency to make sarcastic or facetious remarks such as suggesting that certain questions be instead put to the plaintiff.

In determining this issue, I have considered also the fact that the plaintiff and Montrichard had been friends for some twenty to twenty-five years; that they had both social and business dealings with each other; that they gambled together; that the plaintiff/OGP was in need of short-term funding to tide it over in the short-term; that the defendant did not really need the vehicle, and was not in the business of buying and selling cars; that Montrichard took no steps to verify ownership of the vehicle or its net worth (i.e. whether it was affected by any encumbrances); that Montrichard had not obtained any valuation of the car but relied upon the plaintiff's estimate of it being valued at \$100,000.00; that Montrichard said that he knew the car to be in high demand, although he did not know its age; that Montrichard agreed to lend a sum not unappreciably in excess of the plaintiff's estimated value of the car. The manner in which the amount of \$115,000.00 was to be paid, or repaid to the defendant is also revealing. The interest rate was high being, effectively, twenty-four per cent per

annum, and is indicative of a short term high risk lending. There were to be five equal monthly payments of \$2,300.00 each and then one “balloon payment” of \$117,300.00. This is all indicative of a short-term tiding-over to carry a business enterprise or individual through a “bad patch” or financial straits which are anticipated to last no more than five or six months. It is not indicative of a hire purchase agreement which would in normal circumstances provide for equal monthly payments throughout the duration of the hiring, and be of a duration certainly much longer than a mere six months.

I have also taken into account the sequence of events on 15th November, 1994 in Montrichard’s office, as he outlined them to be. I find it improbable that after the sale had been effected there would materialise some thirty to forty-five minutes later an agreement to hire the car to the plaintiff for six months on the terms I have already outlined. There is also the question of the documentation which the plaintiff was called upon to sign. Mrs. Sheppard said in her evidence that she prepared the hire purchase agreement on the instructions of Montrichard. She said that she had some experience in these matters and in those circumstances, I find it improbable that she should subsequently, within a matter of days decide that a promissory note was necessary and then almost immediately thereafter

find it to be unnecessary if the nature of this transaction was really intended to be that of a letting on hire purchase .

Finally, I have had regard to the correspondence to which I have referred, namely, the letter of 17th of January, 1996 which clearly makes reference to a loan; the letter from Credit Chex Ltd of 22nd April, 1997 which calls for payment of \$200,672,95 being the balance then due on a loan. It is clear that up to that time the defendant regarded the indebtedness as being by way of a loan, and the defendant's letter of 20th June, 1997 making reference to a hire purchase agreement is in my view clearly an attempt to lend a legal patina to a repossession exercise which was shortly to be implemented.

Having considered all of the evidence before me, and the law, particularly the decision in *Polsky v S. And A. Services, Ltd [1951] 1 All ER 1062* and the principles set out there, it is all the more probable that the transaction between the plaintiff and the defendant was entered into as a result of the then long standing personal relationship and friendship between Monrichard and the plaintiff than merely a straightforward, arms length, business transaction. There was a friend in need and Monrichard stepped in to bail him out. His friend needed short-term financing to tide him over the next six months and Monrichard provided it. He provided more than

the value of the vehicle, and more than he would lend to the usual run of the mill customer. In short, I have come to the conclusion that the transaction entered into between the plaintiff and the defendant on 15th November, 1994 was intended to be, and in fact was, a loan and not a hire purchase agreement.

I turn now to the question of whether the plaintiff acted on behalf of OGP or for himself. He was, as I have noted, a fifty per cent shareholder in, and the Managing Director of, OGP from 1990 to 1996. He says that OGP had previous dealings with Montrichard but there is no evidence to support this. He also says that he acted as the Managing Director of OGP in the course of this transaction and obtained the loan from the defendant of \$115,000.00 in November, 1994 to buy goods for OGP and to keep the business going. It should be noted that OGP was not put into receivership until May of 1995, which is coincidental with the default being made in repayment to the defendant, and that OGP was wound-up as a consequence of an application made by the plaintiff who said that he could no longer continue in business with his partner. But despite all these, and the other discussions which the plaintiff had with Montrichard about OGP, or which the plaintiff said he had with Montrichard about OGP, the plaintiff signed all of the documentation consisting of the hire purchase agreement and the promissory note and the application form (which was not put into evidence)

in his own name solely. No mention is made in any document of OGP. The plaintiff said that he did not read the documents before signing them; that it never crossed his mind to do so; but that he considers himself a prudent businessman. I regret that I find this both improbable and difficult to accept. It may well be, and, indeed, I have no doubt that the plaintiff may have borrowed the money for OGP to use in its business operations, but that I have come to the conclusion that the loan was made by the defendant to the plaintiff.

Having arrived at these conclusions, the issues at (1), (2), (3), (4), (5), (6) and (7) have been determined.

I therefore turn to the question as to whether the plaintiff returned the car voluntarily on 7th August, 1997 or whether it was repossessed. Clearly, he did not hand it over voluntarily. That can be discerned without difficulty from the plaintiff's evidence and that of Harripersad. It follows, therefore, that the taking of possession and removal of the car on that day could not have been valid and proper.

There is then the issue of whether the taking of the car was malicious or actuated by spite or ill-will, and in this regard I have come to the conclusion that there is insufficient evidence before me for me to so decide. The defendant acted under a misapprehension and although that

misapprehension may be seen as to have been brought upon the defendant by itself, the evidence before me falls short of demonstrating malice, spite or ill-will.

I turn finally to the question of whether there was an appropriation of \$6,000.00 on or about 3rd March, 1997 and, if there was such an appropriation, whether it was lawful. It is an issue which I think can be disposed of without too great ado. Montrichard's evidence that on the night in question he was in Tobago and could have known nothing of what was taking place does not sound probable to me. Given the nature of the gaming business; the nature of his involvement with Arial Gaming Ltd; and his involvement in "Xante", "Xanadu", Credit Chex Ltd and the defendant, I regret that I cannot accept his evidence that he knew nothing of this. On the other hand, the evidence is clearly that the plaintiff won this door prize and that when collected it was \$6,000.00 short. This has not been challenged, at least seriously enough to displace that evidence. There can, in my view, be no other explanation for this amount of \$6,000.00 finding its way into the hands of the defendant other than through the machinations of Montrichard. He had no authority from the plaintiff to make any such appropriation or payment on behalf of the plaintiff and consequently the appropriation was unlawful.

My further finding is that on a balance of probabilities, Montrichard effected this appropriation, in his capacity as servant, agent or employee of the defendant.

As to the question of damages, the plaintiff has given evidence that he has had, since 7th August, 1997, to rent vehicular transportation so as to carry on his business and also on occasion to make use of public transportation facilities when the rented vehicle broke down. No special damages have been pleaded and although there might lie within my discretion the authority to make some award based on the decision in *Grant v Motilal Moonan Ltd*, (1988) 43 WIR 372 I prefer not to do so and will instead make an award in general damages.

In assessing an award of general damages, I have taken into account the plaintiff's actions, and lack of action, in relation to the subject transaction. To my mind it is clear that the plaintiff has to some extent at least brought the present situation upon himself. He knew full well that if he did not repay the defendant as agreed that he stood to lose the car. He said so in his evidence. He defaulted in his payments. He voluntarily handed over the car in August of 1995 and it was due solely to his personal friendship with Montrichard and, no doubt, further promises to pay, that the car was handed back to him. He defaulted again. The defendant exercised admirable restraint; restraint which I anticipate would not be forthcoming in

the normal arms length commercial transaction. The plaintiff traded on his personal friendship with Montrichard but that friendship has now come to an end.

Having considered all the circumstances, there will be judgment for the plaintiff on his claim. The counterclaim of the defendant is dismissed and the following declarations and orders are made:

- (1) A declaration that the plaintiff is the owner of the Toyota Royal Saloon motor vehicle registration number PAT 3247.
- (2) The defendant to deliver the said motor vehicle to the plaintiff forthwith.
- (3) The defendant to pay to the plaintiff damages in trespass to the plaintiff's premises at 4 Eggleton Road, Maraval in the sum of \$500.00.
- (4) The defendant to pay to the plaintiff general damages in the sum of \$2,500.00
- (5) The defendant to pay the plaintiff the sum of \$6,000.00 with interest at the rate of 6% per annum from 3rd March, 1997.
- (6) The defendant to pay the plaintiff's costs of the claim and counterclaim.

Dated this 14th day of July, 1998.

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C.V.H. STOLLMAYER,
JUDGE.