

IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CIVIL APPEAL NO. 14 OF 1992
CIVIL APPEAL NO. 1 OF 1993

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE HENRY, J.A.
THE HONOURABLE MR. JUSTICE KERR, J.A.

BETWEEN: MARJORIE BODDEN DEFENDANT/APPELLANT

A N D : FERRYMAN INVESTMENTS LTD.)
RESPONDENTS)
A N D : JOSEPH O'BRIEN)

MR. J. LEO RHYNIE, Q.C. AND MRS. REID FOR THE APPELLANT
MR. TURNER FOR THE RESPONDENTS

AUGUST 19, 20, 1993, DECEMBER 1, 1993

ZACCA, P. :

This is an appeal from the judgment of Malone, C.J. (as he then was) whereby he ordered the appellant to pay to the respondents the sums of U.S. \$175,000 and U.S. \$50,000. Interest and costs were also awarded to the respondents.

The respondents had brought an action against the appellant to recover the abovementioned sums. The respondents' case was that the second respondent was induced to part with U.S. \$175,000 on behalf of the first respondent to purchase four Cement Concrete mixers ("the trucks") from the appellant by reason of her fraudulently representing that she was the registered owner of the trucks. The respondents also claimed from the appellant the sum of U.S. \$50,000 which they had to pay to L.B. Leasing for the use of the trucks. This was for the period after the purchase of the trucks from the appellant and the recovery of the trucks by L.B. Leasing from the respondents.

The appellant's case was that the trucks which were registered in the name of Cayman Austrian Concrete Company Ltd. ("Cayman Austrian") As owner, were on or about the 15th September, 1987 re-registered in her name as security for the repayment of a loan made by her to that Company and that what she sold to the respondent was her interest in the trucks. She denied having told the respondents that she was the owner of the trucks.

It is not in dispute that the appellant made a loan of C.I. \$92,626.00 to Cayman Austrian nor is it in dispute that the trucks were owned by L.B. Leasing.

It appears that the trucks were brought into the Cayman Islands by Cayman Austrian and were originally registered in the name of Cayman Austrian.

The issue on appeal was as to whether the second respondent was induced to part with U.S. \$175,000 on the fraudulent misrepresentations of the appellant.

On behalf of the appellant, it was submitted that the respondent was not so induced because in early February, 1988 he was aware that the true owner of the trucks was L.B. Leasing.

In Derry v. Peek [1889] 14 A.C. 337, Lord Herschell stated at p. 374:

"fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false."

The appellant clearly knew that she was not the owner of the trucks and she acknowledges this fact. The learned trial Judge found that the appellant represented to the second respondent that she was the owner of the trucks in the course of a transaction for the sale of the trucks.

He found that her representation was false because she knew that she was not the owner and in fact knew who was the true owner.

In arriving at the finding that she represented that she was the owner, the learned trial Judge took into account the oral evidence of the second respondent and certain documents which were before the Court.

The evidence disclosed that the transaction was completed on the 14th March, 1988. The appellant took possession of the trucks on the 11th March and moved them to her house. After the appellant took possession of the trucks, she met with the second respondent and there was a discussion about the sale of the trucks. I quote from the second respondent's evidence:

Q. What was said about ownership?

A. She said: "I got the books. They are in my name. I own the trucks and I want my money". Hill said nothing about the ownership. After she said that she said: "If I don't have the money by Monday I am selling the trucks to a family friend in the business in Florida".

I authorised the preparation of the document at p. 23 J.B. and to have sent to Leasing to negotiate the purchase of the equipment in the C.I. i.e. equipment of C.A.C. when I wrote the letter I thought defendant owned the 4 trucks. I got that impression from my visits to C.I. prior to writing the letter. Mr. Hill had informed that defendant had lent C.A.C. money which they were unable to pay back because of lack of cash flow so I thought they transferred to her ownership of the trucks."

On the 7th March, 1988 the second respondent received a telefax from Mr. Heith Hill the son in law of the appellant. It read:

"Re: Four Cement Concrete Mixers

Urgently required for Marjorie J. Boddan US \$60,000 on the above equipment before 8th March, 1988 (tomorrow) before 2:30p.m.
As you are aware money needed for

Jill's court case.

I will take care of getting truck papers transferred for you. Please specify name etc."

It was submitted on behalf of the respondent that this telefax could only be referring to a sale of the trucks.

On the 14th March, 1988 when the transaction took place a document was signed by the appellant and Jack Bevins on behalf of the first respondent.

The document read:

TO WHOM IT MAY CONCERN

"This is to certify that I, Marjorie Jane Bodden of the above address hereby transfer the following Registration number trucks (1) 18548 (2) 18549 (3) 18550 (4) 18551 to Ferryman Investments Ltd. for the sum of U.S. \$175,000.00 (one hundred and seventy five thousand U.S. Dollars)."

The books referred to by the second respondent were the motor vehicle certificates of Registration with respect to the four trucks. An examination of the four certificates will show that the trucks were first registered in the name of Cayman Austrian Concrete Ltd. In September, 1987 the Certificates show a first change of ownership in the name of Marjorie Bodden and on the 14th March, 1988 a second change of ownership from the appellant to Ferryman Investments.

These certificates indicate who are the registered owners of the vehicles. On the face of it, it shows a transfer of ownership.

The learned trial Judge came to the conclusion that the second respondent was induced to part with the U.S. \$175,000 on the basis of the oral evidence and the documents which were produced.

However, it was submitted on behalf of the appellant that even assuming that the appellant told the second respondent that she was the owner of the trucks, the learned trial Judge was in error in holding that the second respondent was induced by the false representation of the appellant. Counsel based his submission on two grounds:

- (1) The appellant failed to state in his evidence that he was so induced;
- (2) A letter dated January 3, 1988 written by the second respondent to one Mr. Klotzberg of L.B. Leasing indicating an intent in purchasing equipment which included the four trucks;
- (3) A telefax message to the second respondent indicating that L.B. Leasing was offering to sell the four trucks for U.S. \$296,000. In that same letter it was stated:

"Further I would like to tell you that the already paid amount for Customs of U.S. \$120,000 - which was paid by Marjorie Bodden for a security for four truck mixers is not included. This amount is overdue since months."

On the basis of these two letters, it was submitted that the second respondent was aware that the trucks were owned by L.B. Leasing. The sum of U.S. \$120,000 is the equivalent of C.I. \$92,000 which was the amount loaned to Cayman Austrian by the appellant. It was also submitted that the figure of U.S. \$175,000.00 which was paid to the appellant was far less than the sum for which L.B. Leasing was prepared to sell the trucks. Together with the outstanding amount for Customs duties, L.B. Leasing was in effect asking a price of U.S. \$416,000.00. The second respondent also deponed that if he bought the trucks in the U.S.A. he would have to pay U.S. \$300,000.00

It is true that the second respondent in his evidence did not state that he was induced by the representations of the appellant. However, it was open to the learned Chief Justice to draw an inference from the evidence by which he could conclude whether there was this

inducement. The learned Chief Justice was aware, as can be seen by the opening sentence of his judgment, that the essence of the respondent's case was that the respondent was induced to part with U.S. \$175,000.00 by reason of the appellant's fraudulent representations.

In Smith v. Chadwick [1881-5] A.E.R. Rep. 242, Lord Blackburn states at p. 247:

"It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when Pasley v. Freeman (3) was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In Redgrave v. Hurd (4), Sir George Jessell, M.R., is reported to have said it was an inference of law. If he really meant this, he retracts it in his observations in the present case.

"I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that, being a fair inference of fact, it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be proper direction to tell a jury that, if convinced that there was such a material representation, they ought to find that the plaintiff was induced by it, unless one of the things which Sir George Jessell, M.R., specified (ante p. 79) was proved, nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And, whenever that is a matter of doubt, I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf; and that, if he is not so called as a witness on his own behalf; and that, if he is not so called, or being so called, does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one."

It may be that the second respondent ought to have been put on his enquiry in early February, 1988 that L.B. Leasing was the owner of the trucks, having regard to the letter which he received concerning his offer to purchase the trucks. The question is - Did subsequent considerations arise to lead him to believe that the appellant was the owner of the trucks in March, 1988?

The following events must be considered:

- (1) The telefax from Mr. Hill to the second respondent;
- (2) The oral evidence of the second respondent as to what was represented to him by the appellant;
- (3) The certificate of registration;
- (4) The agreement dated 14th March, 1988 which was signed by the appellant Jack Bevins;
- (5) The legal advice which he sought.

The learned Chief Justice in his judgment at p. 5 stated:

"Taken together the facts establish that the defendant represented in the course of a transaction which she must have known was a sale of trucks that she was the owner of them when she knew she was not and indeed knew who was the true owner. Therefore her representation was false and must have been known by her to be false."

Having regard to the evidence this finding by the learned Chief Justice was one which was open to him and we cannot say that he fell into error. It was also open to the trial Judge to draw the inference based on his findings that the second respondent was induced by the false representation of the appellant. We are of the view that this was a reasonable inference to be drawn by the learned Chief Justice.

In the circumstances, the respondents were entitled to recover the U.S. \$175,000 which was paid to the appellant.

This part of the judgment is affirmed.

In so far as the U.S. \$50,000 is concerned, it was submitted on behalf of the appellant that these damages

are too remote.

In their Statement of Claim, the respondents alleged in paragraph 17:

"The First Plaintiff settled the claim against it by L.B. Leasing as the First Plaintiff was convinced that L.B. Leasing was the true owner of the vehicles and other equipment and accordingly it had not obtained good title to the vehicles from the Defendant. As part of this settlement the First Plaintiff agreed to pay L.B. Leasing US\$50,000.00 for the use of the use of the vehicles during the relevant period. The sum of US\$50,000.00 has been paid to L.B. "Leasing by Cayman Allied Concrete Co. Ltd. and the First Plaintiff has an obligation to pay the sum of US\$50,000.00 to Cayman Allied Concrete Co. Ltd. "

After the purchase of the trucks and having taken possession of the trucks, the first respondent leased the trucks to Cayman Allied Concrete Co. Ltd. (Cayman Allied).

The agreement for the lease shows that equipment owned by L.B. Leasing other than the trucks were leased to Cayman Allied.

The settlement of US\$50,000 was for the use of the trucks and other equipment for the relevant period.

It was Cayman Allied who paid the US\$50,000 to L.B. Leasing and the first respondent claims that they have an obligation to repay the sum of US\$50,000 to Cayman Allied.

Under the lease, Cayman Allied would have to pay to the first respondent the agreed rental for the use of the trucks and the other equipment. It is not clear how the amount of US\$50,000 is made up. If Cayman Allied agreed to pay more than a reasonable amount for the use of the trucks, I fail to see how the appellant could be made liable to pay the amount which was agreed on.

Cayman Allied had an obligation to pay for the use of

the trucks and other equipment and if they agreed to pay US\$50,000 for such use, then they cannot in turn seek to recover that amount from the appellants.

As observed, the claim was that the US\$50,000 was a settlement on the basis of the use of the trucks and equipment. Having had the use of the trucks and the first respondent, having leased them to Cayman Allied, the appellants cannot be held to be liable for this amount.

The damages would in our view be too remote.

The appeal will therefore be allowed in part. The judgment below will be varied to judgment for the Plaintiff in the sum of \$175,000.00 with costs.

One-third costs of the appeal to the appellants to be agreed or taxed.



The block contains two handwritten signatures. The top signature is written in dark ink and appears to be 'James'. The bottom signature is also in dark ink and appears to be 'W. Henry'. Below the bottom signature, the name 'W. Henry' is printed in a smaller, lighter font.