

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT**

Civil Division

[Unreported]

Suit No: CV 1526 of 2006

BETWEEN

JORGE RAIZMAN

PLAINTIFF

(as principal agent for a business t/a Ride N' Style)

AND

AFTABAY RAJA

DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Judge of the High Court

2010: April 20, 21, May 4, 5

2011: February 23

2013: February 14.

Appearances: Mr. Orville A. Durant in association with Mr. John Collymore for the Plaintiff and Mr. Michael R. Yearwood in association with Miss. Nicole Roachford for the Defendant

DECISION

[1] **Introduction:** In August of 1999 Jorge Raizman (“the Plaintiff”) and his business partner, Mr. Mark Harris, who is now deceased went into business together under the business name “Ride N’ Style” which was duly registered with the Corporate Affairs and Intellectual Property Office. As its name implies, the “Ride N’ Style” business was intended by the partners to provide transportation services to the public by the operation of public service vehicles, namely, two route taxis or “ZRs”, as they are more commonly known.

[2] In furtherance of their “Ride N’ Style” business, the Plaintiff and Mark Harris purchased two route taxis, ZR-2774 and ZR-283, along with the relevant government permits through a loan of \$167,000.00 which they obtained from Barclays Bank plc (as it

then was). The loan to the partnership was secured by a charge against property owned by the Plaintiff at Chancery Lane in the parish of Christ Church. The Plaintiff and Mark Harris were joint principals on the loan and, as such, they were required to pay interest on all outstanding amounts due to the bank.

[3] With respect to the partnership arrangement, it appears not to be in dispute that Mark Harris was responsible for the daily operations of “Ride N’ Style”, while the Plaintiff remained in the background as the silent partner who was consulted as necessary.

[4] By May, 2000, it became evident to both partners that their “Ride N’ Style” business not only required more time and effort than it was worth, but more importantly, was less profitable than expected. Mark Harris therefore advertised the route taxis for sale and entered into negotiations with the Defendant for the sale and purchase of both route taxis together with the relevant permits.

[5] The Defendant responded to Mark Harris’ advertisement for the sale of the route taxis and entered into a written agreement dated June 1, 2000 with the Plaintiff and Mark Harris to purchase them for the sum of \$150,000.00. As fate would have it, the written contract for the sale of the two route taxis which initially brought the parties together, is what now brings the Plaintiff and the Defendant before the Court.

[6] **The Claim:** By a Writ of Summons and Statement of Claim dated August 25, 2006, the Plaintiff in his capacity as the principal agent and sole surviving partner of the “Ride N’ Style” business formerly operated by himself and his deceased partner, Mr. Mark Harris, instituted a claim in contract against the Defendant for the sum of \$150,000.00 together with the interest of \$9,419.44.

[7] According to the Statement of Claim, the amount is due under a written contract dated June 1st, 2000 made between the Plaintiff and his now deceased partner, Mr. Mark Harris of the one part, and the Defendant of the other part, under which the Defendant agreed to purchase from them, 2 route taxis together with the corresponding permits issued by the Barbados Licensing Authority. The Plaintiff also claimed damages for fraudulent representation, as well as the costs of the matter.

[8] In his closing submissions, Counsel for the Plaintiff, Mr. Durant, amended the Plaintiff’s claim from the sum of \$159,419.44 to the sum of \$147, 278.29, representing principal and interest which the Plaintiff had paid to the bank from 2005 and 2006 to completely liquidate the loan.

[9] In his Statement of Claim, the Plaintiff contended that it was an implied term of the Agreement that the amount of \$150,000.00 to be paid by the Defendant for the purchase of the public service vehicles would be treated as a loan made by the Plaintiff and Mark Harris to the Defendant.

- [10] The Plaintiff further alleged in his Statement of Claim that another implied term of the Agreement was that the Defendant would pay the customary interest charged by banks for any amount outstanding on the sum of \$150,000.00.
- [11] It was also alleged by the Plaintiff in his Statement of Claim that the Defendant had failed to repay in full the amount due under the Agreement within the period stipulated in the Agreement.
- [12] Mark Harris passed away on March 30, 2003 in a vehicular accident and the Plaintiff alleged that sometime after his death, but still in the year 2003, the Defendant produced a receipt dated March 27th, 2003 to the Plaintiff and/or his Agent. This receipt was purported to have been signed by the now deceased Mark Harris as acknowledgement of his having received from Rashid Raja, the father of the Defendant, the payment of \$80,000.00 as the final payment due by the Defendant under the Agreement.
- [13] The Plaintiff alleged that the Defendant and/or his agent falsely and fraudulently represented to the Plaintiff that he had paid the said sum to Mr. Harris on March 27, 2003 and has pleaded that by reason of the Defendant's breach of contract and fraudulent representation the Plaintiff had suffered loss and damage.
- [14] **The Defence:** The Defendant has in his Defence filed on November 22, 2006 (and which he sought to amend during the course of the trial on April 20, 2010) admitted that he entered into the Agreement with the Plaintiff and Mr. Harris. However, he has denied that the Agreement contained an implied term to the effect that the sum of \$150,000.00 amounted to a loan.
- [15] The Defendant has also denied in his Defence that there was in the Agreement an implied term obliging him to pay the customary interest rate charged by banks on any sum outstanding on the amount due under the Agreement.
- [16] The Defendant has, however, admitted to producing a receipt for the acknowledgement by Mr. Harris of the sum of \$80,000.00, but alleged that the receipt had been signed by Mark Harris and was genuine. He denied that either he or his agent had made any fraudulent representations.
- [17] In his Defence, the Defendant further claimed that he had paid a sum of \$90,000.00 into the account at Barclays Bank plc on diverse dates. He also alleged that his father had also paid on his behalf the sum of \$80,000.000 to the Mark Harris in full settlement of the claim and he was therefore discharged from the payment of any further sum due under the Agreement.

[18] **The Agreement:** According to the written agreement made between the Defendant of the one part, and the Plaintiff and Mr. Harris as the principals of “Ride N’ Style” on the other part (hereinafter called “the Agreement”), the Defendant agreed to purchase from the Plaintiff and Mr. Harris as Vendors, two route taxis bearing the registration numbers ZR 274 and ZR 283 together with the permits issued by the Barbados Licensing Authority for the operation of those vehicles as route taxis. A copy of this Agreement was duly entered into evidence as “*Exhibit JR 1*”.

[19] The first recital of the Agreement stated that the Plaintiff and Mr. Harris were the owners of the route taxis and permits in question and had agreed to sell the same to the Defendant for the sum of \$150,000.00. The recitals of the Agreement further provided that the permits issued for the route taxis being sold were being held by Barclays Bank plc (as it then was) against a loan held by the principals of “Ride N’ Style” with that bank.

[20] The Agreement expressly stated in Clause No. 1 that the Defendant as purchaser would take immediate possession of the route taxis and that the Defendant “*shall pay all sums due to the said Barclays Bank Plc within one year from the date [of the Agreement]*”. It further stipulated that it was only upon repayment of the said sums that the Vendors shall execute all the documents necessary to transfer ownership of the taxis and their permits to him.

[21] Clause No. 2 of the Agreement expressly stipulated that if the Defendant had not repaid the Bank in full after a year had passed, the Plaintiff and Mr. Harris (the Vendors) would give him a further period of 2 months to pay the balance in full, provided that the balance due and owing to Barclays Bank Plc was less than \$20,000.00 in total.

[22] **Issues:** Having regard to the Statement of Claim and Defence filed in this matter, as well as the evidence adduced and the submissions of learned counsel for both parties, the Court is required to determine the following broad issues:

- 1) Whether under the said Agreement the Defendant was obliged to pay the interest and charges on the loan which the Plaintiff and Mr. Harris had obtained from Barclays Bank plc?;
- 2) Whether the receipt dated March 27th, 2003 produced by the Defendant to the Plaintiff evidencing the payment of the sum of \$80,000.00 to Mark Harris in full and final settlement of all sums due under the contract is genuine or whether it was falsely and fraudulently produced?; and
- 3) If the Court finds that the receipt is genuine and accepts that a payment to Mark Harris was made on the Defendant’s behalf of the sum of \$80,000.00, whether the Plaintiff is estopped from claiming that such payment did not discharge the

Defendant from further obligations under the contract? Alternatively, whether receipt by Mark Harris of the payment in full settlement of the amount due under the contract discharged the Defendant from the obligation to pay any further sums under the contract of June 1st, 2000?

[23] **The Evidence**: During the trial of this matter, a number of witnesses gave evidence. For the Plaintiff these witnesses were the Plaintiff himself, Ms. Patricia Harris, the mother of the late Mark Harris, Mr. O'Brien Frost of First Caribbean Bank and Mr. Mervin Holder. The Defendant, his father, Mr. Rashid Raja, and his sister, Mrs. Asina Piprawala, provided evidence as witnesses for the Defence.

[24] At this stage, the Court does not propose to provide a comprehensive review of the evidence adduced by the witnesses called on behalf of the Plaintiff and the Defendant. It will instead set out a brief summary of its findings on the issues as outlined above. Detailed reasons of its decision, including a full review of the evidence and legal submissions in this matter, will, of course, follow in due course.

[25] **Discussion**: Counsel for the Plaintiff is correct when he submits that the determination of the issues outlined by the Court above depends primarily upon the Court's interpretation of the Agreement between the parties and conclusion on the evidence concerning the receipt allegedly given by the late Mr. Harris to the agent of the Defendant as evidence of receipt of money paid on behalf of the Defendant. In its determination of the latter point, the evidence of the expert witness, Mr. Mervin Holder is especially crucial.

[26] **Issue One**: The existence of the Agreement between the Plaintiff and Mr. Harris and Defendant is not disputed. The parties, however, disagree substantially as to its interpretation.

[27] The Defendant asserted in his evidence that he believed the sum of \$150,000.00 he was required to pay under the Agreement to have been inclusive of all bank charges and interest due and owing to the Bank. His attorney-at-law therefore contended on his behalf that the total sum to be paid by him under the Agreement should not be greater than that amount. Mr. Yearwood further argued that the Agreement concerned the purchase of vehicles and was not in any way, whether express or implied, a loan agreement.

[28] The Plaintiff, in contrast, submitted that the Defendant not only agreed to take the public service vehicles and permits owned by the Plaintiff and Mr. Harris, but also agreed to take over payment of the loan that they had taken out with Barclays Bank Plc to purchase those vehicles and obtain the accompanying permits. Mr. Durant as counsel for the Plaintiff argued that although the Agreement spoke of a fixed purchase price of \$150,000.00, it was an implied term of the Agreement that the Defendant would pay all bank charges including the interest associated with the loan.

[29] The Court is required to interpret the Agreement to determine whether pursuant to the Agreement, the Defendant was obliged to pay not only the sum of \$150,000.00 specified therein but any other sums due on the outstanding loan with Barclays Bank Plc, including interest and bank charges.

[30] The Court begins by observing that in interpreting a contractual agreement, the role of the Court is, according to Lord Hoffman, to ascertain

“...the meaning which the document would convey to a reasonable person having the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”: ***Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 cited in Kim Lewison, The Interpretation of Contracts (Third Edition) at p 18.***

[31] The Court is required to establish the mutual intentions of the parties as to the legal obligations assumed by each party under the contract, in so far as this can be determined from the language they have used, considered in light of the surrounding circumstances and the object of the contract: ***Lewison (supra) at para 2.02 and para 2.04.***

[32] The Court is also required to construe the Agreement as a whole and to give the words used in the Agreement their ordinary and plain meaning, unless the context indicates otherwise: ***Ibid at para 2.01 and 5.01.***

[33] Where there is any doubt as to the meaning of a contract or a term within it, the general principle is that the contract shall be construed against the party who was responsible for drafting the Agreement: ***Ibid at para 7.07.***

[34] The Court accepts that terms may be implied into contracts where it appears from the language of the contract and the circumstances under which it was made that the parties had intended such a term to be inferred: ***Chitty on Contracts (Thirtieth Edition) Volume 1, para 13-004.*** However, in order for a term to be implied the term must be (1) reasonable and equitable; (2) necessary to achieve business efficacy; (3) obvious; (4) capable of clear expression; and (5) not contradict any express contractual term: ***Lewison (supra) at para 6.03.***

[35] The Court is aware that the Defendant has, in his evidence, confirmed that the Agreement was drafted by Michael Yearwood who, at the time when the contract was made, was acting as his legal representative, as he continues to do now. Accordingly, where there are two contesting interpretations to any part of the Agreement, the Court is obliged, as a general rule, to favor the interpretation advanced on behalf of the Plaintiff over that of the Defendant.

- [36] The Court is satisfied that the intention of the parties when entering into the Agreement was for the Defendant to service the loan taken out with Barclays Bank plc (as it then was) by the Plaintiff and Mr. Harris. The first clause of the Agreement stipulated that the Defendant shall pay “*all sums due to the said Barclays Bank Plc*” within one year from the date of the Agreement. Moreover, the Agreement clearly provided that all payments made by the Defendant under it were to be made to the loan account which the Vendors, Jorge Raizman and Mark Harris operated at Barclays Bank Plc.
- [37] The Agreement appears to contain an inconsistency between its recitals and the operative part. The Court notes that while the recital of the Agreement specifies a figure to be paid in consideration of the purchase of the route taxis and permits by the Defendant, Clause No. 1 of the Agreement stipulates that the Defendant shall take immediate possession of the route taxis and shall pay all sums due to the said Barclays Bank Plc. It is settled that where there is an inconsistency between the recitals of a deed and its operative part, the operative part prevails. *Lewison (supra) at para 10.13.*
- [38] On the ordinary and plain meaning of the language used in this contractual clause, the term “*all sums*” is not in any way confined to the sum of \$150,000.00 specified in the Agreement’s recitals. Had the parties intended the sum paid to be limited to this amount, it was open to them to expressly stipulate this in the provision in question.
- [39] Given the circumstances surrounding the Agreement and its provisions, including the Defendant’s obligation to make payments directly to the loan account held by the Plaintiff and his partner, the Court is persuaded by the submissions of Counsel for the Plaintiff that it is reasonable and necessary, in order to give effect to the intention of the parties, for a term to be implied in to the Agreement that the Defendant was obliged to pay any interest and other bank charges associated with the loan.
- [40] Accordingly, the Court holds that under the Agreement, the parties intended that the Defendant would assume responsibility for all sums owing to the Bank under the Vendors loan agreement with Barclays Bank plc. The Court further finds that the Defendant’s obligation to pay “*all sums due to the said Barclays Bank plc*” does not cease where the interest owing on the sum has increased because of the failure of the Defendant to pay in the manner and within the time period in which he had contracted to do so.
- [41] While a contract is to be construed on its terms and the conduct of a party subsequent to the making of an Agreement is not examined when construing the Agreement, the Court cannot help but observe that its interpretation of the Clause No. 1 of the Agreement of June 1, 2000 is clearly supported by the very evidence given by the Defendant in this matter.

- [42] The Defendant admitted in his evidence that he understood that the aim of the Agreement was for him to repay the loan. In cross-examination by Mr. Durant, he further asserted that he understood the sum of \$150,000.00 that was to be paid by him as being the sum owed by the principals of Ride N' Style to the bank and believed that this figure included the interest to be paid on the outstanding loan for that year. Additionally, it was also the evidence of the Defendant that he had paid more than \$150,000.00 under the Agreement. He calculated the sum he had paid as \$170,000.00 inclusive of the \$80,000.00 paid to Mr. Harris on his behalf in March, 2003. The Defendant also admitted that he had gone more than 2 years without paying what he was required to pay under the Agreement and that he owed the Plaintiff and Mr. Harris more than \$80,000.00 under the Agreement but had paid \$80,000.00 as he had been told that payment of that amount would clear everything.
- [43] Issue Two: Mr. Mervyn Holder was called on behalf of the Plaintiff to give a professional opinion as a forensic handwriting examiner, as to whether the name of Mark Harris as it was written on the receipt dated March 27, 2003 was actually written in the handwriting of Mr. Harris, as evidenced from samples of his handwriting.
- [44] After giving evidence of his training and qualifications, and based on his extensive qualifications, on-hands training and experience, Mr. Holder was deemed by the Court to be an expert in the field of identification of handwriting and type-script. Counsel for the Defendant did not object.
- [45] The original receipt, which was entered into evidence by consent as "**Exhibit JR 7**", was provided to Mr. Holder. Mr. Holder was also given a copy of the original.
- [46] The handwriting samples of the deceased, Mark Harris, to which Mr. Holder had access were a number of cheques, old examination papers and the last page of the Agreement itself. Mrs. Harris, the mother of the Deceased, confirms that she found the old examination papers and made these available for use as samples. All of the samples were entered into evidence.
- [47] Mr. Holder compiled a report of his analysis of the writing of the name Mark Harris on the receipt as compared to samples of the handwriting of the deceased Mr. Harris that he had received.
- [48] The witness also gave oral evidence before the Court. His oral testimony was detailed and extensive. He was confident and professional in his demeanour. He pointed out that the writing of "Mark Harris" as it appeared on the receipt was not a signature and did not in any way resemble his signature as they appeared in the other documents. He also expressed the view that the person responsible for writing the words "Mark Harris" on the receipt had made no attempt at copying his actual signature as it appeared on the written contract of June 1st, 2000.

- [49] According to Mr. Holder, there were significant divergences in the way that the name “Mark Harris” had been written on the receipt as compared to how the name was written on the samples. At the invitation of the Court, he described in full detail the nature of these differences. He asserted that the only commonality between the writing of Mark Harris on the receipt as compared to the specimen samples, particularly the Agreement, was in the name being written and concluded that “*the handwriting of the name MARK HARRIS on the receipt was not written by the same person who wrote the name MARK HARRIS on the Agreement.*”
- [50] Mr. Holder’s evidence was cogent and quite detailed. It was not seriously tested or discredited during his cross-examination by Counsel for the Defendant, Mr. Yearwood. Additionally, in the absence of the evidence of a handwriting expert called on behalf of the Defendant which may have offered a different opinion to that of Mervyn Holder, the Court is satisfied that the writing of “Mark Harris” as it appears in the receipt does not represent his signature nor is it in his handwriting and is, on the balance of probabilities, a complete forgery.
- [51] In the judgment of this Court, it is clear from the evidence of Mr. Mervyn Holder that the receipt produced by the Defendant in support of his assertion that the sum of \$80,000.00 had been paid to the Plaintiff’s partner, Mark Harris immediately prior to his death did not bear the actual signature of Mr. Harris and was not even in his writing. The Court concludes that this receipt has been forged.
- [52] *Issue Three:* As the Court has concluded, based on the expert evidence of Mr. Mervyn Holder, that the receipt allegedly given by Mr. Harris as acknowledgement of money paid to him was not genuine in nature, the Court is unable to accept the evidence of Mr. Rashid Raja and Mrs. Asina Piprawala that the receipt produced before the Court was genuine as they had both seen Mr. Harris sign it upon receiving the cash sum of \$80,000.00 given to him by the Defendant’s father. The Court is likewise unable to accept the evidence of the Defendant, who claimed that Mr. Harris spoke to him by telephone on receiving the money.
- [53] The Court was of the view that, even without the evidence of Mr. Holder, the evidence of the Defendant’s two witnesses, Mr. Rashid Raja and Mrs. Asina Piprawala left a lot to be desired since their testimonies contradicted each other in a number of important respects which led the Court to conclude that it was more likely than not that the disputed payment to Mark Harris of \$80,000.00 was never made.
- [54] Aside from the evidence of the Defendant and his witnesses, there was also no other evidence of the payment of this sum, whether in bank records or among the personal effects of Mr. Harris. The Court has therefore found that rather than the Plaintiff not being honest in his dealings with the Defendant, as the counsel for the Defendant has

alleged, it is the Defendant who has been far from honest in his dealings and in the evidence that he and his family have given before this Court.

[55] In these circumstances, the Court holds that it is clear that the sum of \$80,000.00 that the Defendant claimed to have paid to Mr. Harris in full settlement of all amounts payable under the Agreement, was not paid as the Defendant alleged, and remains owing to the Plaintiff under the Agreement. The Court further finds that there is no evidence that this sum was, or could have been accepted by Mr. Harris as full settlement of the money owed under the Agreement.

[56] Based on the evidence of the bank records obtained by the Plaintiff and entered into evidence during trial, it is clear to the Court that the Defendant made payments of up to \$92,674.82 to the loan account but ceased making payments before the entirety of sum owed had been paid off.

[57] The evidence adduced by the Plaintiff satisfactorily demonstrated that the Plaintiff, whether by himself or through his company, ultimately had to pay the total sum of \$147,278.29 in order to pay off the loan. This sum had to be paid by the Plaintiff as a direct consequence of the Defendant's failure to meet his legal obligations under Clause No. 1 of the Agreement to directly pay "*all sums due to the said Barclays Bank plc...*" As a consequence of the breach, the Court holds that the sum of \$147,278.29 is owed by him to the Plaintiff in this matter.

[58] At paragraph 14 of the Statement of Claim, the Plaintiff claims to have suffered loss and damage by reason, *inter alia*, of the Defendant's fraudulent misrepresentation. However as no particulars of the alleged fraudulent representation were pleaded, the Court was unable to make any findings whatsoever with respect to that aspect of the claim. In the result, the Plaintiff's claim for damages for fraudulent representation is denied.

[59] In any event, **Order 18 r. 12 (1)(a) RSC, 1982** provides, *inter alia*, that full particulars of any misrepresentation or fraud on which the party pleading relies must be given in every pleading and it is clear that no attempt was made to comply with this requirement.

[60] **Disposal:** Having regard to the totality of the evidence adduced before it, the Court has no difficulty awarding judgment to the Plaintiff in this matter.

[61] As the Court is satisfied that the receipt which was put in evidence at the trial was in all probability a forgery and further, that the sum of \$80,000.00 was never paid to Mark Harris on the Defendant's behalf by his father, Rashid Raja in full settlement of all amounts due under the Agreement as the Defendant has alleged, the Court hereby orders that:

- (i) The Defendant, Aftabay Raja, shall pay to the Plaintiff, Jorge Raizman the sum of \$147, 278.29 being the amount paid by him to settle the principal and interest due on the Barclays Bank plc loan standing in the names of Jorge Raizman and Mark Harris trading as “Ride N’Style” and which the Defendant, having regard to Clause No. 1 of the written contract dated June 1, 2000, had agreed to assume upon his taking possession of the route taxis which he had purchased.
- (ii) The above award shall bear interest at the rate of 4% per annum from the date of the issue of the Writ until today and, thereafter, at the rate of 8% per annum until payment;
- (iii) The Plaintiff will have his costs certified fit for one attorney-at-law to be agreed or taxed.

Maureen Crane-Scott

Judge of the High Court