

IN THE MAGISTRATE'S COURT IN BA

CIVIL JURISDICTION, WESTERN DIVISION

Civil Action No. 237 /2011

BETWEEN: **DINESH PRASAD** of Yalalevu, Ba, Fiji, Logging Contractor

PLAINTIFF

AND: **SURESHNA DEVI VADAN** of Cunningham, Suva, Garment Worker

DEFENDANT

Hearing: 7 March, 2019

Ruling : 18 April, 2019

APPEARANCES

For the Plaintiff: Samuel K. Ram Lawyers

For the Defendant: Nands Law

RULING

The Claim

1. The Plaintiff had on 21 October, 2011 filed a Writ of Summon seeking the following:
 - a) An injunction restraining the Defendant by herself, her servants or agents from seizing, selling, disposing, interfering with the taking possession of Toyota Truck registration no. CH 823 from the Plaintiff.
 - b) That the Defendant to forthwith transfer Toyota Truck registration No. CH 823 onto the Plaintiff name and execute all necessary documents to execute the Plaintiff's.
 - c) That the Fiji Police Force Officers provide assistance in the execution of the orders if necessary.

- d) Damages for breach of contract with a total sum in this matter not to exceed the jurisdiction of this Honourable Court.
 - e) Any such other relief that this Honourable Court deems just and fair.
 - f) Costs.¹
2. The Defendant on 4 November, 2011 filed a Statement of Defence and Counter Claim in the sum of \$4707.00. The Plaintiff filed reply to Defence and Defence to Counter Claim.

Matrix of Facts

3. The facts of this matter may be summarised as follows: parties entered into an agreement for the Sale and Purchase of a Toyota truck registration number CH 823 (referred to as "**the truck**"). The Plaintiff agreed to pay the Defendant a sum of \$10,000.00 ("**Purchase Price**") for the purchase of the truck.
4. The Defendant accepts the sum of \$10,085.00 has been paid to her by the Plaintiff. However, she claims that the sum of \$2,785.00 was paid to her pursuant to a verbal agreement whereby the Plaintiff was to work for the Defendant and keep the income from the use of the truck after deduction of his weekly wages and other expenses.
5. The issue that is central to this proceeding is whether the purchase price for the truck had been fully paid. In the event the purchase price had been fully paid the Defendant is to be ordered to facilitate transfer of the truck to the Plaintiff by executing all the relevant documents with the Land Transport Authority.

¹ Refer paragraph 14 of the Writ of Summon

Plaintiff's Position

6. The Plaintiff submitted an agreement was in place prior to 17 January 2010. Documentary evidence that the payment of \$7200.00 was made before that date and also the purchase agreement was dated before that time. It was submitted that the Plaintiff took possession of the truck on 25 August, 2009 and that all the evidence points to the inevitable conclusion that this was the date of purchase. The Plaintiff submits that viewed from this perspective, any payments made would have been in reduction of the purchase price.²
7. The Defendant admitted that the Plaintiff had paid her a sum of \$2,875.00 in addition to the sum of \$7200.00. This admission bolster that Plaintiff's argument that the entire purchase price has been paid.
8. The Plaintiff further fortified his position by stating that in the absent of evidence, credible evidence to support the Defendant's assertions that the Plaintiff was employed by her, her Counter Claim and Defence are mere allegations, frivolous, vexatious and ought to be struck out for want of cause.

Defendant's Position³

9. On the other side of the spectrum, the Defendant denied that the Plaintiff had paid the full amount of the purchase price. According to the Defendant, the Plaintiff paid the Defendant a sum of \$7200.00, a receipt was issued. However, there is no further receipt to suggest that further payment was made to the balance. In relation to the deposits that were made to the Bank Account of the

² Refer to the Plaintiff's submission filed on 29 October, 2016

³ Refer to the Defendant's submission filed on 12 July, 2016

Defendant, according to the Defendant these were income derived from cartage of cane and wood. The Defendant submitted that she later decided to sell the Truck to the Plaintiff.

10. The Defendant further argued that in the event, the Plaintiff had further advance money towards the purchase price of the truck, then the same would have been acknowledged by the Plaintiff through issuance of a receipt by the Defendant. The Defendant is still been owed the sum of \$2800.00. From this prism, the Defendant urged the Court to consider the fact that there is no acknowledgment by the Defendant that she received the payment of \$2800.00 and the Court to note that the \$2875.00 which is being referred to by the Plaintiff was for the income generated after cartage of cane and wood before the agreement between the Plaintiff and Defendant regarding the Defendant to purchase the truck was concluded. It follows; the Defendant argued that this is a carefully orchestrated legal choreography to mislead the court in believing that the purchase price had been paid in full.

Determination

11. It is not in dispute that there is no written contract. This is an admitted fact.⁴ It is possible to make a contract by word of mouth. Albeit, this is an admitted fact, if parties were given another opportunity they would certainly opt for a written contract. Written records of obligations of the parties are understood and accepted by any person or persons with business experience and acumen. This is the value of a written contract in a commercial context. On the other hand, the

⁴Refer to paragraph 5 of the Affidavit of Dinesh Prasad.

absent of a written contract tend to imply that there was no concluded contract; and even if there was an oral contract, it would be difficult (though not impossible) to prove the terms of the contract.

Was there a legally binding contract?

12. For a contract to be legal binding, there must an offer to be accepted. The acceptance is supported by consideration. Lastly, the contract needs to be sufficiently certain and complete to be enforceable. It is prudent to note that certainty and completeness of terms is also an independent requirement of a contract. Courts are reluctant to conclude that the parties intended to be legally bound if the terms are uncertain to be of contractual effect.
13. All the elements that make a contract legally binding are satisfied in this instance. The Plaintiff made an offer for the purchase of the truck. The Defendant accepted the offer of \$ 10 000.00. The Plaintiff alleged that he paid a consideration of \$ 10 000.00. However, the terms are uncertain and incomplete. What was the date the contract was concluded? Were the deposits made to the Defendant's bank account part of the consideration?
14. In ***Durham Tees Valley Airport v Bmibaby [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep 68, at para 88:***

Where parties intend to create a contractual obligation, the court will try to give it legal effect. The court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content. (citing *Scammell v Dicker [2005] EWCA Civ 405, para 30, Rix LJ*).

Was a binding contract made on 25 August, 2009?

15. In answering this question, the Court took into account what the parties understood, whether the offer was vague, the terms of the discussion, and whether the terms of the agreement made commercial sense.

16. In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, an objective test is appropriate. Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14; [2010] 1 WLR 753 restated the general principle as follows:

The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.

17. In *Blue -v- Ashley plc* [2017] EWHC 1928, Justice Leggatt stated:

As with all questions of meaning in the law of contract, the touchstone is how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties.

18. I reached the conclusion that there was a binding contract made on 25 August, 2009 and that the purchase price has been paid in full. This decision is predicated on the following reasons.

a. Exclusive possession of the vehicle⁵

19. It is not in dispute that on 25 August, 2009, the Plaintiff assumed exclusive possession of the vehicle. And to date the vehicle is still in the possession of the Plaintiff. The Court noted that on 19 October, 2011, a person who identified himself only as Kuar attempted to seize the vehicle. He did not have any documents with him. He was told by the Plaintiff's Counsel that he must make formal application to the Court before he can take possession of the vehicle. No formal application for the seizure of the vehicle was made in this Court.

b. Deposits made to the Defendant's Account⁶

20. It is not in dispute that on 7 January, 2010, the Plaintiff paid the sum of \$ 7 200.00 to the Defendant. This was acknowledged by the Defendant. On 4 October, 2011, the Plaintiff paid a further \$ 2 785.00 to the Defendant. The payment was made between 25 August, 2010 and end of December, 2010 during the crushing seasons.

21. The Court noted that the Defendant denied that the above sum was payment made in relation to the purchase price. She stated that this was owned to her, from the revenue generated from the truck and the loan for the sum of \$ 2 600.00 advanced by her husband to the Plaintiff, to assist him in building his house.

22. The Court rejected these assertions, as no documentary evidences were tendered in Court. No documentary evidence

⁵ Refer to paragraphs 4 and 5 of the Affidavit of Dinesh Prasad

⁶ Refer to Annexure marked "DP -1" in paragraph 5. This letter confirms that the truck was to be sold for \$ 10 000.00. This is an undisputed fact. Paragraph 6, annexure 2, a letter from M.K. Sahu Khan & Co to Mr Kumar outlining the payments made by the Plaintiff.

to support the fact that the Plaintiff was an employee of the Defendant, nor any loan agreement documents that a sum of \$ 2 600.00 was advanced to the Plaintiff. The person who advanced the sum alluded to above was not called as a witness in this matter.

23. Further, parties agreed that the Plaintiff were depositing monies into the Defendant's Bank Account. The Deposit Slips bear the seal of the Bank of Baroda. The Defendant did not call any witness nor put any evidence before the Court to challenge this fact.⁷

24. A notice prepared on her instructions of 26 September, 2011 from Consultancy Pacifica showed that an agreement would have been reached prior to 17th January 2010. On the second last paragraph of the first page of this letter it is stated:

You chose later to buy the truck and a verbal agreement was reached..

25. The Court finds that this verbal agreement was for weekly payments. The last paragraph of the letter on the same page starts with the words:

On 17th of January 2010 you paid a sum of \$7,200.00 and stopped making payments thereafter.

26. From the above, the Court made the following findings:

- a. a verbal agreement for the sale and purchase of the truck was reached prior to 17th January 2010;
- b. the verbal agreement was for weekly payments to be made; and

⁷ Refer to Annexure 3 in the Affidavit of Dinesh Prasad. Deposit slips bear the seal of the Bank of Baroda.

- c. 17 January, 2010 is not the date of agreement but the date the sum of \$7200.00 was paid.

c. Repair and maintenance of the vehicle⁸

27. It is not in dispute that since 25 August, 2011, the Plaintiff had been maintaining the truck. He produced documentary evidences such as invoices and receipts as evidence of the various parts of the truck he purchased and installed in the truck. He also paid for the registration of 3rd party policy and Land Transport Authority inspection costs.
28. This Court is driven to reach the conclusion that neither party wanted a written negotiated contract in the way of selling the truck.
29. The above arrangement makes commercial sense i.e. plaintiff making payments to the bank, paying for the third party policy, repairing the vehicle etc. The parties intended that this contract would be legally binding. To argue otherwise, would not make any commercial sense. In reaching this conclusion, I viewed the facts from the perspective of a reasonable businessman stepping into the parties' shoes.⁹

Reliance on documentary evidences

30. Further, in making the above findings, I have not committed to relying on the memory of the witnesses in this matter. I would be remiss if I fail to expound the

⁸ Refer to annexure D-5 in the Affidavit of Dinesh Prasad.

⁹ *Investors Compensation v West Bromwich Building [1998] UKHL 28*, *Chartbrook v Persimmon Homes [2009] UKHL 38* & *Re Sigma Finance [2009] UKSC 2*, in these cases the House of Lords and Supreme Court of the UK were willing to adopt a commercial rather than a legalistic approach. The question of the parties' intentions should be viewed from the vantage point of reasonable businessmen in the parties' position.

reasons for drawing evidence from documents rather than the oral testimony (memory) of witnesses. This is a 2011 matter. The transaction which birth this action dates back to 2009. The hearing was held in 2019, 10 years after the incident. Memories fade over time and in some instances reshaped to align the thought process of a witness with a party's perception of the truth or at least their version of the truth.

31. Justice Leggatt in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), at paras 16-20 is apt pointing out the frailty of human memories in the following observations:

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

32. The Learned Judge further stated:

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness neither does nor does not say. The statement is made after the

witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

I concur with his Lordships observations, hence my reliance on documentary evidence.

Final Orders

33. The Court hereby ordered makes the following orders:

- a. That the Defendant is restrained by herself, her servants or agents from seizing and taking possession of the vehicle.
- b. That the Defendant forthwith to execute all documents necessary to facilitate the transfer of ownership of the vehicle: Toyota Truck, No. CH 823 to the Plaintiff with the Land Transport Authority.
- c. Costs follow the event and are awarded to the Plaintiff, summarily assessed at \$ 800.00.


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Ropate Green

Senior Resident Magistrate

