SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2007/0698

BETWEEN:

[1] GARNAT GEORGE
[2] ADOLPHUS SMALL

Claimants

and

CLAUDIUS ETIENNE

Defendant

Appearances:
Mr. Horace Fraser for Claimants
Ms. Lydia B. Faisal for Defendant

2011: September 1.

JUDGMENT

On written submissions

[1] **GEORGES, J. [AG.]:** This is an application for assessment of damages consequent upon entry of judgment in default of acknowledgment of service entered against the defendant on 11th March 2008.

Introduction

[2] According to the statement of claim filed on 14th August 2007 in or around Friday 19th October 2006 the second claimant (Mr. Small) entrusted his motor vehicle registration number PC 2157 to the care and custody of the first claimant (Mr. George) for servicing purposes and in or around Sunday, 21st October 2006 he got into an accident with the said motor vehicle and on the said day took it to the

defendant's repair shop at Odsan, Castries for repairs with the full authorization of the owner Mr. Small who thereby he alleged acted as his agent.

[3] According to paragraph 8 of the statement of claim it was orally agreed between Mr. George and the defendant (although this is denied by the defendant) that the defendant would deliver the repaired vehicle in three weeks and that Mr. George would pay him $5,725.00 which would include the cost of workmanship and replacement parts. In keeping with the terms of the agreement Mr. George deposited $4,400.00 with the defendant with the balance to be paid on delivery of the repaired vehicle in three weeks time.

[4] In breach of the agreement it is alleged that the defendant failed to deliver the repaired vehicle as promised and has unlawfully detained it despite several demands by the claimant to repair and to release it. Mr. George further alleged that inspection of the vehicle by him around the first week of July 2007 revealed that parts of the engine were missing.

[5] Damages are therefore claimed by the claimants for breach of contract detinue and conversion as follows:

Particulars of Special Damage

Value of car	$13,000.00
Money had and received for a consideration which has wholly failed	$4,400.00
Loss of use – 260 days at $200.00 per day from 13th November 2006 – 31st July 2007	$52,000.00
TOTAL	**$69,400.00**

In addition the claimants claim general damages costs interest and further or other relief.

Observations

[6] In perusing the file I noticed that the certificate of truth which accompanied the

claimants' statement of case was verified only by the second claimant Adolphus Small the owner of PC 2157 a 1994 Nissan Bluebird which he had purchased in January 2000 with a loan from CIBC Caribbean Limited. Part 3.12(1) of the Civil Procedure Rules (CPR) stipulates that every statement of case must be verified by a certificate of truth and CPR 13(12)2 requires that it should be signed by the party personally. CPR 3.13(1) states that the court may strike our any statement of case which has not been verified by a certificate of truth. No statement of claim has been verified by a certificate of truth by the first claimant Mr. Garnat George which would render the statement of case filed liable to be struck out on application by the defendant.

[7] But the defendant in his affidavit in response to the second claimant's affidavit in support of his application for assessment of damages in default of acknowledgment of service filed 11th April 2008 avers at paragraph 3 that he had absolutely no recollection of having received any claim form and statement of claim at any date prior to when he received the application for assessment of damages.

[8] Turning to the claimants' affidavit in support of their application for assessment of damages the court notes that the affidavit is in fact sworn only by the second claimant Adolphus Small paragraph 1 of which states:

> **"1. That I am the second claimant and Deponent herein and I swear this affidavit also on behalf of Garnat George the first named Claimant."** (My emphasis)

[9] This is clearly unorthodox and irregular as Rule 30.2(c) CPR stipulates that **every affidavit must be in the first person** and state the name, address and occupation of the deponent and, if more than one of each of them. One cannot swear an affidavit on behalf of oneself and another. Besides that paragraph 2 is erroneous as the default judgment was entered in favour of both claimants (and not the deponent only) against the defendant for his failure to file an acknowledgment of service.

[10] Similarly in paragraph 4 the deponent Adolphus Small avers that "we are entitled to recover the sum of $4,400.00 from the defendant as money had and received for a consideration that wholly failed" when the fact of the matter is that it is the first claimant Garnat George who in actual fact allegedly paid the advance of $4,400.00 as part payment to the defendant for the repairs to the damaged car which were to be done by him and which were allegedly not carried out and who would therefore be entitled to recover the part payment from him as money had and received for a consideration which has wholly failed since there was no contractual arrangement between the second claimant Adolphus Small and the defendant and no way could the first claimant be regarded as agent of the said Adolphus Small as stated in paragraph 7 of the statement of claim.

[11] On the pleadings it is plain that the claimant Small has no cause of action against the defendant as at no time was any agreement made between them and all dealings and communications were with the claimant George who could not legally be labeled as the agent of Adolphus Small. Mr. George clearly contracted with the defendant in his own personal capacity.

Value of Damaged Car

[12] When the claim was filed in August 2007 the claimants put the value of the Nissan Bluebird motor car at $13,000.00 without any empirical data or supporting documentary evidence. It was a 1994 second hand model when Mr. Small acquired it in January 2000 with a Bankplan loan of $18,000.00 from CIBC Caribbean Limited and it was thus 13 years old when suit was filed in August 2007. Following the accident in October 2006 it was towed to the defendant's garage severely damaged - a wreck – minus windscreen. Preliminary estimated cost of repairs was put at $5,725.00 of which $4,400.00 was paid in advance to the defendant by Mr. George with the balance to be paid on completion.

Loss of Use

[13] According to the Application for Transfer of Ownership of Motor Vehicle Form

(AS1) completed signed and dated 17.01.00 by Adolphus Small the intended use of the vehicle is stated as **"Private (Recreational)"**. Paragraphs 3 and 4 of the statement of claim however state that at all material times the claimant Adolphus Small was a businessman and engineer trading in the name and style Allied Consultancy Services and had applied the said motor vehicle for **use in his business operations**. This was in no way substantiated. On the basis of guidelines supplied by the Insurance Council of St. Lucia the claimant Adolphus Small claims loss of use for 260 days at $200.00 per day from 13th November 2006 to 31st July 2007 totaling $52,000.00. (My emphasis)

[14] The Insurance Council however points out that the guidelines furnished by it in no way require the insurer to abide strictly to the amounts specified. Where the third party has incurred the expense of hiring an alternative vehicle adequately supported by appropriate invoices and receipts, insurers agree to reimburse the expense legitimately incurred. The claimant Adolphus Small has furnished no documentary evidence of any kind whatsoever to support or justify his claim in that regard which is in my opinion manifestly extortionate and wholly unsubstantiated.

[15] The first claimant would plainly have been the person liable to the second claimant for damages and loss caused by his driving of the claimant's Nissan Bluebird motor car PC 2157 whilst on a frolic of his own on Sunday, 21st October 2006 since the second claimant had entrusted its care and custody to him on Friday, 19th October 2006 only for the purpose of servicing it. He would have been liable for the cost of repairs and loss of use and evidently sought to make restitution (as the pleadings reveal) by contracting to have the necessary repairs done by the defendant body repairman to whom he in fact allegedly paid two deposits initially totaling $4,400.00 with a balance of $1,325.00 to be paid on completion of the job in three weeks.

[16] All of this having been said the nub of this application as I see it is that judgment in default of acknowledgment of service was entered by the court on 11th March 2008 against the defendant pursuant to Rule 12.4 and 12.10(1)(b) CPR for an amount to

be determined by the Court and the matter was adjourned to Chambers for a determination of the terms of the judgment on Monday, 14th April 2008. In his affidavit in response to the claimants' application for assessment of damages the defendant averred that he had absolutely no recollection of having received any claim form and statement of claim at any date prior to the date when he received the claimants' application for assessment of damages. An affidavit of service sworn on 8th October 2008 and filed on 12th October 2008 by Ernest Lafeuille affirms that the defendant was served personally by hand on 21st September 2008 at Odsan Castries with the claim form and all other related documents and at the time of service the defendant had identified himself to him.

[17] No attempt to set aside the default judgment has been made by the defendant. And Rule 12.13 CPR stipulates that:

> "Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are –
> (a) an application under rule 12.10(4);
> (b) costs;
> (c) enforcement of the judgment; and
> (d) the time of payment of any judgment debt."

And Rule 12.10(1)(c)(ii) CPR states that:

> "Default judgment on a claim for -
> (c) goods - must be –
> (ii) judgment requiring the defendant to pay the value of the goods as assessed by the court. And finally Rule 12.10(4) CPR decrees that – Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim. And Rule 12.10(5) elaborates that an application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit."

[18] Particulars of special damage are set out in paragraph 5 of the judgment the general rule is that special damage must be specifically pleaded and strictly proved.

The Value of the Damaged Vehicle

As I stated at paragraph 12 the value of $13,000.00 placed by the claimants on the pre-accident value of the Nissan Bluebird motor car is in my view not only exorbitant but wholly unsubstantiated. Purchased in January 2000 according to the Transfer of Ownership Form it was then stated to be a 1994 Model. So that at the time of the accident in October 2006 it would have been at least 13 years old. A Bankplan loan for $18,000.00 was obtained by the second claimant owner from CIBC Caribbean Limited in January 2000. The vehicle was supposed to have been comprehensively insured but no policy was exhibited which would have shown the insured value of the vehicle.

[19] On the assumption that the vehicle was purchased for $18,000.00 in January 2000 and depreciated at the rate of 20% per annum its value at October 2006 would have been less than $6,000.00 leaving a residual value after five years. After the accident in October 2006 it was towed to the defendant's garage without windscreen as a virtual wreck. The engine could not be started. That is the condition in which the defendant apparently received it from the first claimant tortfeasor who would be responsible under the maxim restitutio in integrum to put the second claimant in the position which he would have been if the accident had not occurred. The second claimant owner has no cause or right of action against the defendant in that regard. His claim would clearly lie against the first claimant who would have incurred the responsibility to mend the damaged car and to restore him so far as is financially and practically feasible to his original position before the accident occurred.

[20] In paragraph 10 of the statement of claim it is acknowledged that the motor vehicle was the property of the second claimant Adolphus Small therefore it is incompetent for the first claimant to claim its value. He cannot supplant the owner's proprietory interest therein.

[21] As regards the claim for $4,400.00 as money had and received for a consideration which has wholly failed proper receipts for the money paid by the first claimant and

received by the defendant were exhibited. The defendant contended that the amount paid had been used to effect some repairs to the damaged vehicle but had proved insufficient to complete same. The engine could still not start and the first claimant eventually towed the car away to outside of his house where it has since remained. Having regard to all the circumstances I would make no award under that head of claim.

Re claim for loss of use

[22] This head of claim arises directly from the tortious driving of the first claimant which resulted in severe damage to the second claimant's car. And the claim for the resultant damage and the ensuing loss of use would clearly lie against the first claimant who has in my opinion been erroneously joined as a claimant in this action. And as indicated earlier the amount claimed under that head is not only exorbitant but worst still is wholly unsubstantiated. I would therefore unhesitatingly make no award under this head as well.

[23] In the result having regard especially to the egregious and unsatisfactory manner in which this claim has been instituted and prosecuted it would in my considered view be meet right and just in all the circumstances to make no award of damages or costs and let the chips lie where they fall.

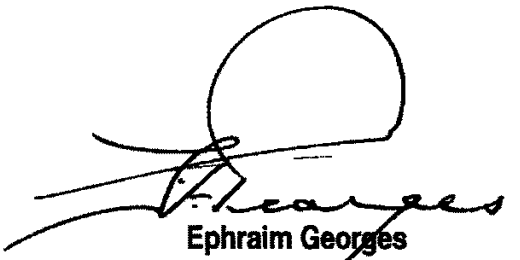
[24] Finally in parting I would point out that the two cases relied on by counsel for the claimants namely **Bernstein v Pamson Motors (Golders Green) Ltd.** [1987] AER 220 and **Jackson v Horizon Holdings Ltd** [1975] 3 AER 92 are readily distinguishable from this case. On the other hand Justice Pemberton in Grenada High Court Suit No. 2001/0308 has set out some helpful guidelines on the principles which are applicable in matters of this kind.

[25] In paragraph 7 of the learned Judge's judgment mention is made of Dr. Lushington's dicta in **The Gazelle** (1844) 2 Wm and Rob 279 at 281 who had this to say:

> "The right of the wrongdoer is for restitutio in integrum, and this Restitution he is bound to make without calling upon the party injured to assist him in

any way whatsoever."

My own research has revealed Privy Council Appeal No. 61 of 2001 – **Carlton Greer v Alstons Engineering Sales and Services Limited** delivered on 19th June 2003 by Sir Andrew Leggatt on appeal from the Court of Appeal of Trinidad and Tobago which I would commend as being particularly beneficial in this area of the law.



Ephraim Georges
High Court Judge [Ag.]