

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 972 of 1994

BETWEEN:

COMPTON FRANCOIS

Claimant

and

(1) CARIBBEAN ENGINEERING COMPANY LIMITED
(2) JAMES TOBIERE also known as KERVIN

Defendants

Appearances:

Ms. Cybelle Cenac for the Claimant.
Mr. Andie George for the Defendants.

2001: November 26
2002: April 09, 11, June 03
August 21 (Decision on no-case submission)
September 24, October 04
November 05

JUDGMENT

1. **HARIPRASHAD-CHARLES J:** On the 15th day of December 1994, the Claimant filed a Writ of Summons indorsed with a Statement of Claim seeking the following:
 - (i) A mandatory injunction requiring the First Defendant to return the tractor forthwith to the Claimant upon payment by the Claimant of the balance of the purchase price of \$5,000.
 - (ii) Damages.
 - (iii) Costs.

2. On the 1st day of March 1995, d'Auvergne J. dismissed the application for the injunction. In the interim, the substantive matter took its normal course in accordance with the Rules of the Supreme Court. A request for hearing was subsequently filed on 6th day of July 1995 together with a complete copy of the whole of the pleadings. The matter was waiting for a hearing date. It then took an unprecedented turn. It was heard on the 16th day of June 2001 in the absence of the Defendants. The Defendants were unaware of the trial date. At the time, they were represented by Mr. Leonard Riviere, who has since departed this terrestrial bliss. Barrow J. (Ag.) heard the matter. It appears from the pathetically deficient court record that the Learned Trial Judge reserved judgment and before the judgment was delivered, the Defendants moved the Court to reconsider and restore the matter to the hearing list. Justice Barrow heard the application on 26th day of July 2001. After hearing arguments from Mr. Andie George, the new Solicitor for the Defendants in the presence of Counsel for the Claimant, he ordered that the action be tried *de novo* for reasons specified in the Order.
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3. As a consequence, the matter started *de novo*. For a multiplicity of reasons, the case took nearly one year before it finally came to a close. The issue of damages and costs are the sole concern of this court.
4. The Claimant, Mr. Compton Francois is a businessman. He owns a construction company, Southern Equipment and Construction Company which is involved in road construction. He knows the Second-named Defendant, Mr. James Tobiere. He knows him as 'Kervin.' Kervin worked with him as a mechanic on a contractual basis for approximately six years from 1988 to 1994. The Claimant knows the Managing Director of the First-named Defendant Company. There is no special relationship between them.
5. Mr. Francois alleged that Mr. Tobiere informed him that the First-named Defendant, through its Managing Director, Mr. Oliver Sampson was selling a D-6 caterpillar tractor for \$70,000.00 but Mr. Sampson was willing to sell it to him (Mr. Tobiere) at a discounted price of \$40,000.00. Mr. Francois relished the thought of owning a tractor as part of his heavy-duty machinery and plants. Mr. Francois alleged that he agreed for Mr. Tobiere to

- purchase the tractor for him at the discounted price. He could have only paid \$25,000.00 initially. So he bargained to pay the balance over a three-month period.
6. On or about the 8th day of April 1994, Mr. Francois alleged that he paid on account of the purchase price the sum of \$25,000.00 in cash. No receipt was issued. On two subsequent occasions, he paid the total of \$10,000.00. He is still owing a balance of \$5,000.00 which he is willing and ready to pay.
 7. He next alleged that on the 17th day of April 1994, the First-named Defendant delivered possession of the said tractor to him and the same remained in his possession until the 2nd day of November 1994 when the First-named Defendant acting by itself, its servants and or agents wrongfully took away the tractor from his possession whereby he has suffered the loss of the use of his tractor. Mr. Francois claims an aggregate of \$224,400.00.
 8. It is not surprising that the Defendants tell an entirely different story.
 9. The First-named Defendant, Caribbean Engineering Company was the owner of a caterpillar tractor (D6C) serial number 76A-5157. Mr. Oliver Sampson, its Managing Director wanted to sell the said tractor for \$70,000.00. He was prepared to sell it to Mr. James Tobiere at a discounted price of \$40,000.00 because of Mr. Tobiere's long and dedicated service to his company.
 10. So, on the 1st day of February 1994, upon the request of Mr. Tobiere, Mr. Sampson prepared a statement addressed "To whom it may concern" giving particulars of the cost of the tractor. Mr. Tobiere informed him that this was required for the Bank where he was seeking to obtain a loan. On 11th day of April 1994, he sold the tractor to Mr. James Tobiere for \$40,000.00 and received the cash sum of \$25,000.00. Receipt No. 13 dated 11th day of April 1994 was issued to Mr. Tobiere. It was agreed that the balance of \$15,000.00 was to be paid in the form of labour in maintaining the First-named Defendant's heavy-duty equipments and pre-mix plant.

11. Mr. Sampson received the cash sum of \$25,000.00 from Mr. Tobiere and the tractor was released forthwith. Mr. Sampson denied all allegations that he had knowledge of any discussions and contract of dealings between Mr. Tobiere and Mr. Francois. He also denied that Mr. Tobiere acted as his agent for any purpose and that his dealings with Mr. Tobiere was strictly confined to utilizing his expertise as a heavy duty equipment operator and repair technician.

12. The Second-named Defendant, Mr. James Tobiere was employed with the First-named Defendant Company on a contractual basis to do repairs on heavy duty equipment and plant, as was needed for approximately 5-10 years. He had some negotiations with Mr. Sampson in respect of the purchase of the caterpillar tractor. He attempted to secure a loan from the Bank but later on, he abandoned the idea. He decided to raise the cash by borrowing from family members and from savings. On the 11th day of April 1994, he paid the sum of \$25,000.00 to the First-named Defendant. Mr. Tobiere alleged that a month after he purchased the caterpillar tractor, Mr. Francois gave him the sum of \$15,000.00. He next alleged that the \$15,000.00 was given to him for services rendered to Mr. Francois as an operator and also for the use of the said caterpillar tractor.

13. The Claimant contended that Mr. James Tobiere acted as agent for Mr. Oliver Sampson, the Managing Director of the First-named Defendant Company and that the said Mr. Tobiere was also acting as agent for the Claimant thereby creating a contract between the Claimant and Mr. Oliver Sampson. Complicated as this contention appears, it is basically two-fold in nature namely:
 - (a) Was Mr. James Tobiere acting as agent for Mr. Oliver Sampson and
 - (b) Was Mr. James Tobiere acting as agent for the Claimant?

14. Ms. Cybelle Cenac for the Claimant forcefully argued that Mr. Oliver Sampson believed that when he was selling the caterpillar tractor, he was doing so to Mr. James Tobiere, the Second-named Defendant. She next submitted that Mr. Sampson was unaware that Mr. Tobiere was acting as an agent for the Claimant. As Mr. George for the Defendants

correctly submitted, if this is the case then there may not be a legitimate reason for joining the First-named Defendant in the matter.

15. This brings into focus the doctrine of privity of contract. Under the common law doctrine of privity of contract, the general rule is that a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it. The doctrine of privity seems to be intimately connected with the doctrine of consideration and the rule that consideration must move from the promisee. In the instant matter, two questions arise for consideration namely:
 - (a) Who are the parties to the agreement?
 - (b) Has the Claimant provided consideration for the promise which he is seeking to enforce?

16. The Defendants argued that the parties to the agreement for the purchase of the disputed caterpillar tractor were Mr. Oliver Sampson, the Managing Director of the First-named Defendant Company and Mr. Tobiere, the Second-named Defendant. The Claimant argued that an agency existed between the Claimant and the Second-named Defendant and that the Second-named Defendant was acting as agent for the First-named Defendant. On the evidence adduced in this court, my factual finding is that if any agency existed between the Second-named Defendant and the Claimant, the First-named Defendant had no knowledge of it. There is also no evidence that the Claimant provided consideration for the promisee, which he sought to enforce. It is abundantly clear from the evidence that the parties to the agreement were the First-named Defendant and the Second-named Defendant. This is further substantiated by the contemporaneous documentary exhibits which were tendered in evidence.

17. The begging question of agency arises. Ms. Cenac submitted that James Tobiere acted as agent of the Claimant in purchasing the tractor thereby creating a contract between the First-named Defendant and the Claimant.

18. The relation of agency arises whenever one person called 'an agent' has authority to act on behalf of another called 'the principal' and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent: *Brooke v Bool* (1928) 2 KB 578.
19. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of his principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen. Conversely, the relation of agency may arise despite a provision in the agreement that it shall not. See: *Customs and Excise Comrs v Pools Finance (1937) Ltd* (1952) 1 All ER 775.
20. The essence of the agent's position is that he is only an intermediary between two other parties. So it is essential to an agency in this sense that a third party should be in existence or contemplated. Whether a person intends to act on behalf of another is a question of fact. As a general rule, the agent must intend to act on behalf of his principal.
21. In the instant case, the Claimant alleged that Mr. Tobiere was acting on his behalf. In my opinion, the only relationship that existed between the Claimant and Mr. Tobiere was that of contractual employer/employee relationship. Mr. Tobiere was the claimant's mechanic for 6 years from 1988. There is not a scintilla of evidence to show that Mr. Tobiere acted as agent for anyone.
22. The issue of undisclosed principal requires some consideration. The general rule is that an agent is not a party to a contract made between his principal and a third party but the rule may be displaced by reason of the doctrine of undisclosed principal. For example, where A intends to contract as agent for P, but knows that the offeror thinks that A is contracting as principal, P will usually be able to take the benefit of the contract by reason of the doctrine of undisclosed principal, but, P will not be able to do so where A knows that the identity of

the offeror is material, either in the sense that the offeror positively wishes to contract with A as principal, or does not wish to contract with P.

23. The Defendants submitted that an undisclosed principal should not be allowed to intervene if he knew that the third party does not want to deal with him. This is borne out from the evidence of the Claimant himself in paragraph 12 of his witness statement and further supported by the additional witness statement of Mr. Oliver Sampson dated the 2nd day of October 2001.
24. All in all, the evidence does not disclose any relationship of agency between the Claimant and Mr. Tobiere. The agency relationship as alleged between Mr. Tobiere and the First-named Defendant is even more far-fetched.
25. Counsel for the Defendants reiterated his earlier arguments when he moved the court to consider his no-case submission at the end of the Claimant's case. Counsel argued that Articles 1163 (2) of the Civil Code is applicable and that the claim should be dismissed. Counsel referred to the Saint Lucian cases of *Anthony Jn. Jules v Veronica Fletcher (Suit No. 40B of 1986)* and *Sonia Girard v Vincent Doxerie (Suit No. 408 of 1986) (unreported)*.
26. In her well-presented written documentation on a no-case submission raised by the Defendants, Counsel for the Claimant cleverly argued that this claim fell within Article 1163 (1) of the Civil Code. Article 1163 of the Civil Code states in effect:

"Proof may be by testimony:

1. Of all facts concerning commercial affairs;
2. In a matter which the principal sum of money or value in question does not exceed forty-eight dollars;
3. In a case in which real property is held by permission of the proprietor without lease, as provided in the Book respecting *Lease and Hire*;
4. In case of deposit or bailment under pressing necessity or deposit made by a traveller in an inn, and in other cases of a like nature;

5. In the case of an obligation arising from a quasi-contract, delict or quasi-delict, and in all other cases in which proof in writing cannot be procured;
6. In any case in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the claimant, and cannot be produced;
7. In any case in which there is a commencement of proof in writing.

In all other matters proof must be by writing or by the oath of the adverse party..."

27. It is common ground that the value of the disputed caterpillar tractor exceeds \$48.00 and that by virtue of Article 1163 (2), something more than oral testimony is required, for example, a receipt. But, Counsel for the Claimant submitted that though the value of the claim exceeds \$48.00, the claim was not caught by Article 1163(2) but fell within the nature of a commercial transaction as provided by Article 1163 (1) of the Civil Code.

28. The Civil Code is silent as to what constitutes "commercial affairs." The only reference to commercial matters is to be found in Article 2121 which deals with certain short prescriptions. Article 2121(5) states as follows:

"Upon sales of movable effects between non-traders, or between traders and non-traders, these latter sales being in all cases held to be commercial matters."

29. The Oxford Compact English Dictionary defines the word "commercial" as follows:

"engaged in, or concerned with commerce...having profit as a primary aim rather than artistic etc value..." and

"commerce" is defined as "financial transactions, esp. the buying and selling of goods, on a large scale."

30. I do not agree with Counsel for the Claimant that this transaction between Mr. Tobiere and Mr. Sampson falls within the meaning of a commercial transaction. Instead, I agree with Mr. George that the purchase of the caterpillar tractor was a transaction between two private individuals and as a consequence, could not be classified as a "commercial"

transaction. I also agree with Mr. George that Article 1163 (2) of the Civil Code is applicable and not Article 1163 (1).

31. I find it incredible that a businessman, as ingenious as the Claimant would give to a mechanic, the sum of \$25,000.00 cash to purchase a tractor for him and would not demand a receipt. His excuse was that he was traveling to Miami the following day. He did return. Why was a receipt not requested or demanded? In the Doxerie's case, the parties were lovers, about to get married. Matthew J. in dismissing her claim stated as follows:

"I think there is good reason for the provisions of paragraph 2 of Article 1163. It means that people must come to court with reliable evidence to base claims of this magnitude."

32. On a thorough examination of the facts, the Claimant stated that he is the owner of a D-6 Tractor which he purchased. He was given a manual which is lost. He does not know the chassis number, the serial number or even the colour of the tractor. The custom documents which were produced as evidence referred to parts. The Claimant is the owner of other heavy equipments. The documents did not specifically refer to parts for a tractor.

33. This is a civil case wherein the standard of proof is based upon a balance of probabilities. Examining the facts presented to this Court, I was much more impressed with the demeanour of, and the evidence given by the Defendants particularly Mr. Oliver Sampson, Managing Director of the First-named Defendant Company. He impressed me as a witness of truth. The Second-named Defendant also impressed me as a witness of truth although his defence filed on the 1st day of February 1995 by his then Counsel, the late Mr. Riviere conflicted with his evidence upon oath. He admitted in his defence that he received \$35,000.00 from the Claimant. In examination in chief, he changed that story but admitted receiving sums of money from the Claimant for services which he rendered and for use of his tractor. I attributed such inconsistencies to his naivety rather than a witness of untruth.

34. It is my firm view that for the Claimant to succeed he should have brought some reliable evidence to substantiate such a significant claim. For the Claimant to say that because he

owned other heavy equipments and he has money, therefore, he was a man more interested in purchasing a tractor are mere speculations. And this is not a court of speculation. He who asserts must prove. His witnesses were found to be untruthful or unknowledgeable. They were deemed most unhelpful. Mrs. Francois was not privy to any discussions. She relayed what was told to her by the Claimant, her husband. Mr. Edmund Prophet struck me as a witness who concocted his story. Mr. Lafeuille could not provide any documentary evidence to substantiate his testimony.

35. Accordingly, I dismissed the Claimant's claim and awarded costs of \$10,000.00 as previously agreed by the parties to each of the Defendant.

INDRA HARIPRASHAD-CHARLES
High Court Judge