

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1993-B346

BETWEEN BRYAD ENGINEERING COMPANY LIMITED, CLAIMANT

AND CARLAND INVESTMENTS LIMITED, 1st DEFENDANT

AND TARIQ MALIK, 2nd DEFENDANT

AND CAROLYN WARREN, 1st THIRD PARTY

AND LEYMON STRACHAN, 2nd THIRD PARTY

AND PERCIVAL THOMAS (Deceased), 3rd THIRD PARTY

Mr. John Graham and Ms. Analeisa Lindsay instructed by John G. Graham & Co for the Claimant; Mrs. Pamela Benka-Coker Q.C. and Mr. Gregory Lopez instructed by Lopez and Lopez for the 1st and 2nd Defendants; 1st Third Party not served; Mr. Barrington Frankson and Mr. Winston Taylor instructed by Gaynair and Fraser for the 2nd Third Party; Mr. Leon Green and Mr. John Moodie instructed by Green and Moodie for Marcia Lambert and Rosalind Watts (executors of the estate of the 3rd Third Party, Percival Thomas, now deceased).

Heard: November 7, 8, 9, and 29, 2007; June 2, 3 and July 21, 2008.

Breach of Contract; Breach of Implied Terms; Larceny Act

Claimant alleging breach of implied terms or conditions of sale of motor car; claimant must prove on balance of probabilities that defendant did not have good title; whether the defendants had good title to car at the time it sold the car to the claimant; whether the defendants had shown that they had good title; whether the 1st Third Party had shown evidence of ownership; whether registration booklet is itself proof of ownership; appropriateness of use of hearsay evidence to show state of mind; Whether claimant on the evidence had established proof of breach of any condition; whether assuming 1st Third Party not actual owner, she had been clothed with authority by the 2nd and 3rd Third parties; effect of plea of guilty of larceny in civil proceedings involving the same property; whether plea conclusive of proof of ownership; application of maxim, ex turpi causa, non oritur actio.

CORAM: ANDERSON J.

The famous quotation from poet, Sir Walter Scott, "Oh, what a tangled web we weave when first we practice to deceive," is one that comes to mind as one reviews the factual situation in this case. It is a tale of persons living on the edge and of an acceptance of the actions of even persons in authority who are prepared to act according to the proposition that, "that is the way the runnings". There is, accordingly, a sense in which there is no moral outrage that persons skirt the provisions of the law as "a so it go".

The drama is set in the years of the late 1980s and early 1990s before liberalization of the motor vehicle market, when used motor cars, now known as "deportees", were not accessible and acquisition of a vehicle import licence a challenge not to be visited upon by your worst enemy. Back in those now forgotten days the stringent control over motor vehicle imports which existed at that time made it extremely difficult for individuals to readily import cars. The effect of these restrictions which nevertheless facilitated the importation of persons coming home as "returning residents" to the Island, created a whole new trade in this valuable commodity and turned persons of otherwise impeccable credentials into hustlers willing to trade in the business of acquiring such licences and selling the licence or the imported product thereof to the highest bidder.

Bryad Engineering Company Limited ("Bryad" or "the Claimant"), the apparently innocent party in one such scheme, claims against the 1st and 2nd Defendants in respect of a Mercedes Benz motor car which it bought but which was subsequently seized by the police. The 1st defendant is a dealer in used cars and the 2nd defendant its managing director, and for the purposes of this suit, the agent through whom it acted. Bryad purported to enter into a contract to purchase the car from the 2nd Defendant, some time in March 1993.

But I get ahead of myself.

The Claimant's case is set out in the witness statement of its present managing director, Tracey Adams-Goldson. The Claimant is a company duly incorporated under the Jamaican Companies Act. In March 1993, the Claimant acting through its then managing

director, Raymond ("Dixie") Adams, the father of the present managing director, entered into an agreement with the 1st Defendant, acting through its agent, the second defendant, for the purchase of a Mercedes Benz motor car for the price of \$2,350,000.00. The car was delivered on or about March 22, 1993 and the purchase price paid as agreed.

Some five (5) months later, on or about August 31, 1993, the motor car was seized by members of the Police Fraud Squad and has never been returned. According to the witness statement of Tracey Adams-Goldson, Bryad later learnt that in the Resident Magistrate's Court at Sutton Street, the 1st Third Party who has not taken part in these proceedings, on or about September 17, 1993, pleaded guilty to simple larceny of the said motor car. The learned Resident Magistrate acceded to an application for the "return" of the said car to its putative owner, the 3rd Third Party, Percival Thomas, now deceased. As far as Mrs. Adams-Goldson is aware, the motor car was returned to Mr. Thomas but Bryad has never recovered possession of the vehicle. This non-return seems to be the basis upon which the Amended Statement of Claim is built. The Claimant's case as set out in its statement of claim is for breach of an oral contract.

- In breach of the said conditions and warranties
- a) the defendant had no right to sell the said motor car,
 - b) the plaintiff did not have or enjoy quiet possession of the said car after the said sale.

The said motor car was at all times the property of one Percival Thomas and/or Eeymon Strachan. On or about the 31st day of August 1993, the plaintiff was obliged to deliver up possession of the same to the police who subsequently arrested and charged one Carolyn Warren who was on the 17th September 1993, convicted of the offence of larceny of the said car.

On the 17th September 1993 the said court before which the said Carolyn Warren was convicted ordered the return of the said motor car to the said Percival Thomas.

By reason of the aforesaid the plaintiff has lost the said 1991 Mercedes Benz motor car and has suffered loss and damage.

Alternatively, in the premises the consideration for the payment of the said sum has wholly failed and the defendants have had and received the said sum to the use of the plaintiff (sic)

It avers that the Defendant has breached implied warranties in the contract of sale for the motor vehicle, including a warranty that the defendant had a right to sell the vehicle that the claimant would have and enjoy quiet possession and that the car was free from any charge or encumbrance. It claims damages for breach of contract as well as interest and costs. The Defendants deny that there has been any breach of contract or indeed of any implied term thereof and denies any liability to the Claimant. I should note that for the purposes of this action, there is no averment that the 2nd Defendant acted in any other capacity than as the agent of the 1st Defendant and there is no justification for treating them together as other than a single defendant.

The evidence of what took place in the transaction, in so far as evidence from the Claimant is concerned is very limited as the only evidence offered before the Claimant closed its case was that of the present managing director. It is clear that she has no first hand knowledge of the transactions involving this car. In fact, it is not clear that on the Claimant's evidence there is any basis for finding of breach of contract. The question may well be asked whether the evidence of the breach is the fact that that car was ordered by the magistrate to be given to Mr. Thomas.

The Witnesses

The first witness in these proceedings was Mr. Garth McBean, Bryad's attorney at law in September 1993. He had been brought into these proceedings by a witness summons (issued at the instance of the claimant), which demanded his presence in court to testify. He had been present in the Sutton Street Court on September 17, 1993 when Carolyn Warren had pleaded guilty to simple larceny of the Mercedes Benz. He had attended court on the instructions of the Claimant's then managing director in order to make an application on behalf of his then client, for the car which was then in the custody of the police, to be returned to his client. That application had been refused by the Resident Magistrate who then granted an application by the late W.B. Frankson, Q.C. for the car to be turned over to Percival Thomas. He testified that there had been no written application

before the court for the car to be given to Thomas. He also testified that he had checked the car's registration documents and they were in the name of Bryad Engineering Company Limited. He stated that prior to that occasion on September 17, 1993, he had not been to court concerning the motor car and he had not been previously aware that Mrs. Frankson would be involved in making such an application.

Mrs. McBean also testified that at some point he had seen the indictment which had charged the said Carolyn Warren with fraudulent conversion of the motor car but he could not recall when or whether there had been an application to amend the indictment to a charge of simple larceny. During the time he had represented the Claimant, he had not seen any documentation which suggested that Percival Thomas was the owner of the car. Further, at the time he made his application he had produced the papers he had in the name of Bryad Engineering.

The only other witness on behalf of the claimant was a Mr. Barrington Chisholm a former banker with the Bank of Nova Scotia, who testified about interest rates prevailing in Jamaica in 1993. After the testimony of Mrs. Adams-Goldson, Mr. McBean and Mrs. Chisholm the claimant closed its case.

Tariq Malik

Evidence was given by the 2nd defendant (Tariq Malik). He had known the then managing director of Bryad Engineering, Mr. Dixie Adams, for about three (3) years and had done business with him before. Among other things, he had facilitated the importation of another car on his behalf and had sold a Mercedes Benz for him. As to his interaction with the 1st Third Party who is clearly central to these proceedings although she was never served and has taken no part in them, he said she introduced herself to him on or around September 1992. At that time she advised him that she had imported a 1990 260 SE Mercedes Benz into the country on the basis that she was a returning resident. She had indicated to him that she did not have the funds to clear the vehicle from the wharf where, in addition to outstanding duties, it had remained for some considerable

time incurring storage fees and penalties. She was therefore trying to sell the vehicle and to so cut her losses.

Mr. Malik's evidence was to the effect that having entered into an agreement with Mrs. Warren for the purchase of the car, he satisfied himself as to her legal right to the vehicle. He certainly was presented with all the necessary documentation to establish her legal rights to the car and he was also assured by the Commissioner of Customs that the documentation was sufficient to establish the right to ownership. He was able to satisfy the Inland Revenue Department as to the legitimacy of his right to title to the vehicle, and to get the vehicle transferred upon selling it to the Claimant. He paid the duties, the amount agreed with Mrs. Warren as well as other charges and expenses on her behalf, as part of fulfilling his obligations to her. He testified of securing the necessary repairs to the vehicle which had remained on the wharf for over two (2) years, and eventually transferring it to the Claimant in exchange for the purchase price agreed.

According to the witness, he first became aware of the putative claim of the 3rd Third Party when, on the day he went to pay the duties, he overheard two men in a car in a discussion mention the name of Warren. When he enquired of them they indicated that there was someone else who owned the car, but provided no proof and said the matter would be resolved in court. It was as a result of this conversation that he sought the confirmation of the Commissioner of Customs that Warren was the true owner. He said this confirmation was given. While it is to be observed that Malik's recall of what the Commissioner said to him is clearly hearsay, it is nevertheless relevant to his state of mind and to the issue of whether his was a bona fide purchase for value without notice. Similarly his evidence that when he spoke to Warren about the interest of Thomas, she had assured him that he had wanted to buy the car but was unable to afford it. Again, this is hearsay but the same comment as above may be made.

I accept the 2nd defendant as a witness of truth. I regret that I cannot say the same for the evidence of the 2nd Third Party who is not only an accountant, but I understand an attorney at law. I do not accept his evidence, except to the extent that it clearly

confirmed that he was the driving force in a course of conduct which was intended to secure for his friend Percival Thomas, a licence to import the said car in breach of the law as it was then. His acknowledged involvement in the transaction that was clearly aimed at facilitating Thomas being able to import a car using illegitimate means and in breach of the law, calls into question both his credit and his credibility. Nor was I impressed by the evidence of Deputy Superintendent of Police Colbert Edwards (then a corporal in the constabulary force) who saw nothing wrong in persons entering into agreements to circumvent the lawful licensing regime. What is more, he personally was involved in arranging the seizure of a vehicle registered in the Claimant's name on his personal view that someone may have an "interest" in it, despite being provided with documents of title and never having previously been aware of Thomas ever having been in possession of the car.

COURT'S RULING

Based upon the evidence of the 2nd defendant which I accept, and as succinctly set out in the defendant's closing submissions, I set out the following as a faithful chronology of events as it affects the matter at hand.

Factual Background

In light of the evidence that I have accepted as outlined above, I adopt the following chronology as correct for the purposes of this decision.

- 1) Carolyn Warren had apparently lived in England for some time and had returned to Jamaica in or around 1989.
- 2) Sometime after her return, she imported into the Island a 1990 Mercedes-Benz 260 SE motor car. However, she did not have the wherewithal to complete the importation process but she apparently could secure access to a licence.
- 3) Her failure to clear the car from the docks meant that it attracted penalties imposed by Customs and in addition there were the import duties.
- 4) Warren was unable to secure the funds to pay the relevant duties and penalties.
- 5) At that time the 1st defendant operated a car dealership and for all purposes herein, the 2nd defendant acted as its agent.

- 6) On or about 7th September 1992, Warren approached the 2nd defendant and advised him that she had a 1990 Mercedes Benz which she had imported as a returning resident but that she did not have the funds to clear the vehicle and as a result she wished to sell it.
- 7) She provided the 2nd defendant with original documents relative to the vehicle which on his examination appeared credible.
- 8) The 2nd defendant did the necessary due diligence investigations including checks with the Commissioner of Customs and satisfied himself that Warren did own the vehicle and was the proprietor thereof.
- 9) On September 17, 1992, the 2nd defendant on behalf of the 1st defendant entered into an agreement to purchase the motor car for \$1,000,000.00 plus paying all penalties and import duties.
- 10) On the date of the agreement, Warren was paid \$50,000.00 with an agreement to pay the cost of clearing the vehicle and to pay to Warren the balance on delivery of the vehicle.
- 11) Investigations with the Customs Department and the Trade Board confirmed that the vehicle was not stolen and Warren was the true owner.
- 12) The 2nd defendant then took steps to have the vehicle assessed during the period September 17, 1992 to March 9, 1993. During that period, the 2nd defendant made further payments to Warren of a further \$910,000.00.
- 13) In early March 1993, pursuant to assessments made by the Customs Department he paid \$275,000.00 for import duties and \$300,000.00 for penalties imposed in respect of the vehicle.
- 14) On or around the 3rd March 1993, the defendant went to Customs House and while there heard two men in a blue Volvo car nearby in a discussion in which the name "Carolyn Warren" was mentioned several times.
- 15) On enquiring of the men, he was advised that this was the same Carolyn Warren with whom he had been dealing and one of the men, who later turned out to be Leymon Strachan, told him he had made arrangements with Warren about the vehicle and had an interest in it, although he did not detail the nature of the interest.

16) He also told the 2nd defendant that he knew the 1st defendant was purchasing the vehicle and when asked why he had not previously said anything, Strachan said they would meet in court.

17) When he discussed this exchange with Warren, she advised that there was nothing to worry about as Strachan had wanted to purchase the car but could not come up with the money.

18) On checking with the Commissioner of Customs he was further reassured that Warren had a proper title to the vehicle.

19) On payment of the relevant duties and penalties, the defendant had the vehicle towed from the Customs Yard as it could not start.

20) Warren did indeed transfer full title to the 2nd defendant and provided all the relevant documentation.

21) She thereupon collected the balance of the outstanding purchase price.

22) On or around March 22, 1992, the 1st defendant sold the car to the claimant through its principal Mr. Dixie Adams who had been known to the 2nd defendant previously and with whom he had had dealings.

23) On March 26, 1992, one Detective Sergeant Colbert Edwards of the Fraud Squad contacted the 2nd defendant and advised him that he was investigating the circumstances surrounding the said motor car. He took a statement from the 2nd defendant and was provided with copies of all the relevant documentation in relation to the car and copies in respect of all payments made to Warren.

24) The 2nd defendant also advised the policeman that the vehicle had been properly sold to the claimant.

25) Carolyn Warren was arrested for the offence of fraudulent conversion of the said motor Mercedes Benz sometime in June 1993.

26) The motor car was taken from the claimant by the police on or around the 24th August 1993.

27) On the 17th September 1993, Carolyn Warren is alleged to have pleaded guilty to a charge of larceny of the said motor car in the Resident Magistrate's Court for the Parish of Kingston. There is no direct evidence of what took place at the trial.

although it is known that whereas she had been originally charged with fraudulent conversion, she eventually pleaded to larceny.

28) From the evidence of Garth McBean, given the then attorney at law for Bryad, the Magistrate made an order that the car be delivered to Percival Thomas although there

is no record of the procedure adopted, which would have authorized the making of such order. Similarly, there is no record of the precise order that was made

29) The 3rd Third party instituted judicial review proceedings in the Supreme Court and in that case, an application for mandamus was made to force the Commissioner of

Inland Revenue to register the said motor car in his name. This was firmly rejected by the court.

30) It appears that some time in 1993, the defendants instituted proceedings in the Supreme Court but there is no record of those proceedings.

31) The present proceedings were instituted by the claimant (then "plaintiff"), against the defendants as a consequence of the seizure of the car by the police, it having been delivered to someone other than the plaintiff.

The Issues:

Given the nature of the pleadings before the court, there are essentially two issues which the court must determine:

- a) Whether in the circumstances the defendant could have acquired good title so as to pass it on to the Claimant;
- b) Whether the judge's ruling in the criminal matter affects civil liability in this court especially in light of the order of His Honour Mahadev Dukharan, Resident Magistrate, (as he then was) whereby he ordered that the motor car in question be delivered to the 3rd Third Party.

The Law:

Whether good title was acquired by the defendant and so passed to the Claimant.

The fundamental question to be explored and answered in this matter is whether the defendant had acquired good title for the car from the 1st Third Party, Carolyn Warren, which could be subsequently transferred to Bryad. It is clear that the question of whether good title was passed is both a legal and evidential one as a resolution of the question of ownership is contingent on the nature of the evidence adduced by the parties. It is therefore crucial to have regard to the relevant legal principles under the Sale of Goods Act which govern transfer of title. Section 22 of the Sale of Goods Act provides as follows:

- (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
- (2) Provided that nothing in this Act shall affect:
 - a. The provisions of any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;
 - b. The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

In the case of Vilma Verley v Michael Powell HCV 2520 of 2004 (unreported) section 22 of the Act received judicial consideration. The learned trial judge stated the following:

"Is the defendant precluded from denying De Planner's authority to sell? Is there anything about his conduct from which that can be inferred?"

He did absolutely nothing. He was aware that a purchaser was found. He facilitated the sale by the handing over of the documents to prove his ownership. At no time did he make it plain to the purchaser before she handed over her money to his agent that the money was to be paid to him. He remained silent and money was paid and contract completed.

In Rimmer v Webster, [1902] 2 Ch 163, Sir George Farwell stated the following principle:

"The owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner; the case forms one of

actual authority apparently equivalent to absolute ownership and any limitations on this generally must be proved to have been brought to [the attention of] the purchaser or mortgagee."

The defendant in the instant case signed with the company an agreement for sale of the vehicle.

In Henderson and Company v Williams [1895] 1 Q.B. 521, at page 525, Lord Halsbury said:

There may be a question where, although no property has in fact passed yet the true owner has allowed another person to hold himself out as the owner in such a way as to make an innocent person enter into a contract which, being performed, cannot be set aside.

From the evidence adduced, the court is driven to the conclusion that Mr. Powell empowered De. Planners with both the apparent and actual authority to sell his vehicle.

The essence of these passages is that a good title will be passed to a buyer from the seller, who is not the owner and who is not authorized by the owner to sell, if the owner, by his conduct, is precluded from denying the seller's authority to sell. However, if that ownership is established in a given situation, then it would be unnecessary to consider the legal effect of section 22, since inherent in the right of ownership is the right to dispose of the property. In the instant matter therefore, it is crucial to seek to ascertain whether Carolyn Warren was indeed the owner of the car. If she were, there would be no need for her to obtain the consent of Thomas who claims that it belongs to him. Nor would there be any necessity for Thomas to have conferred upon her any ostensible authority to sell the car. A look at some of the critical evidence will assist in answering this question.

Tariq Malik, whose evidence I have already indicated I find credible, in his witness statement points to factors which seek to establish that Warren was in fact the owner of the car. He listed a number of documents which are all part of the agreed bundle of documents, and which he received from her in support of the claim that she was the owner of the car. These were:

- (1) English Registration booklet in her name;
- (2) Bill of Lading for the vehicle in her name;

- (3) Letter from Mercedes Benz dated December 12, 1989 directed to Carolyn Warren;
- (4) Notice of Detention of the vehicle dated 13th July 1992 directed to Carolyn Warren;
- (5) Motor vehicle Order and Clearance permit dated June 9, 1991;
- (6) Letter to the Trade Administrator from Carolyn Warren dated April 29, 1992;
- (7) Letter to the Commissioner of Customs and Excise Duties from Carolyn Warren dated August 17, 1992.

Leymon Strachan, the 2nd Third Party, gave evidence and under cross examination confirmed that the relevant documentation had been in the name of Carolyn Warren as is indicated by the following:

Q: Was a title to the car issued to Carolyn Warren in England?

A: Yes. We instructed Mercedes Benz to issue title to Carolyn.

Q: Did you give Mercedes Benz instructions orally or in writing?

A: In writing.

Q: Where were you when you gave Mercedes Benz the instructions?

A: I think, in England.

Q: Do you have a copy of the documents given to Mercedes Benz?

A: No. I do not have a copy. Mr. Thomas may have had it.

Q: Neither you or Thomas got an import licence?

A: No.

Q: Carolyn Warren got the licence and imported the vehicle?

A: Yes.

Q: You paid no duties or penalties?

A: No.

Q: I suggest that you approached Malik after he had paid the duties!

A: I don't know.

Q: When did you know Malik had paid the duties?

A: That day March 9, 1993.

Q: You could not have gotten an import licence, is that correct?

A: That is correct.

Q: You could not have imported the car as you had no licence to do so?

A: Yes.

Q: Mr. Thomas likewise?

A: Yes.

Q: You could not have written to the Trade Board as you had no title?

A: Correct.

Q: You could not write to the Ministry of Finance for the same reason?

A: Yes.

Q: Neither could Mr. Thomas?

A: That is correct.

As noted above, evidence was also given by Deputy Superintendent of Police Colbert Edwards. I have already commented upon his evidence but the following exchange is instructive:

Q: When you went to Bryad, did Mr. Adams show you all the documents to the car and which were legitimate?

A: Yes.

Q: On September 17, 1993 were you in court when Warren was there?

A: Yes.

Q: Did you hear the judge make any enquiries of Thomas or Strachan?

A: I don't recall.

Q: What order did the judge make?

A: He ordered the car be returned to Thomas.

Q: When the order was made, what did you do with the vehicle?

A: Shortly after the order was made I delivered it to Thomas.

Q: Prior to delivering it to Thomas, had you ever seen it in the custody of Thomas?

A: No ma'am.

Q: The only persons who had produced documents of title were Malik and Adams?

A: Yes.

Q: Was there a registration booklet in the name of Bryad?

A: Yes, there was registration booklet and certificate of fitness.

Q: Did Strachan or Thomas produce any documents of ownership?

A: No.

I hold that on the totality of the evidence, there was abundant reason to believe that Mrs. Warren was, in fact, the true owner of the vehicle. There is the documentary evidence in the bundle and there is the evidence, such as it is, of Strachan. He admitted that title was issued to Warren, that she had a licence and had imported the vehicle and that neither he nor Thomas had made any payment in regards to the entry of the vehicle into the island. There is no evidence that Strachan or Thomas ever had legal ownership or even beneficial ownership of the motor car. All the available evidence pointed to Mrs. Warren's ownership of the vehicle. Importantly, the registration booklet was in her name.

It is true that there is authority for the proposition that though a registration booklet is not a conclusive document of title, it does provide powerful evidence of ownership. In

Bishopgate Motor Finance Corporation Ltd. v Transport Brakes Ltd [1949] 1 All

ER 37, Denning L.J. (as he then was) at page 46 said:

It seems to me that the system of registration books for motor cars, if properly worked, should do a great deal to protect both the true owner and the innocent purchaser. The registration book of a car or the "log book" as it is called, may not itself be a document of title, but it is the best evidence of title.

Luckhoo, J.A. in the Court of Appeal decision in Henriques and Another v United

Dominion Corporation (JA) Ltd 11 JLR 481, at page 15 in referring to submissions

made by counsel noted:

"Counsel for the appellant contended that the registration book relating to the car, though not a document of title, is the best evidence of the ownership of the car. Further, counsel urged, as there was no evidence prior to January 31, 1961, Simpson was ever in possession of the car, and indeed there was evidence that up to the end of November 1960, Hugh had

been seen driving the car and had been issued on December 8, 1960, with a substitute licence disc; it could not be urged that there was any evidence that Simpson had title, possessory or otherwise, to confer on UDC in 1960. I think there is much force in counsel's contention that in light of the subsequent discovery of frauds of a similar nature perpetrated by Simpson on the UDC in relation to motor cars which at no time were in the ownership of Simpson, it was more probable than not that in October 1960, Simpson was not the legal owner of the car.

In the instant case, there is evidence coming from the defendant and from Strachan that the car was registered in Warren's name. According to Strachan, the arrangement involving himself, Thomas and Warren was that she would be given title in her name in order to use her import licence. Even assuming this to have been true, which I doubt, it is difficult to understand why either or both of them would not have asserted the right to beneficial ownership when they were aware that the car was being sold to Bryde. They certainly could have asserted their right by an action to avoid the title or for a declaration. In that regard it should be borne in mind that section 23 of the Sale of goods Act states:

When the seller of goods has a voidable title thereto but this title has not been avoided at the time of the sale, the buyer accepts a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

The fact is that there was no evidence that Mrs. Warren's title was voidable and it is patent that a mere assertion of claim to ownership cannot make it voidable. Nor is there any basis for the proposition that the defendant was under a duty to launch extensive investigations once it had been satisfied as to the validity and authenticity of the documents presented to it by Warren. In any event, there is no such pleading by the Claimant and no credible evidence in that regard. I am satisfied that the defendant pursued reasonably diligent enquiries as to the title to the car including discussions with the Commissioner of Customs. I am accordingly satisfied that the defendant had acquired the car in good faith and without notice of any defect in Mrs. Warren's title, if indeed there were such defect. But I would go further and say that even if everything that Strachan said was true about the arrangement with Thomas and Warren, I would still be prepared to hold that by their own deliberate actions they had clothed her with apparent

or ostensible authority and cannot now be heard to say otherwise. There is no question but that the defendant had acquired good title to the motor car.

Whether the ruling in the RM Court and the order of the magistrate affect civil liability.

Section 66 of the Larceny Act provides:

- (1) If any person guilty of any such offence as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, having in his possession, or disposing of, or in knowingly receiving, any property, is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative;
- (2) In every case in this section referred to, the court before whom such offender is convicted shall have power to award from time to time writs of restitution for said property or to order the restitution thereof in a summary manner.

Provided that where goods as defined in the Sale of Goods Act have been obtained by fraud or other wrongful means not amounting to stealing, the property in such goods shall not revert in the person who was the owner of the goods or his personal representative, by reason only of the conviction of the offender.

Further, section 24 of the Sale of Goods Act provides:

Where goods have been stolen and the offender has been prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

It would seem that on a proper construction of these sections, when a person has been prosecuted to conviction where the goods have been stolen, there is an automatic reversion of ownership in the true owner. Where the goods were obtained by fraud or other wrongful means, not amounting to larceny, there is no automatic reversion by virtue only of that conviction. In any event, the reversion is to the person who was the true owner.

In the instant case, the Resident Magistrate accepted a plea of guilty to larceny and thereafter ordered the return of the goods to Mr. Thomas. It is to be remembered that, as stated above, Panton J. (as he then was) observed in the case involving this same vehicle cited below that larceny is an offence against possession and there was no information that any evidence had been led before the magistrate concerning Mr. Thomas having ever been in possession. In this court, there has been evidence to the contrary that Thomas had never been seen in possession of that car. One may only wonder whether the matter was properly aired before the magistrate so as to give him the benefit of full submissions on the implications of the relevant sections of the two Acts.

It seems however that they would have had to expose themselves as breaching the law and would not have been able to show clean hands. In that regard, see my comments below on a related decision in the Full Court on an application for mandamus by Mr. Thomas.

But I do not express this view lightly because it should be noted that this vehicle was the subject matter of an application for mandamus at the instance of the 3rd Third Party, Percival Thomas in the Full Court of this Supreme Court in that matter, Suit No. M-059 of 1994, (R v. Commissioner of Inland Revenue, Ex Parte Percival Thomas) delivered on 6th day of December 1994; Thomas had sought an order of mandamus to compel the Commissioner of Inland Revenue to register the said vehicle in his name. The hearing was on December 6, 1994 before the Full Court, Rattray C.J. (Ag) presiding, Panton J. (as he then was), and Reid J. This, it is to be noted, was more than a year after the car had been ordered to be delivered to Thomas by the Resident Magistrate at Sutton Street (September 1993).

Upon reading the judgment of the court it seems that the court heard much of the same evidence which was adduced before me. Panton J. writing for the court stated, and the finding is clearly borne out by the evidence in this case,

There was a money transaction between the Warrens and Strachan. According to Strachan, "an agreement of US\$70,000.00 was finalized between the Warrens and myself regarding the using of their licence on Mr. Thomas' behalf". Certainly, even if this agreement was not illegal, it would seem that the applicant would be tainted by its apparent uncleanness".

His Lordship's carefully framed understatement, while untypical of his usual robust approach, is inordinately instructive. I adopt it unreservedly and am in little doubt as to the application of the principle, *ex turpi causa non oritur actio*, in these circumstances.

I also adopt for the purposes of this decision the dicta of the learned judge where he refers to the provisions of the Larceny Act, in the following terms:

"The learned Resident Magistrate's Order formed the basis of the applicant's request. There is no doubt that a Resident magistrate has the authority to order restitution of goods upon the conviction of a person for larceny of such goods. Section 66 of the Larceny Act reads thus:

He then recites the provisions of the section which have been set out above. He continues:

These provisions indicate that the Resident Magistrate's power is conditional on there being evidence of ownership. In addition, it has to be remembered that the offence of larceny is an offence against possession, not ownership. It follows that the complainant whose name appears on the particulars of offence in an indictment for larceny is not necessarily the owner.

In the instant case, the facts that were before the learned Resident Magistrate did not establish proof of ownership in Percival Thomas. It is doubtful whether even possession was established in Percival Thomas. This latter consideration is, however, not a matter for debate or determination before us.

If the learned judge (Panton J.) was correct and I have no doubt that he was, then there is a real issue as to whether there was any basis for accepting a plea of guilty to larceny rather than fraudulent conversation. And if that is correct, the order for the "return" of the car must have been *ultra vires*.

At the end of the day the question in this trial is: Has the Claimant proven its case that the defendant breached its contract to sell the motor car in issue or breached any implied terms of the agreement?

In the Amended Statement of Claim, there is in fact no averment that the defendants broke any contract with the claimant. There is an averment that there was a breach of an implied term or condition being that the defendants had a right to sell and that the claimant would have quiet possession. There is nothing in the particulars which indicate how if indeed there were such any such conditions or terms, either was breached. If there is only allegation to support this is the seizure of the vehicle by the police, then it seems to me that the claimant must show that the seizure was a proper one. Not only is there any such averment, there is no evidence of that. I would hold that on that basis alone, the claimant's case must fail. I accordingly give judgment for the defendants on the claim with costs against the claimant, to be agreed or taxed.

I should also note that that the claimant's statement of claim in its particulars raises "total failure of consideration". However, there is no plea of total failure of consideration and that cannot be used as particulars of breach of the conditions articulated above. Total failure of consideration does not represent particulars of a breach of an implied term.

I also award judgment for the defendants against the 2nd and 3rd Third Parties on their counterclaim and I award costs on a full indemnity basis to the defendants against the 2nd and 3rd Third Parties.

ROY K. ANDERSON
NOVEMBER 10, 2009