[2014] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 29/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LTD**	**1ST APPELLANT**
AND	**OWEN CAMPBELL**	**2ND APPELLANT**
AND	**TOUSHANE GREEN**	**RESPONDENT**

Kevin Powell instructed by Hylton Powell for the appellants

Ms Gilda Daley and Mrs Sonia Durrant Clarke instructed by Robinson & Clarke for the respondent

12, 13 February and 30 May 2014

PHILLIPS JA

[1] In this appeal, the appellants challenge the decision of Straw J made on 21 March 2013 in which the learned judge refused to grant their application for summary judgment and for mediation to be dispensed with. This application arose out of a claim brought by the respondent against the appellants for recovery of possession of a white 2007 BMW motor car with registration no 2609FY; damages for unlawful detention of property; damages for trespass to goods; and special damages for loss of use of the said BMW, insurance and registration fees.

[2] The application for summary judgment was supported by the affidavit of Lenroy Lewis, acting manager of the 1st appellant's Hagley Park branch, sworn to on 29 October 2012. Mr Lewis deponed that on 21 June 2007, Mr Shawn Scott, a customer of the 1st appellant was indebted to it for the sum of $5,000,000.00 and on 21 June 2007, he had granted to the 1st appellant a bill of sale over his 2007 BMW 328i motor vehicle bearing chassis number WBAWB33587PV70971 as security for his indebtedness. He deponed further that the bill of sale was recorded at the Island Records Office on 25 July 2007 and the 1st appellant had also registered a lien against the BMW at the Inland Revenue Department. Mr Scott, it was deponed, had fallen into arrears and on 20 July 2009, the 1st appellant had authorized the 2nd appellant to recover possession of the said motor car. On 9 December 2011, acting on the 1st appellant's instructions, the 2nd appellant had recovered possession from the respondent. Exhibited to Mr Lewis' affidavit were copies of the bill of sale granted over a 2007 BMW 328i motor vehicle with chassis number WBAWB33587PV7091, stamped by the Taxpayer Audit and Assessment Department as a duplicate; an executed notice of lien dated 8 June 2007 for a 2007 BMW motor car with chassis number WBAWB335870V70971 indicating that Shawn Scott was the registered owner and bearing the stamp of the Collector of Taxes dated 12 June 2007; and a report from an investigator whose services had been engaged by the 1st appellant to locate the 2007 BMW motor car.

[3] No affidavit in response was filed by the respondent, but for a better appreciation of the background, reference will be made to his particulars of claim filed on 15 May 2012 in so far as necessary. The particulars of claim aver that on or about

25 October 2011, the respondent, who was a businessman at the material time, had seen a 2007 BMW motor car on sale at a car mart and having attended upon the premises and engaged in negotiations for a purchase price, his offer of $3,200,000.00 was accepted. He was shown the title for the motor car in the name of Beverly Belnavis; it had a signature at the back which appeared to be that of Miss Belnavis. The title had already been stamped at the tax office with a stamp dated 26 July 2011. No lien or mortgage had been noted on the title and on 28 October 2011, the car together with the relevant documents was delivered to him and he registered and insured it in his name. On or about 14 December 2011, the vehicle was removed from his residence by the 2nd appellant acting for and on behalf of the 1st appellant and despite a letter demanding return of the vehicle being sent to the 1st appellant, it was not returned. Attached to the particulars was a copy of a motor vehicle certificate of title for a 2007 BMW motor car with chassis number WBAWB33587PV70971 in the name of Beverly Belnavis bearing a date of acquisition of 6 April 2011. There was no notation in the section marked "Particulars of Lien". Also attached were copies of a motor vehicle registration certificate in the name of Toushane Maurice Green for a 2007 BMW motor car bearing chassis number WBAWB33587PV709…, certificate of fitness for the said motor vehicle and an insurance certificate in the name of Toushane Maurice Green.

[4] In determining the application, the learned judge adopted the approach of the court in **Gordon Stewart v Merrick Samuels** SCCA No 2/2005, delivered 18 November 2005 that the focus would be directed to the "ultimate result of the action as distinct from the initial contention of the parties". She then found that the 1st appellant

had been assigned ownership of the motor vehicle and was entitled to possession as Mr Scott had breached the terms of the agreement in relation to repayment of the loan and a forbearance to not sell or dispose of the motor car. She then examined whether sections 22, 23 or 25 of the Sale of Goods Act were applicable, as had been submitted by counsel for the respondent. These sections provide:

> "22. (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
>
> …
>
> 23. When the seller of goods has a voidable title thereto but this title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.
>
> 25. (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by his duly appointed agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.
>
> (2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by his duly appointed agent

> acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same, in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were the duly appointed agent of the owner in possession of the goods or documents of title with his consent.
>
> …"

[5] The learned judge concluded that in relation to section 22, a material issue for determination was whether the omission of the 1st appellant to have the lien registered on the title was more than carelessness and therefore sufficient to preclude it from asserting its title. She found that it was a live issue that could not be resolved on the application as the respondent's attorney had stated that it was intended that at trial evidence would be adduced to show the effect of a lack of registration from the appropriate authority. She found that section 23 was inapplicable as it was hardly feasible that Mr Scott could be described as having a voidable title. Despite this, she considered that **Robin and Rambler Coaches Ltd v Turner** [1947] 2 All ER 284 (in which a motor car was obtained by hire purchase and sold to another before the completion of payments) appears to have left open the possibility that the section could apply. She compared that decision to **Lydon Allen v Olds Discount of Ja Ltd and Others** (1966) 9 WIR 452 stating that the remarks in both cases were contradictory although both cases related to hire purchase agreements. She commented that although Graham-Perkins JA (Ag), as he then was, in the **Lydon** case had stated that section 23 was irrelevant, nonetheless, the court would have to look at the implications of both decisions since the distinction between both decisions could arise as the **Lydon**

case included an option to purchase where title does not pass. In dealing with the applicability of section 25, she referred to the definition of a "contract of sale" as contained in the Act and stated that it could be argued that Mr Scott sold the car to the 1st appellant and continued in possession of it and if the section applied to Mr Scott, the respondent would be protected under that section.

[6] Five grounds of appeal were filed, namely:

> "(a) The Learned Judge erred in finding that a bill of sale is a contract of sale of goods within the meaning of section 2 of the Sale of Goods Act.
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> (b) The Learned Judge erred in finding that there were triable issues based on sections 22, 23(1) and 25 of the Sale of Goods Act.
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> (c) The Learned Judge erred in finding that a triable issue arose by reason of the non-registration of the 1st Appellant's lien on the certificate of title to the car in issue.
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> (d) The Learned Judge erred in finding that the decision in **Robin and Rambler Coaches Ltd v Turner** gave rise to a triable issue on whether the grantee under the bill of sale had a voidable title to the car in issue.
>
> (e) The Learned Judge erred in comparing a bill of sale to a hire purchase agreement.
>
> (f) The Learned Judge erred in finding that the Respondent has a real prospect of succeeding on the claim."

[7] In his written submissions, Mr Powell submitted that these grounds raise the following issues:

> "(a) whether the effect of the bill of sale was to transfer

ownership in the motor vehicle to the Bank; and

(b) whether the Sale of Goods Act or particular provisions of that Act have any application to the Bill of Sale giving rise to triable issues."

[8] In support of the first issue, it was submitted that any prospect of the respondent succeeding in his claim was dependent on him establishing that he had a greater right to possession of the motor vehicle than the 1st appellant. Mr Powell argued that the legal effect of the bill of sale deprives the respondent of any real prospect of success. Relying on **Johnson v Diprose** [1893] 1 QB 512 and **Small Businesses Loan Board v Reid** (1964) 7 WIR 287 it was submitted that a bill of sale transfers the legal ownership in a relevant chattel from the grantor to the grantee and entitles the grantee to the immediate possession of the chattel.

[9] Counsel referred to clause 1 of the bill of sale and submitted that the legal ownership was transferred to the 1st appellant pursuant to the bill of sale entitling it to exercise rights as owner over the vehicle. Reference was also made to the provisions in which Mr Scott covenanted to repay the 1st appellant all monies owed by him and not to sell or otherwise dispose of the motor vehicle; and the power given to the 1st appellant to enter upon and remain upon any premises where the goods are, to "seize and take away the same" and to sell the goods whether or not money is actually due or payable. He submitted that Mr Scott had breached his obligations in that he had defaulted on his payments and had sold or otherwise attempted to dispose of the motor car. Mr Powell submitted that the respondent could not have acquired a greater ownership right in the

motor vehicle than Mr Scott as the respondent did not own or have any title to the motor vehicle, nor could the respondent have acquired title from someone who could not exercise any rights of ownership over it. This, it was argued, equally applied whether the respondent had purported to purchase the vehicle from Mr Scott or from an intervening third party. He submitted further that although the bill of sale had not been recorded until 25 July 2007 that did not impeach its validity in relation to the respondent. For this submission, he relied on **Workers Savings and Loan Bank v Mignott and Mignott** SCCA No 72/1997, delivered 4 October 1999.

[10] With regard to the issue of the failure to affix the certificate of title to the affidavit of Mr Lewis, counsel submitted that there had been no contest in the court below with regard to whether Mr Scott did have a title to the motor vehicle and did own the motor vehicle which he gave as security under the bill of sale to the 1st appellant. In paragraph 31 of her judgment, he submitted, the learned trial judge stated that Mr Scott "had clearly transferred the ownership of the car to the bank". Counsel stated that at the hearing below the appellants had relied on the affidavit of Mr Lewis wherein he had stated that Mr Scott had granted to the bank "a bill of sale over his BMW 328i motor vehicle bearing chassis no WBAWB33587PV70971" and there was no challenge to this evidence before the court. He submitted that even if the evidence was hearsay, this was permitted in a summary judgment application, which is interlocutory in nature.

[11] In relation to the second identified issue, Mr Powell submitted that the provisions of the Sale of Goods Act do not apply to the bill of sale. He argued that the bill of sale is not a "contract of sale of goods" as defined by that Act as although the bill of sale

transferred title to the 1st appellant, the 1st appellant did not pay any money consideration for it. It was instead a security for a debt owed to the 1st appellant by its customer, counsel argued. For this latter submission, counsel relied on **Small Businesses Loan Board**. Counsel also argued that section 22 of the Act does not apply as the non-registration of the lien on the motor vehicle's title did not constitute conduct that should prevent the 1st appellant from denying Mr Scott's authority to sell the car. Based on a proper construction of the section, there was no evidence to show that the section gave rise to a triable issue and although the judge had correctly found that the evidence did not suggest that there was any conduct on the part of the 1st appellant which could fall within the section, she had acceded to the submission of counsel for the respondent below, that evidence would be presented at trial as to the effect of the lack of registration from the appropriate authority. Counsel referred to **Commissioner of Police and Anor v Bermuda Broadcasting Co Ltd and Others** PCA No 48/2007, delivered 23 January 2008 and **Gordon Stewart and Others v Samuels** SCCA No 2/2005, delivered 18 November 2005 and submitted that the court should have considered and ruled on the application on the basis of the evidence before it. Counsel submitted that no affidavit had been filed by the respondent in the application. Further, it was submitted, there was no suggestion that the evidence that was to come would show conduct on the part of the 1st appellant giving rise to the application of section 22. Instead, it was to show what could only be properly considered to be the effect of the non-registration of the 1st appellant's lien on the title and this did not give rise to an issue which should be left for consideration at trial.

[12] On the applicability of section 23, Mr Powell argued that the learned judge had erred in relying on **Robin and Rambler Coaches Ltd** in that the court did not find or even consider whether the seller's title in the car was voidable. In any event, it was submitted, Mr Scott did not have any title in the motor car that could be considered voidable. Mr Scott had transferred the vehicle to the 1st appellant pursuant to the bill of sale and as a consequence he had no title. Counsel submitted further that the recording of the bill of sale at the Island Records Office would constitute notice to the world and therefore any title to Beverly Belnavis, from whom the respondent bought the vehicle, would be void. In relation to section 25 counsel submitted that the motor vehicle was transferred to the bank as security for the repayment of Mr Scott's debt to the 1st appellant. The learned judge had misconstrued the effect of the bill of sale and incorrectly characterised it as a contract for sale within the meaning of the Act. In response to the written submissions of the respondent, he argued that contrary to those submissions, section 35 of the Hire Purchase Act is not applicable. The section created a legal fiction whereby a bill of sale is treated as a conditional sale agreement for the purposes of the provisions of the Hire Purchase Act. However, none of the provisions referred to by the respondent is similar to the provisions of the Sale of Goods Act on which the respondent had relied below, Mr Powell submitted. It was not a consumer's bill of sale within the meaning of the Hire Purchase Act, counsel argued, because the money was not borrowed to buy the car.

[13] Counsel for the respondent submitted that the documents relied on by the 1st appellant for ownership of the motor vehicle were not sufficient, for several reasons.

Counsel stated that no evidence had been submitted in the court below to substantiate that the motor vehicle had ever been transferred into Shawn Scott's name. As a consequence, if Mr Scott had never been registered as owner of the motor vehicle, nor had a title issued to him, then the "legal chain" on which the 1st appellant was asserting its legal right to the vehicle would not have been established and the 1st appellant would have a worthless bill of sale. Counsel also said that the registration process utilised by the 1st appellant was deficient. Additionally, counsel posited that no evidence had been produced to show that monies advanced to Mr Scott had been paid over to Ms Belnavis, and there was also no evidence of any conspiracy between Mr Scott and herself. On these bases alone, counsel submitted, the court should find that the appeal had no merit.

[14] Counsel submitted that the claim by the appellants that the respondent could not have obtained a better title to the motor vehicle was inaccurate, as, since there was no evidence to show that Mr Scott purchased the vehicle or that it had been transferred to him, which meant that he could not have transferred the motor vehicle to the 1st appellant, then it was Beverly Belnavis, as the registered owner of the vehicle with no recorded lien or interest endorsed thereon, who could exercise any ownership rights with regard to it. The respondent who had acquired the car from her would therefore have obtained good title.

[15] Counsel submitted further that even if title to the car was vested in Mr Scott and he was able to transfer the car to the 1st appellant, the 1st appellant would still not have obtained legal ownership of the car as there was a defect in the registration process.

Counsel clarified that to mean that the 1st appellant had an obligation to ensure that its interest was noted on the motor vehicle title by way of a notice of lien (similar, she submitted to the registration of a mortgage under the Registration of Titles Act), and the failure of the 1st appellant to do so meant that the legal ownership of the motor vehicle did not pass to the 1st appellant. The effect of this is that the legal and equitable interest in the car would have remained with Mr Scott. To buttress these submissions, she referred the court to the Road Traffic Act and regulations 5, 25 and 33 of the Road Traffic Regulations.

[16] Counsel also submitted that at the initial stage of due diligence, the notice of lien registered on the motor vehicle title, was notice to an "innocent and unsuspecting buyer" that there is an interest that he/she ought to be mindful of, particularly counsel stated, when the vehicle remains in the possession of the borrower, and "the official public records will continue to show that person as being the registered owner". Counsel said that although Mr Lewis had indicated that the 1st appellant had registered the bill of sale with the Island Records Office that would not have assisted the respondent as he would have searched the register for the name of Beverly Belnavis not Shawn Scott, which is why the lien should be on the motor vehicle title. Counsel stated that the 1st appellant had been negligent in the protection of the chattel and the bona fide purchaser from Miss Belnavis ought not to be made to suffer as a result of that negligence.

[17] Counsel therefore concluded that as the 1st appellant had not done all that "was required and necessary to acquire the legal title to the motor vehicle" and the

respondent had "taken all the necessary precautions to ensure that the Motor Vehicle had not been stolen", he had acquired a good title to the motor vehicle by virtue of being a bona fide purchaser for value without notice. Counsel submitted that to deprive him of his property in those circumstances by way of summary judgment would leave him "unprotected and deprived of his property" in circumstances which could have been avoided had the 1st appellant done what it ought to have done in respect of the registration of its interest. There were, she submitted, triable issues to be determined by the court below.

[18] Counsel submitted further that contrary to the submissions of counsel for the 1st appellant that the bill of sale granted to the 1st appellant was not a "contract of sale of goods" as no "price" or any other consideration had been paid by the 1st appellant, the Sale of Goods Act was applicable, as the bill of sale was a "consumer's bill of sale" as defined under section 35 of the Hire Purchase Act. Counsel referred to sections 35 and 37 of the Hire Purchase Act, and section 2 of the Bills of Sale Act for the definition of "bill of sale" and section 2 (1) of the Hire Purchase Act for the definition of "conditional sale agreement". Counsel argued that section 2(1) of the Hire Purchase Act and section 2(3) and (4) of the Sale of Goods Act, when read together, must be interpreted to mean that a "consumer's bill of sale" is a "contract of sale of goods", whether absolute or conditional. Counsel further contended that as the loan was given to the 1st appellant to purchase the subject of the bill of sale, it was a "consumer's bill of sale".

[19] Counsel argued that based on the wording of section 37 of the Hire Purchase Act, and section 2 of the Sale of Goods Act, the 1st appellant was the vendor of the motor

vehicle and had agreed under the "consumer's bill of sale" to transfer the motor vehicle for $5,000,000.00 that is for the "money consideration, called the price". Counsel submitted that the case of **Small Businesses Loan Board** was not applicable, as the purpose of the debt incurred in that case, was not for the purpose of acquiring the subject matter and was therefore a security given to the bank, contrary to the instant case, where the sums loaned were for the purchase of the motor vehicle, and pursuant to section 35 of the Hire Purchase Act, the bill of sale was a consumer's bill of sale, and therefore fell within the remit of the Sale of Goods Act. As a consequence, counsel argued, there were triable issues which arose pursuant to sections 22, 23 and 25 of the Sale of Goods Act.

[20] Counsel relied on section 22 of the Sale of Goods Act and the dictum of Lush J in **Heap v Motorists' Advisory Agency** [1923] 1 KB 577 to contend that as the 1st appellant had not ensured that the notice of lien had been properly registered on the certificate of title, that amounted to a disregard of its obligations owed to the respondent. Counsel submitted that there had obviously been a breakdown in the internal controls by the 1st appellant which could explain why the custody of the certificate was not with the 1st appellant with the necessary recording of its interest noted thereon. Counsel said it was this breakdown which created "the opportunity for corruption by its own employee which resulted in Mr Green ultimately being caught in a scheme that seemed designed to obtain a loan while depriving the Bank of the asset to be used to secure the loan".

[21] Counsel referred to the Privy Council decision of **Commissioner of Police v**

Bermuda Broadcasting Co Ltd and that of Mangatal J (as she then was) in **Adola Manufacturing Co Ltd v Malcolm McDonald et al** Claim No CL A 38/2002, delivered 3 April 2009 to state that even though the court ought to make its decision on the matter before it, yet in an interlocutory matter all the evidence is not before the court at that stage of the proceedings; and in a summary judgment application the court ought only to grant the order in a clear cut case, and not to conduct a mini-trial. In the instant case, although there was no affidavit filed on behalf of the respondent in response to the summary judgment application, she stated that "there [was] sufficient evidence by way of admissions on its own documents that the 1st appellant's conduct precludes it from denying Mr Scot's authority to sell the Motor Vehicle, if he in fact was the owner of the Motor vehicle at the relevant time".

[22] With regard to section 23 of the Sale of Goods Act, counsel submitted that the failure of Mr Scott to deliver the certificate of title to the 1st appellant, coupled with the 1st appellant's failure to endorse its notice of lien thereon, meant that the 1st appellant at the time of the transaction had a voidable title, and as a consumer's bill of sale, which had not been avoided at the time of the transaction, the respondent having purchased the vehicle in good faith, and without notice of the 1st appellant's interest, would therefore have acquired a good title to the motor vehicle. Additionally, counsel submitted, the respondent could obtain protection under section 25(1) of the Sale of Goods Act, as Mr Scott, having sold the vehicle had been left in possession of it and, his transfer of the vehicle to Miss Belnavis, and her transfer of the same to the respondent, without the respondent having notice of the previous sale, would have the effect of

both Mr Scott and Miss Belnavis having been duly authorised to effect the transfers.

[23] In a brief response to the respondent's submissions on the Road Traffic Regulations and their relevance to the argument that ownership had not been transferred as the lien had not been noted on the title, Mr Powell submitted that the provisions of the Road Traffic Act and the regulations do not support the contention that the registration of the bill of sale was not completed unless the lien was registered on the title of the motor vehicle. Regulation 25 on which the respondent sought to rely, it was submitted, provides for the treatment of certain documents as proof of ownership prior to the provision of a certificate of title and no such issue arose on this appeal. Regulation 33 is equally of no assistance, he further submitted, as the obligation under that regulation is also on the registered owner of a motor vehicle to take certain steps when he desires to transfer ownership. In any event, counsel argued, the regulations do not refer to the Bills of Sale Act, and the transfer of ownership provided for under the scheme of that Act is not affected by the requirements under the regulations.

Analysis

[24] There are several issues which arose on this appeal. I shall set them out below and deal with them sequentially indicating when the issues encompass particular grounds of appeal:

1. What are the specific requirements of part 15 of the Civil Procedure Rules 2002 (CPR) and what is the effect of these

requirements on this case? (ground f)

2. Can the respondent challenge the judge's finding about the transfer of ownership without evidential support or a counter-notice?

3. (a) Can the respondent challenge on appeal for the first time as a matter of law ownership of the motor vehicle, the subject of the bill of sale? (b) Ought the 1st appellant to have provided proof of ownership or a certificate of title for the motor vehicle to be able to enforce the bill of sale?

4. What is the effect of the contents of the bill of sale, its execution and registration and the non-registration of the notice of lien? (ground c)

5. Is the Hire Purchase Act applicable? (grounds (a) and (e)

6. What is the effect of sections 22, 23 and 25 of the Sale of Goods Act on the respondent's claim to title/ownership? (grounds (b) and (d))

Issue 1 – Part 15 (ground f)

[25] Part 15 of the CPR deals with the grant of an order for summary judgment, that is the procedure for the court to decide the claim or a particular issue without a trial. The relief is available to both the claimant and the defendant. Rule 15.2 of the CPR sets out the grounds for such an application. It states:

"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that:

(a) the claimant has no real prospect of succeeding on the claim or the issue; or
(b) the defendant has no real prospect of successfully defending the claim or the issue.

(Rule 26.3 gives the court power to strike out the whole or part of [sic] statement of case if it discloses no reasonable ground for bringing or defending the claim)"

Rule 15.4 sets out the procedure for the application and rule 15.5 the evidence for the purpose of the summary judgment hearing. Rule 15.5 states:

"15.5 (1) The applicant must-

(a) file affidavit evidence in support with the application; and

(b) serve copies on each party against whom summary judgment is sought, not less than 14 days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must –

(a) file affidavit evidence; and

(b) serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing."

[26] In this case the defendants (appellants) were the applicants for summary judgment and the overall burden therefore rested upon them to establish that there were grounds for their belief that the claimant (respondent) had no real prospect of success on the claim. The phrase "no real prospect of succeeding on the claim" has

been given judicial interpretation and the oft-cited words of Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91 at 92, bear repeating here:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[27] Lord Woolf made it clear that the proper approach to the application is not to endeavour to assess whether the claim was bound to be dismissed at trial, as "that would be putting the matter incorrectly because that did not give effect to the word 'real'." He went on to say that he had detected that the judge in the court below in that case, "was looking at the matter on the basis that he had to be certain that the case could not succeed and was bound to fail before he could appropriately accede to the defendant's application". Having commented that the judge had adopted the wrong approach, Lord Woolf set out the parameters of and the rationale for the powers of part 24 of the English Civil Procedure Rules, which is the equivalent of part 15 of the CPR. At page 94b he put it this way:

> "...it is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

However, that notwithstanding, Lord Woolf gave the following strong caveat at page

95b:

> "…. Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial…… the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way to be disposed of summarily."

[28] It is clear from the above that in the instant case the 1st appellant was required to show that there were good grounds for believing that the respondent had no real prospect of succeeding on the claim, and not that the claim was bound to be dismissed at the trial. Once that had been shown, then summary judgment could be granted in keeping with the overriding objectives and in the interests of justice. The court in assessing the parties' respective positions must do so on the basis of the affidavit evidence which must be filed if the parties intend to rely on it. In this case, as previously indicated, the respondent did not file any affidavit evidence. The particulars of claim is a pleading, not evidence. As a consequence, there was no material before the court with regard to the alleged efforts made by the respondent in respect of: his due diligence searches before purchase of the motor car; the reason for the said purchase; the notice or lack thereof with regard to the registration of the bill of sale; or the notice of lien given by the 1st appellant at the Inland Revenue Department. This would have enabled him to rely on the principle of the bona fide purchaser for value without notice. Even the documents of registration in his name and in that of his predecessor in title were only before the court as attachments to the particulars of claim, but not by way of evidence. The failure to file affidavit evidence, which is a

mandatory requirement, in a case such as this, goes a long way toward disposing of the appeal, particularly since that is how the respondent would have been able to make his challenge, in respect of the ownership by Mr Scott of the motorcar known to his opponent, the 1st appellant, had it existed then. That bone of contention relates to issues 2, 3 and 4 which I will deal with later in this judgment.

[29] The learned judge in the court below had to exercise her discretion on the matters before her at the material time, not, in my view, on the bases of speculative material that was promised to be available at the trial. However, that is still not the end of the matter as the court had to be satisfied that there was merit in the position taken by the appellants that there was no real prospect of succeeding on the claim based on the affidavit evidence filed by them in support of the application before the court.

[30] The decision to grant or refuse an application for summary judgment being an exercise of the discretion of a judge, the approach of the appellate court when dealing with these matters is well known. The appellate court is hesitant to interfere with that discretion and will only do so in circumstances where the judge's exercise of his discretion was based on a misunderstanding of the law, of the evidence before him, or on an inference that particular facts existed or did not exist. The court defers to the judge's exercise of his discretion and does not interfere merely on the basis that the members of the appellate court would have exercised the discretion differently (see **Hadmor Productions Ltd v Hamilton** [1982] 1 ALL ER 1042).

Issues 2, 3 and 4 - The respondent's challenge to the judge's finding about the transfer of ownership, the effect of the contents of the bill of sale, its execution and registration and the non-registration of the notice of lien (ground c)

[31] As an answer to the appellant's assertion of title, the respondent has sought to challenge the finding of the transfer of the ownership of the motor vehicle. Firstly, it is contended that there is no evidence as to Mr Scott's ownership of the BMW motor vehicle at issue so as to provide evidence of title that he could have passed to the 1st appellant; and secondly, even if it were in fact owned by Mr Scott, the transfer would not have been valid because it was incomplete. It must be noted that in the court below there appears to have been no issue made of the validity of the transfer of title to the 1st appellant. The judge in recording the submissions of both parties did not indicate any submissions of this nature. Indeed, it seems that the respondent's focus was on demonstrating a basis upon which the 1st appellant should be precluded from asserting its title. The respondent is therefore seeking to raise an issue that was not raised before.

[32] Generally, a party is not allowed to raise on appeal an issue that was not before the court below, unless it concerns a matter of law. Rule 1.16 of the Court of Appeal Rules has expanded the ambit of matters to be raised for the first time on appeal to include matters which were relied on by the court below or where the court gives permission. It provides, further, that the court is not confined to the grounds set out in the notice but may not make its decision on a ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground. By virtue of this rule, the respondent would be permitted to

raise this issue. However, the judge's finding that there was a transfer of ownership is one of fact, and, would, in my view, pursuant to the provisions of part 15 which I have dealt with above, require that there be evidence on affidavit to address Mr Lewis' evidence as to how the 1st appellant became entitled to ownership. No affidavit having been filed, there is no evidential basis for the challenge.

[33] However, the learned judge rightly commented that the application was based on "the law dealing with the rights of parties in a Bill of Sale to possession". The respondent's challenge to the transfer is therefore partly based on the law as to the effect of the bill of sale and whether the holder of a bill of sale ought to be allowed to assert title based on this document, without there being some proof of the entitlement of the person who conveyed the property in the subject of the bill of sale to the holder of the bill of sale.

[34] There is no dispute that a bill of sale transfers property in chattels from the grantor to the grantee. In **Johnson v Diprose** Lord Esher MR stated that "a bill of sale" is a document given with respect to the transfer of chattels where possession is not intended to be given. The learned Master of the Rolls stated further that the bill of sale in that case, which had been executed in the form contained in the schedule to the English Bills of Sale Act 1887 would give to the grantee an absolute right to the property in the goods assigned and a right to possession of them. However, the right to possession of them in that instance was circumscribed by certain conditions, which it is not necessary to mention here. Lord Bowen in that case stated that, as an ordinary rule, on a mortgage of chattels, the property passes to the mortgagee. Likewise, in **Small**

Businesses Loan Board, after a careful review of some of the relevant authorities Lewis JA, stated that though bills of sale may provide that possession is to accompany the transfer of ownership, in practice they are used where it is intended that possession is to remain with the debtor. Implicit in this statement is a recognition that a bill of sale transfers ownership.

[35] That the property in the BMW, which was the subject of the bill of sale dated 12 June 2007, had been transferred is evident from clause 1 of the bill of sale that the borrower "ASSIGNS, TRANSFERS AND SETS OVER unto the Bank ALL AND SINGULAR the goods described in the Second Schedule … TO HOLD the same … absolutely…". Indeed, the respondent has not sought to deny that the effect of this is to transfer ownership, nor has he sought to say that the BMW motor vehicle mentioned in the Second Schedule is not the motor vehicle which was seized and which he is seeking to have returned. There is also no challenge as to the validity of the bill of sale itself. It is true that the bill of sale in this case was recorded at the Island Records Office outside the 30 day period stipulated by section 3 of the Bills of Sale Act. However, this could not provide an effective platform from which to launch an attack as to the validity of the bill. That is the effect of the decision in **Workers Savings and Loan Bank v Mignott and Mignott**, where the bill of sale was registered outside the requisite period. The judge at first instance in that case had held that the late registration of the bill of sale rendered it null and void against the holder of the bill of sale, which was a bank. However, the Court of Appeal allowed the appeal holding that the bill of sale was void only against certain parties listed in section 3 and reversed the judge's order that the

bank's bailiff return the motor truck to the third party from whom he had seized it.

[36] The respondent is, however, seeking to say that the bill of sale is not sufficient evidence of the transfer of title and that for the transfer to be effectual there must be proof shown of the ownership of Mr Scott. To approach the matter in this way, is, in my view, to ignore the provisions of section 4 of the Record of Deeds, Wills and Letters Patent Act which speak to the effect of documents which are recorded or registered at the Island Records Office. That Act is applicable as the bill of sale executed in this case, it being an indenture which was signed, sealed and delivered by the grantor, Mr Scott, is a deed. Section 4 of the Act provides:

> "4. The records of any letters patent enrolled in the Record Office; and the records of any deeds duly executed and proved or acknowledged and enrolled in the Record Office or other proper place of enrolment as provided by any enactment; and the record or enrolment of any last wills and testaments duly executed according to law and proved, shall at all times hereafter be deemed, judged, and taken as sufficient evidence of the several persons' titles to any lands, tenements, hereditaments, or estates whatsoever, real or personal, claimed under the said patents, deeds, conveyances, or wills; and the same shall be read and allowed in every court within this Island as if the original patents, deeds, conveyances or wills were actually produced, proved, and read in all and every the said courts."

[37] The effect of this section, it seems to me, is to render the bill of sale, once it is recorded or registered at the Island Records Office, sufficient evidence of the title to the chattels claimed therein by the grantee. It is noticeable that the section does not merely

provide that it is evidence of an interest claimed. The wording of the section, in my mind, indicates that the bill of sale in these circumstances is to be treated as being akin to a title and may only be defeated by a better title, which would be the actual certificate of title. In this case, the better title being asserted by the respondent is the one that was granted to Beverly Belnavis in 2011, but this does not provide a better title for the period between 2007 and 2011, and more particularly in June 2007, when the bill of sale was executed by Mr Scott who warranted that he was the absolute owner. In the light of the effect of section 4, it follows that the non-registration of the lien on the title would not have in any way operated to affect the 1st appellant's title and it is therefore unnecessary to consider the effect of the Road Traffic Regulations, which in any event, do not assist the respondent's case as, contrary to what was contended, they are not authority for the proposition that registration of a lien on a certificate of title is a pre-condition to the transfer of ownership.

Issue 5 – The relevance of the Hire Purchase Act

[38] The respondent has contended that the provisions of the Sale of Goods Act are applicable to the subject bill of sale as it is a "consumer's bill of sale" pursuant to section 35 of the Hire Purchase Act. That section falls under Part IV of the Hire Purchase Act which reads as follows:

> "PART IV. *Application of the Act to prescribed bills of sale.*
>
> 35. In this Part 'consumer's bill of sale' means any document which is a bill of sale as defined under section 2 of the Bills of Sale Act, not being---
> (a) a document the subject matter of which includes---
>
> any (i) part of the stock in trade; or

any (ii) plant or equipment, of a trade, business or calling; or

(b) a document made or given to a bank for a debt incurred for a purpose other than the purchase of the subject matter of such document.

36. The provisions of the Bills of Sale Act shall, from and after the 1st October ,1974, have no application to consumers' bills of sale.

37. The provisions of sections 7, 13, 16, 17, 22, 24, 25 and 26 of this Act shall apply to consumers' bills of sale in like manner as if----

(a) the person to whom such bill of sale is granted were a vendor of the goods, the subject matter of the bill of sale;

(b) the person granting such bill of sale were a purchaser of such goods; and

(c) the document constituting the bill of sale were a conditional sale agreement."

[39] Counsel further contended that on the basis of the above provisions, the definition of "bill of sale" in section 2 of the Bills of Sale Act, the definition of "conditional sale agreement" in section 2 (1) of the Hire Purchase Act and section 2 (3) and (4) of the Sale of Goods Act, once the subject bill of sale is a consumer's bill of sale, it is subject to the Sale of Goods Act and equates to "a contract of sale of goods", which includes "an agreement to sell" and "an agreement for the sale of goods".

"Bill of Sale" is defined in section 2 of the Bills of Sale Act as follows:

"'bill of sale' includes bills of sale, assignments, transfers,

> declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, but shall not include the following documents that is to say: assignments for the benefit of the creditors of the person making or giving the same; marriage settlements; transfers or assignments of any ship or vessel, or any share thereof; transfers of goods in the ordinary course of business of any trade or calling; bills of sale of any goods in foreign parts or at sea; bills of lading; warehousekeepers' certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or to receive goods thereby represented;"

The definition of "conditional sale agreement" in section 2(1) of the Hire Purchase Act, reads:

> "'conditional sale agreement' means an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled;"

Section 2(3) and (4) of the Sale of Goods Act reads as follows:

> "2. (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

The loan, counsel argued, which was given to acquire the motor vehicle was such a contract. The 1st appellant, it was submitted, was the vendor of the motor vehicle, Mr Scott was the purchaser and, under the consumer's bill of sale the 1st appellant agreed to transfer the car to Mr Scott for $5,000,000.00 the purchase price. This sale was therefore subject to the provisions of the Sale of Goods Act, and the respondent would be entitled to the protection afforded him under sections 22, 23 and 25 of that Act. The applicability of those provisions will be dealt with later in this judgment.

[40] The fallacy of the above submission, is in my view, readily exposed, as the foundation for it is false. The affidavit of Lenroy Lewis in paragraph 3, sets out the purpose of the loan. It read thus:

> "3. In June 2007 Shawn Scott, a customer of the Bank, was indebted to the Bank for the sum of $5,000,000.00. On June 21, 2007 as security for his indebtedness Mr Scott granted to the bank a bill of sale over his 2007 BMW 328i motor vehicle bearing chassis number WBAWB33587PV70971 ('the Bill of Sale')….

[41] Additionally, the preamble to the bill of sale also confirms existing indebtedness, of the borrower at the time when the bill of sale was given to the bank. It states:

> "The Borrower is indebted to the Bank and has requested the Bank to allow to the Borrower time to repay such indebtedness which the Bank has agreed to do upon the terms and conditions herein contained and hereunder implied and upon having the repayment thereof secured in the manner hereinafter appearing."

In clause 1 of the bill of sale, as referred to previously, the borrower in consideration

of "the premises" and the principal sum loaned by the 1st appellant to him, assigned and transferred all the goods referred to in the second schedule of the document to the 1st appellant to hold absolutely. The 2007 BMW 328i motor car with chassis, engine and registration numbers is stated in the second schedule under the sub heading "The Assigned Goods". It is the only item mentioned in the second schedule of the bill of sale.

[42] In the light of the above, in my view, the evidence does not disclose that the sums loaned were for the purpose of purchasing the motor vehicle. What the evidence discloses is that sums having been loaned to Mr Scott, he granted a bill of sale in respect of his motor car as security for sums already advanced to him. Based on that interpretation, the subject bill of sale would be a document made or given to the bank for a debt incurred for a purpose other than the purchase of the subject matter of the document, and therefore would not be captured under the definition of a "consumer's bill of sale" in section 35 of the Hire Purchase Act.

[43] I am fortified in my view by the dictum of Forte JA (as he then was) in **The Bank of Nova Scotia Jamaica Limited v Musson Jamaica Limited** (1989) 26 JLR 539. In this case a motor car was seized under a writ of execution from a judgment debtor, and the appellant issued an interpleader summons claiming a priority interest pursuant to an unregistered bill of sale, the vehicle having been handed over as a security for a debt. The issue for resolution was whether by virtue of section 35 of the Hire Purchase Act the bill of sale was a consumer's bill of sale and therefore exempt

from registration as provided by section 36 of that Act. Forte JA stated that section 35 of the Hire Purchase Act sets out firstly to:

> "equate bills of sale as defined by section 2 of the Bill[s] of Sale Act, with consumer bill of sale and expressly excludes documents falling within the two categories described in section 35(a) and (b). If therefore [the bill of sale] falls within either of these, it would be excluded, and therefore cannot be equated with a consumer bill of sale. The fact that this document, may come within the provisions of section 35 (a), cannot in my opinion avail the appellant if in the final analysis it is a document excluded by section 35(b)."

Forte JA then went on to analyse the evidence in that case to determine whether the document was so excluded. He referred to the preamble of the document which addressed the mortgagee extending loans from time to time and he concluded as follows:

> "These provisions describe an arrangement between the appellant and its customer Wee Tom for general financing facilities to Mr Wee Tom from time to time. Indeed a detailed perusal of the document indicates that there is no reference therein either expressly or impliedly from which it could be concluded that the loan was made to Mr Wee Tom for the specific purpose of the purchase of the motor car. In my view, the document itself defeats any contention that it was given to the Bank for a debt incurred for the specific purpose of the purchase of the subject matter. In the words of section 35(b) the document per se purports to show that it is a document made or given to (the) bank for a debt incurred for a purpose other than the purchase of the motor car 'the subject matter of the document;' the motor car being nothing more than the security offered in respect of the loan.
>
> Consequently, without more, I would conclude that the document would be excluded by virtue of the provisions of section 35(b) and therefore would not be a consumer bill of sale…"

The court ultimately held that as the document was not a consumer's bill of sale,

section 36 of the Hire Purchase Act was not applicable to it, and the bill of sale not having been registered under section 3 of the Bills of Sale Act would be null and void.

[44] The facts of that case are somewhat similar to the case at bar. There was no indication whatsoever and no express mention made in the bill of sale that the loan was given to Mr Scott for the express purpose of purchasing the motor car. The respondent cannot challenge that assertion without affidavit evidence to that effect, and as previously stated there was none. The subject bill of sale having been excluded by section 35 of the Hire Purchase Act from the definition of a consumer's bill of sale, the latter Act did not apply to it, and the provisions of the Sale of Goods Act would be inapplicable in that context. However, the sale of the motor vehicle by Mr Scott to Ms Belnavis and the sale of the said motor vehicle to the respondent, were sale of goods transactions and the Sale of Goods Act would therefore be applicable to them in that context.

Issue 6 – The relevance of the Sale of Goods Act

[45] With regard to section 22 of the Sale of Goods Act, on the basis of what has been said in paragraphs [34] to [37] herein, there is no doubt that the sale by Mr Scott of the motor car was effected by a person who was not the owner of the car, he having assigned and transferred the ownership absolutely to the 1st appellant, by execution of the bill of sale, and any sale by him was also a sale done without the authorization or consent of the owner. The buyer, in this case Ms Belnavis, would have acquired no better title to the goods than Mr Scott had, which was none at all. Mr

Scott's title was void ab initio and "a purchaser from a seller whose title is void acquires no property in the goods unless the sale falls within other provisions of that Act which confer such protection" (see Halsbury's Laws of England, Vol 91 (2012) 5th edition). This is to be distinguished from circumstances in which the seller may hold a voidable title to the goods, as in the case where the sale is induced by fraudulent representation, for if the title is not avoided before the transaction, and the purchaser buys in good faith, then property in the goods can pass (see **Robin and Rambler Coachers Ltd v Turner**).

[46] In the instant case, where the respondent purchased from Ms Belnavis who held a void title, his title would have been void also unless he was able to rely on the proviso to section 22 which requires the respondent to show that the 1st appellant was by its conduct precluded from denying Mr Scott's authority to sell. The learned judge was of the view that the issue of whether the failure to register the lien on the title was one of carelessness sufficient to award protection under the Act was a "live issue" between the parties, which could not be resolved on the application before her. I disagree.

[47] The facts of this case relate to situations which obtain in several authorities where the owner of a chattel parts with possession of it to the fraudster who sells it unlawfully to the buyer for valuable consideration, without any notice of any defect in the fraudster's authority to sell, and the fraudster disappears leaving the two innocent persons, the owner and the buyer, to fight over which of them has the lawful entitlement to the chattel. There are two principles operating, firstly, the principle that no person can give what he does not have, or to put it another way, no person can give

a better title than what he himself possesses. This principle is often expressed in the latin maxim *nemo dat quod non habet*, and is subject to statutory and common law exceptions. The first part of section 22 of the Sale of Goods Act re-enacts the *nemo dat* principle. The second principle is embodied in the proviso to section 22, which provides an exception to the rule in that the *nemo dat* principle will not operate if the owner is precluded from denying the seller's title. This exception is in effect applying the common law principle of estoppel by conduct, sometimes referred to as estoppel by negligence.

[48] In **Elisaia v Ropati and Anor** [2006] 4 LRC 700, a case from the Western Samoa Supreme Court, the plaintiff purchased a taxi van, did not register the same and employed the second defendant as the driver, who unlawfully sold it to the first defendant, who initially refused to buy the van as it was not registered in the name of the plaintiff or the second defendant, and only did so when the second defendant obtained a certificate in the second defendant's name. Sapolu CJ relied on the dictum of Lord Wilberforce in **Moorgate Mercantile Co Ltd v Twitchings** [1976] 2 ALL ER 641, and who had dissented on the facts rather than the law, in dealing with the question as to whether an estoppel can be founded on inaction or silence rather than positive conduct, emphasised that :

> "English law has generally taken the robust line that a man who owns property is not under any general duty to safeguard it and that he may sue for its recovery any person into whose hands it has come… He is not estopped from asserting his title by mere inaction or silence, because inaction or silence, by contrast with positive conduct or statement is colourless; it cannot influence a person to act to

> his detriment unless it acquires a positive content such that that person is entitled to rely on it. In order that silence or inaction may acquire a positive content it is usually said that there must be a duty to speak or to act in a particular way, owed to the person prejudiced, or to the public or to a class of the public of which he in the event turn out to be one."

Indeed Sapolu CJ after canvassing several authorities in the Commonwealth concluded:

> "In order to successfully raise an estoppel by omission to preclude an owner of goods from denying a seller's authority to sell the goods to a buyer it is essential to establish that the owner owed a duty of care to the buyer, that the owner was in negligent breach of that duty and that such negligence was the proximate or real cause of the buyer being induced to buy the goods."

[49] The court held, inter alia, that the information on the register did not induce the first defendant to purchase the van; in fact it had the contrary effect, and the failure to register was not the proximate or real cause of the first defendant's purchase of the van. Estoppel by omission therefore failed. The court also held that the second defendant did not come into possession of the van by the sale of the van to him, but because he was employed to the plaintiff, and his mere possession of the van did not give him a voidable title. As one of the prerequisites of section 23 of the 1975 Act (of Western Samoa) (similar to section 23 of the Sale of Goods Act) was that the seller had to have a voidable title, section 23 did not apply.

[50] In **Cummins Engine Co Ltd v OTT Transport** [2006] WSSC 21, another case out of the Western Samoa Supreme Court, in circumstances where the fraudster, a

previous agent of the plaintiff, sold power generation equipment belonging to the plaintiff unlawfully to the defendant, Sapolu CJ again endorsing Lord Wilberforce in **Moorgate Mercantile Co Ltd v Twitchings** stated:

> "To constitute an estoppel a representation must be clear and must unequivocally state the fact which, ultimately, the maker is to be prevented from denying."

The court held that the plaintiff was not to be held responsible for the conduct of its erstwhile agent and therefore he should retain the title to the generator.

[51] In the case of **Heap v Motorists' Advisory Agency Limited** [1923] 1 KB 577, the plaintiff wishing to sell his motor car gave it to the fraudster who claimed to have a specific purchaser available. That person however did not exist, and the fraudster through an intermediary sold the car to the defendants for valuable consideration. Lush J in dealing with the defence raised under section 21(1) of the Sale of Goods Act, similar to the proviso in our section 22, made the following statements:

> "It is true that the plaintiff was very trustful in parting with the possession of the car, and in letting North go on using the car without accounting for the price. He was not so careful as he should have been in his own interest, but that does not mean that he was negligent in the sense that he broke some duty that he owed to the defendants. Negligence, in order to give rise to a defence under the section in question, must be more than mere carelessness on the part of a person in the conduct of his own affairs, and must amount to a disregard of his obligations toward the person who is setting up the defence. There is, in my opinion, no evidence to show that the plaintiff was negligent in that sense and to justify the defence that he is precluded from denying the seller's authority to sell."

[52] In the instant case Mr Scott had possession of the motor vehicle by way of agreement under the bill of sale. He had assigned the title in the same to the 1st appellant and had no authority, ostensible or otherwise, to sell the car. The 1st appellant had registered the bill of sale and given notice of its lien. It is true that it ought to have kept the certificate in its possession, but in my view that was not sufficient carelessness to amount to negligence to afford protection under the Act. The 1st appellant owed no duty to the respondent. There is also no evidence that the respondent was induced by that failure to purchase the car, or that it was the proximate cause that induced him to buy the motor car. The respondent has failed to put anything at all before the court in this regard. I do not think that section 22 can avail him.

[53] To obtain the protection of section 23 of the Sale of Goods Act , the buyer must have purchased from a seller who had a voidable title. As indicated, it is a prerequisite for the buyer to obtain a good title, that the voidable title has not been avoided at the time of sale, and the buyer obtains the goods in good faith without notice of the defect of the seller's title. In this case as indicated previously Mr Scott's title was not voidable but void. On the execution of the bill of sale he had no title to the motor vehicle at all.

[54] **Lydon Allen v Olds Discount of Jamaica Ltd and Others** is very instructive in this regard. In that case, the hirer of a motor car under a hire purchase agreement, which contained a clause restraining the hirer from selling or otherwise disposing of the motor car, while sums were still owing under the agreement, sold the car. The car was subsequently on-sold to four other buyers. The plaintiff, the fourth in line, sued the

defendant who had let the car under the agreement. Graham–Perkins JA (Ag) (as he then was) set out with clarity the legal consequences of such actions. He stated at page 456 E-G:

> " … At this time, that is, on January 3, 1961 Smith was still bound by the provisions of his hire-purchase agreement with the defendant to whom he was then indebted in the sum of approximately 300. He therefore purported to do something in contravention of the precise terms of an agreement by which he was bound with the result that there was no title which he could pass to Vincent Gaynor. This defect in title would quite clearly follow the several subsequent transactions affecting the car, so that when on September 6, 1961 the defendant exercised its right to repossess this car, it was doing no more than it was manifestly entitled to do. It follows that the plaintiff's claim against the defendant must fail.
>
> The plaintiff's position is not, however, entirely hopeless, as he must succeed against the added defendant from whom he bought the car. The added defendant must in turn succeed against the third party."

[55] I have no doubt that the same applies in the instant case, as Mr Scott clearly acted in breach of the terms of the bill of sale by which he was bound, and, therefore as indicated, there was no title that he could pass to Ms Belnavis, nor could she pass any title to the subsequent purchaser, the respondent. However the respondent must succeed against her for the sums he paid to purchase the motor car. Section 23 of the Sale of Goods Act cannot therefore avail the respondent against the 1st appellant and, the learned judge erred in finding that there was any possible argument which could be advanced in his favour in this regard.

[56] The bill of sale was neither a sale of goods, nor an agreement to sell goods, for a

price. It was in this case an agreement providing the authority for the 1st appellant to take the motor car as a security for a debt, (section 2 of the Bill of Sale Act). Section 25 of the Sale of Goods Act therefore does not apply to this transaction. The learned judge erred when she attempted to import the definition of "contract of sale" in section 2 of the Sale of Goods Act into the transaction.

Conclusion

[57] There is no doubt, in the light of all of the above, that the claim had no realistic chance of success and, it is in the claimant's interest to know this as soon as possible. In the circumstances of this case no useful purpose would be served for there to be a trial, as it would be a waste of the court's resources and therefore not in keeping with the overriding objective. In my view the learned trial judge exercised her discretion wrongly. Sections 22, 23 and 25 of the Sale of Goods Act are inapplicable to the facts of this case. Mr Scott had assigned the ownership of the motor vehicle on the execution of the bill of sale to the 1st appellant, which bill of sale was properly registered. His title in the motor vehicle thereafter was void not voidable and, the transfer to Ms Belnavis was also void, as was the later transfer by her to the respondent. There was no evidence of any conduct by the 1st appellant which could have precluded it from denying the ownership of the motor vehicle in Mr Scott at the time of the transition.

[58] In my view, the appeal must be allowed with costs both here and below to the appellants. I would set aside the order made on 21 March 2012 refusing the application

for summary judgment and order that the appellants be granted summary judgment against the respondent.

BROOKS JA

[59] This appeal concerns the correctness of the decision by Straw J to dismiss an application by National Commercial Bank Jamaica Limited (NCB) and its bailiff, Mr Owen Campbell (together referred to hereafter as "the appellants"), for summary judgment against Mr Toushane Green. Mr Green had instituted a claim against the appellants for, among other things, damages for trespass to goods. He also claimed the return of the item in question, being a 2007 BMW motor car.

[60] NCB sought summary judgment on the basis that, as it was the owner of the vehicle, by virtue of a bill of sale in respect of the vehicle, it was entitled to possession of the vehicle. It asserted that any claim that Mr Green had to the vehicle, on the basis that he had purchased it from someone else, was worthless. He could get, NCB contended, no title to the vehicle without that title having been given to him by NCB. It argued that Mr Green had no real prospect of success in his claim.

[61] The learned judge opined that there were issues to be tried. She pointed to the fact that NCB had allowed the grantor of the bill of sale, Mr Shawn Scott, to retain the certificate of title to the vehicle. The omission to take custody of the certificate of title for the vehicle, and the omission to have its lien noted on the certificate of title, were,

the learned judge found, issues to be considered at a trial to determine whether Mr Green was "a bona fide purchaser without notice of [Mr Scott's] defective title". It should be pointed out here that Mr Green asserts that he had purchased the vehicle from a third person, Ms Beverly Belnavis. The learned judge seemed to be of the opinion that Mr Green and Ms Belnavis could perhaps be the beneficiaries of certain provisions of the Sale of Goods Act. Those issues, the learned judge found, were issues to be aired at a trial. She therefore dismissed the application.

[62] The appellants have challenged that exercise of the learned judge's discretion. The main issue arising from their challenge is whether any statutory provisions, particularly in the Bills of Sale Act, the Sale of Goods Act or the Hire Purchase Act (all of which were mentioned in arguments before us) affected NCB's title to the vehicle. In other words, whether NCB's entitlement, by virtue of the bill of sale, to possession of the vehicle became equivocal as against Mr Green.

Factual background

[63] My learned sister, Phillips JA, has given a full outline of the factual background to the claim, and therefore I need only set out the essence thereof for the purpose of context. The essential points of that background, for these purposes, are as follows:

a. Mr Shawn Scott was the owner of the vehicle in June 2007. At that time, he was also indebted to NCB for $5,000,000.00.

b. On 12 June 2007, NCB lodged a notice of its lien with the Inland Revenue Department but it did not receive or retain Mr Scott's certificate of title to the vehicle.

c. On 21 June 2007, Mr Scott executed a bill of sale over the vehicle to NCB, as security for the debt. The bill of sale was an absolute assignment of Mr Scott's interest in the vehicle subject only to the right of redemption on repayment of the loan and all other sums due to NCB.

d. NCB registered the bill of sale on 25 July 2007, which is in excess of the 30-day period stipulated by section 3 of the Bills of Sale Act for the registration of bills of sale.

e. Mr Scott fell into arrears with the repayment of the debt, and, on 20 July 2009, the bank authorised Mr Campbell to seize the vehicle in accordance with the terms of the bill of sale.

f. Mr Campbell seized the vehicle from Mr Green on or about 9 December 2011. Despite demands for its return, NCB retained the vehicle and Mr Green filed the claim mentioned above.

[64] Those points were mainly gleaned from an affidavit filed in support of the application for summary judgment. No affidavit was filed in response by Mr Green. There was therefore no evidence before the learned judge as to the circumstances under which he came into possession of the vehicle. He sought to rely on his particulars of claim that he had purchased the vehicle having satisfied himself that Ms Belnavis was the owner of the vehicle. To that end, he exhibited to his particulars of claim, copies of the following:

a. a certificate of title for the vehicle in the name of Beverly Belnavis;

b. a registration certificate in his name,

c. a certificate of fitness, and

d. a certificate of insurance in his name.

All the documents were in respect of the vehicle. The certificate of title shows that Ms Belnavis had acquired the vehicle on 6 April 2011 by way of purchase.

The relevant law

[65] The first aspect of the relevant law that needs to be mentioned is the effect of a bill of sale. Execution of a bill of sale by the owner of goods results in the transfer of title to those goods to the grantee of the bill of sale, in this case, NCB. The essence of the instrument was described by Lord Esher MR in **Johnson v Diprose** [1893] 1 QBD 512 at page 515 of the report:

> "A bill of sale is a document given with respect to the transfer of chattels, and is used in cases where possession is not intended to be given. Such a transaction is not a pledge, the conditions of which are entirely different. A bill of sale…give [sic] to the grantee an absolute right to the

> property in the goods assigned, and also a right to the possession of them…"

[66] The Bills of Sale Act is the first statute that must be considered in this analysis. Section 3 of that Act stipulates the formal requirements of a bill of sale. Most importantly, it stipulates that a bill of sale is to be recorded at the Island Record Office within 30 days of being executed. Failure to meet that deadline, the section stipulates, renders the bill of sale null and void as against specific categories of persons. Those categories were identified by Walker JA in **Workers Savings and Loan Bank v Mignott and Another** SCCA No 72/1997 (delivered 4 October 1999). At page 4 of his judgment, with which the other members of the court agreed, Walker JA stated:

> "The true construction of section 3 I take to be that an unregistered bill of sale is null and void to all intents and purposes whatsoever:
>
> (a) against assignees of the estate and effects of the grantor under the laws relating to bankruptcy or insolvency;
>
> (b) under any assignment for the benefit of the creditors of such a grantor;
>
> (c) against the Bailiff of a Court and his deputies and assistants and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of a Court of law or equity;
>
> (d) against every person on whose behalf such process as described in (c) above shall have been issued."

Walker JA pointed out that any person claiming to benefit from the failure to register a bill of sale within the stipulated time, must show that they fall within one of those categories. This requires evidence.

[67] The next relevant statute is the Sale of Goods Act. The sections to which the learned judge referred in her judgment were sections 22, 23 and 25(1). Section 22(1) stipulates, in part, that the normal principle, that a purchaser acquires no better title to property than the seller possessed, may not apply if the owner of the property "is, by his conduct, precluded from denying the sellers authority to sell". Section 23 speaks to cases where a purchaser of goods who buys in good faith may obtain a good title even though the seller's title thereto was voidable. Section 25(1) allows a purchaser of goods, who has bought in good faith, to obtain a good title to the goods if the person from whom he bought, had previously sold the goods to someone else, but had been allowed to retain possession of the goods.

[68] Three points may be made about the application of these provisions of the Sale of Goods Act. The first is that the assignment of title to goods by virtue of a bill of sale is not a sale of the item. It is not a transfer of title to the goods in exchange for a money consideration, as defined by section 2 of the Sale of Goods Act. It is, instead, a transfer of property in goods in order to secure a debt. The second point is that a bill of sale is an absolute transfer of title to the subject property. The grantor of the bill of sale does not, thereafter, have a voidable title. He has no title whatsoever. The third

point is that, in order to benefit from the provisions of sections 23 and 25, a purchaser who buys in good faith must produce evidence of the circumstances of that purchase.

[69] The next statute to be mentioned is the Hire Purchase Act. It may quickly be dismissed as being irrelevant to the transfer of title by virtue of a bill of sale. The two transactions are entirely different. The difference between hire purchase and the transfer of title to goods by virtue of a bill of sale was accurately set out by Robert Lowe in Commercial Law 4th edition. The learned author stated at page 249:

> "The ordinary hire-purchase agreement is clearly not affected by the Bills of Sale Acts, even if it contains a power on the part of the owner to retake possession, because under a bill of sale the owner remains in possession and confers a power to seize, whereas in a hire-purchase agreement the owner parts with possession if default is made."

[70] Having considered those statutory provisions, it only remains, for an outline of the relevant law, to examine the procedure required for applications for summary judgment. Where such applications are made, part 15 of the Civil Procedure Rules 2002 (the CPR) applies. Rule 15.5(1) stipulates that the applicant for summary judgment must file and serve affidavit evidence. Rule 15.5(2) stipulates that a respondent to the application "who wishes to rely on evidence must" file and serve affidavit evidence. The respondent is not obliged to rely on any evidence of his own but he makes a decision whether or not to do so.

[71] One other provision of the CPR is highly relevant to this case. It is rule 29.2. The rule stipulates the manner by which evidence is to be adduced and the manner by which facts are to be proved. Rule 29.2(1) states as follows:

> "(1) The general rule is that **any fact which needs to be proved by the evidence of witnesses** is to be proved -
>
> (a) at a trial, by their oral evidence given in public; and
>
> (b) **at any other hearing, by affidavit**." (Emphasis supplied)

[72] The rule does not allow for reference to statements of case or attachments thereto as proof of facts in issue. The tenor of the CPR in this regard is distinct from that of the Civil Procedure Rules in England. The latter rules allow reference to statements of case. Rule 32.6 of those rules states:

> "Evidence in proceedings other than at trial
>
> 32.6-(1) Subject to paragraph (2), the general rule is that evidence at hearings other than the trial is to be by witness statement unless the court, a practice direction or any other enactment requires otherwise.
>
> (2) At hearings other than the trial, a party may, in support of his application, rely on the matters set out in-
>
> (a) **his statement of case**; or
>
> (b) his application notice,

> if the statement of case or application notice is verified by a statement of truth." (Emphasis supplied)

[73] In considering applications for summary judgment, the judicial officer is not required to conduct a mini-trial but where the case of one party or another is untenable that party should not be allowed to go to trial on that case. There is authority for the principle that parties to litigation must know at the earliest opportunity whether their cases have a real prospect of success. The judicial officer considering the application exercises a discretion whether or not to grant the application. This court will not interfere with that exercise so long as there has been no breach of any principle of law or misapplication of facts in that exercise.

Application to the instant case

[74] In this case, the principal issue that the learned judge was required to decide is whether NCB had shown that it was clearly entitled to take possession of the vehicle based on its title created by the bill of sale. In my view, NCB clearly showed that it had title to the vehicle on that basis. **Johnson v Diprose** and **Small Businesses Loan Board v Reid** (1964) 7 WIR 287 both assert the right of immediate possession to the subject goods that a grantee of a bill of sale holds. NCB therefore, without more, would be entitled to take possession of the vehicle wherever it found it.

[75] It was then for Mr Green to show that NCB was not entitled to possession of the vehicle because his title to it was better than NCB's or that NCB was precluded from asserting its title. This he could do by one of three means. Firstly, he could point to

conduct by NCB that precluded it, by virtue of legislation or common law, from asserting its title. Secondly, he could rely on legislation that deprived NCB of its title or thirdly, he could show that the circumstances of his acquisition of the vehicle were such that his title was superior to NCB's.

[76] As has been pointed out above, Mr Green provided no evidence to establish his right to possession of the vehicle. The only relevant failure to which he could realistically point, in seeking to undermine NCB's title, is its failure to record its bill of sale within the time stipulated by section 3 of the Bills of Sale Act. That failure did not destroy the effect of the bill of sale except with respect to specific categories of persons, but in failing to present any evidence, Mr Green did not demonstrate that he fell within any of the categories specified in the statute.

[77] The facts of this case are very similar to those in the **Workers Savings and Loan Bank** case. In that case, the Mignotts purchased a truck from Ms Clarke. They did not know at the time, however, that Ms Clarke had previously granted a bill of sale over the vehicle to a bank. The bank had failed to record the bill of sale within the statutory period. When Ms Clarke defaulted on her obligations, the bank seized the vehicle from the Mignotts, who sued for its recovery. This court held that the Mignotts had not demonstrated that they fell within any of the categories of persons who could benefit, by virtue of section 3 of the Bills of Sale Act, from the bank's failure to record the bill of sale in time. This instant case is materially indistinguishable from the

circumstances in **Workers Savings and Loan Bank**. The result must be the same and no trial is required to achieve that end.

[78] The other failure that Mr Green contends that NCB is guilty of is that it failed to secure or retain the certificate of title for the vehicle and failed to register its lien on the title. Two things may be said about these complaints. The first is that NCB promptly (on 12 June 2007) lodged with the proper authorities, a notice of its lien. What should have occurred thereafter is that the certificate of title, if it had not yet been issued by the Inland Revenue Department (the vehicle was a 2007 model), ought to have been produced by that department with the lien endorsed in accordance with the notice. If the certificate of title had already been issued by the time the notice was lodged, the notice ought to have prevented any dealings with the title after 12 June 2007 without reference to NCB.

[79] The second thing that may be said about these complaints is that it is incumbent on Mr Green to show that the failures resulted in the situation whereby he came to purchase the vehicle. He has not done so.

[80] It is my respectful view that the learned judge erred in finding that there was room for Mr Green to show, at a trial, that he was "a bona fide purchaser without notice of the defective title" (paragraph 33 of the judgment). Not only did Mr Green produce no evidence to support such a finding, but his attempt to rely on the provisions of the Sale of Goods Act in that regard was also, wholly misguided.

[81] The learned judge pointed to a submission by Mr Green's counsel of Mr Green's "intention to present evidence at a trial of the effect of lack of registration from the appropriate authority" (paragraph 23 of the judgment). The authorities show that at the stage of an application for summary judgment "surmise and Micawberism" have no place. The parties must each show what it is they will reasonably produce at the trial in support of their respective cases. They cannot hope, like Mr Micawber in Dickens' David Copperfield, that "something will turn up".

Conclusion

[82] From the foregoing analysis, I conclude that NCB's right to possession of the vehicle, by virtue of its title thereto stands unchallenged. That title was created by the bill of sale granted by the owner of the vehicle, Mr Shawn Scott. Mr Green has not demonstrated, by evidence or otherwise, that NCB is not entitled to assert its title. He was entitled to do so by pointing to a failure on NCB's part, to legislation, or to a common law principle, but he did not. In the circumstances, the learned judge, in my view, erred in refusing NCB's application for summary judgment. Consequently, I respectfully agree with Phillips JA that the appeal ought to be allowed and summary judgment granted to NCB with costs both here and below.

LAWRENCE-BESWICK JA (Ag) (DISSENTING)

[83] This is an appeal from the refusal of Straw J to grant an application for a

summary judgment. It is long accepted that

> "[the appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently." (**Hadmor Productions Ltd. v. Hamilton** [1982] 1 All E.R 1042 at 1046 per Lord Diplock)

[84] Indeed Lord Diplock extended these cautionary words to state that the Court of Appeal may also properly set aside the judge's exercise of his discretion if it is "so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it" (at page 1046).

[85] It is therefore from that perspective that I give consideration to this appeal. The issue to be determined is whether the judge's decision was correct or whether it was of such a nature that it should be set aside.

[86] The learned judge examined the law concerning summary judgment and analysed the submissions and available evidence and pleadings. She concluded that:

> "The issues raised by the claimant are cogent and it is my opinion that the defendants have not met the standard necessary to succeed in an application for summary judgment as I am not clear as to what the ultimate result of a trial would be." [para. 33 of judgment]

[87] What is the standard necessary for the defendants to succeed in an application for summary judgment?

Rule 15.2 of the Civil Procedure Rules (CPR) provides:

> "The Court may give summary judgment on a claim or on a particular issue if it considers that –
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) ..."

[88] The applicant is required to file affidavit evidence in support of the application, and the burden of proving that the claimant has no real prospect of succeeding on the claim rests on the applicant.

[89] The claim involved in this matter was by Mr Toushane Green against National Commercial Bank (NCB) and the bailiff Mr Owen Campbell for, inter alia, recovery of possession of a motor vehicle and damages. NCB asserts that it is the owner of the vehicle which Mr Green had bought at a used car lot. It therefore authorised the bailiff to seize the vehicle. The bank based its claim to ownership of the vehicle on a bill of sale which had been executed in its favour by a previous purported owner of the vehicle.

[90] The resolution of Mr Toushane Green's claim rests on an interpretation and application of the law concerning the ownership of the vehicle.

[91] Counsel for the appellants, NCB and Mr Owen Campbell, relied on the Bills of Sale Act to ground ownership of the vehicle in the bank. The details of the facts surrounding the acquisition of the Bill of Sale are stated in the judgment of Phillips JA and it is not necessary to repeat them save for certain pertinent portions.

[92] Mr Stephen Scott had granted a bill of sale to NCB over a motor vehicle which, it appears, he purported to be his, as security for a loan. The appellants' submission is that the ownership passed to the bank with that grant and therefore only the bank would be entitled to sell it. Mr Toushane Green, who purchased it from a car lot and from another purported owner Beverly Belnavis, would therefore have received a void title.

[93] On the other hand, Mr Toushane Green's counsel sought the protection of the Sale of Goods Act and the Hire Purchase Act to argue that Mr Green was a bona fide purchaser for value without notice and ought to be allowed to prove his claim in a trial.

[94] The learned trial judge's judgment details that during the application she had examined a title to the motor vehicle. She observed that it showed the registered owner as Beverly Belnavis, with a signature appearing to be hers, at the back of the title, signed as a transferor. Further, the title bore no endorsement of a lien or mortgage and also bore a tax office stamp.

[95] At page 6 of her judgment, the learned judge stated:

> "Mr Green carried out due diligence by checking with the Tax Office and also CarFax in order to ensure that he was not purchasing a stolen vehicle. Having been so satisfied, he paid the full purchase price of $3.2 million (as agreed) to Ricardo Barker and Curtis Watson, the agents of Beverly Belnavis. There is no dispute in relation to these facts also."

[96] The Bills of Exchange Act plays a major role in this appeal as it is on this Act that the appellant relies. Stripped to the basics relevant to this appeal section 3 reads:

> "Every bill of sale…whereby the grantee or holder shall have power … to take possession of any property … comprised in … such bill of sale … shall be recorded at length in the Record Office within thirty days after the making or giving of such bill of sale … otherwise such bill of sale as against all assignees of the estate and effects of the person whose goods … are comprised in such bill of sale, … under any assignment for the benefit of the creditors of such person, and as against … persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity, authorizing the seizure of the goods of the person by whom … such bill of sale shall have been made … shall be null and void … as regards the ...right to the possession of any personal chattels comprised in such bill of sale, which … at or after time … of the execution … of such assignment … and after the expiration of the said period of thirty days shall be in the possession, or apparent possession of the person making such bill of sale."

[97] The appellants relied on **Workers Savings and Loan Bank v EP Mignott and Paul C Mignott,** SCCA No 72/1997 (delivered 4 October 1999) to support their submissions, as the facts there appear to be very similar to the instant appeal. There the Mignotts (the respondents) bought a truck from Ms Clarke (the registered owner of it). However, unknown to the Mignotts, the Workers Bank (the appellants) held a bill of sale on the truck to secure a loan to Ms Clarke. The bill of sale was recorded outside of the 30 day period prescribed in the Act. The bailiff, acting on the instructions of Workers Bank, seized the truck.

[98] The Mignotts sought a declaration that the bill of sale made between the Workers Bank and Ms Clarke was null and void as against the Mignotts because of its late registration. The judge at first instance: (1) declared the bill of sale to be null and

void and of no effect; (2) declared that Ms Mignott was entitled to possession of the said truck and (3) ordered the bailiff to deliver the truck to the plaintiffs.

[99] The appeal was allowed against that decision. The argument for the successful appellant was that the categories of persons against whom an unregistered bill of sale is null and void are listed in section 3 of the Act, and that the Mignotts were not in any of those categories.

[100] The argument of the respondents there was that the sale of the truck to the Mignotts by Ms Clarke was an assignment to the Mignotts for their benefit as creditors of Ms Clarke. The court regarded this latter argument as fallacious as the Mignotts could not be classified as creditors within the scope of section 3.

[101] However, in my view, there is a major distinguishing factor between the case at bar and the **Workers Bank** authority. **Workers Bank** involved a trial. All the available evidence would have been presented which would have provided the basis on which the court came to its decision. This appeal however is against the learned judge's refusal to grant a summary judgment. All the issues would not have been fully ventilated nor would all the evidence have been presented in the manner in which it would have been presented at a trial.

[102] The requirement at the summary judgment application would have been for the applicants, NCB and Mr Campbell, to prove that the claimant, Mr Toushane Green, had no real prospect of succeeding on the claim [rule 15.2 CAR]. Mr Toushane Green could then respond if he so chose, in order to show that the application was without merit.

The burden of proof rests on the applicants.

[103] On the other hand the requirement at a trial would be for Mr Toushane Green to prove that he had the right to possess the vehicle. He would have to provide the pertinent evidence and NCB and Mr Campbell would, in that circumstance, respond if they so chose, in order to show that the claim was without merit. The burden of proof rests on the claimant in that instance.

[104] Here the bill of sale was registered outside of the prescribed time allowed by law. The Act specifies the consequence of the flouting of the law. The bill of sale becomes null and void, that is, it is of no value and cannot be relied on as against the persons categorised in section 3 of the Act.

[105] The wisdom of this provision is evident. It is to protect the unsuspecting person involved in a transaction involving a bill of sale. A bill of sale transfers ownership in the goods from the "registered owner" (the grantor) to another (the grantee). It is vital that the public be made aware of that as soon as is reasonably possible, which here, in the Act, is specified to be 30 days after the execution of the assignment. In that way, the cautious purchaser would be notified of a prior interest in the property which is the subject of the bill of sale.

[106] It seems to me that the effect of the law is twofold –

(1) to protect the rights of the holder of a registered bill of sale (grantee) by giving notice to the world of his interest and

(2) to protect the public at large from engaging in transactions concerning the property which is the subject of the bill of sale with

no knowledge of the existence of a prior interest.

[107] It is registration which would inform the public. However, there must be a time limit for such registration. If it were otherwise, then it is conceivable that the grantor of the bill could conduct business with an unsuspecting person long after having granted the bill and then years after, the grantee could claim a prior interest from an entirely innocent party who had made all the required and appropriate investigations before dealing with the item which was the subject of the bill. In my view the registration of the bill of sale within 30 days is to lend certainty to transactions involving the assignment of titles to assets, or generally dealing with such titles.

[108] The description in section 3 of the Act of the persons who are protected from the effect of a bill of sale which is registered out of time would include a person who has obtained the assignment of the bill for the benefit of the creditors of the grantor. The pertinent provision in the section describing such a person is:

> "[an] assignee of the estate and effects of the person whose goods … are comprised in such bill of sale … under any assignment for the benefit of the creditors of such person …"

[109] In my view, in the circumstances of this appeal, when the 30 day period for the registration of the bill of sale had elapsed, any person to whom Mr Steven Scott subsequently assigned his estate in the car and who fell within the protected categories in section 3, would not be subject to the bill of sale. Such is the consequence of the late registration.

[110] Here, the bank had failed to register the bill of sale in accordance with the law.

Mr Scott's interest, it appears, passed thereafter to a third party ("new assignee"), not identified in these proceedings. If that new assignee fell into a category specified in section 3, that assignee would be protected from any enforcement by the bank of the bill of sale. That protection would continue to all subsequent assignments arising from the "new assignee".

[111] In my view, for the appellants to succeed in an application for summary judgment against Mr Toushane Green, they would have to prove that Mr Green did not benefit from the protection which any such previous assignee had under section 3 of the Act. It would therefore be necessary for the bank to prove, at least, that the person to whom Mr Scott subsequently assigned the vehicle was not protected. Any such protection of the assignee, would, in my view, be propagated to subsequent assignees including Mr Toushane Green. It is therefore irrelevant that in the particulars of claim Mr Green asserts no connection as a creditor of Mr Scott. The important connection would be that between Mr Scott and the next person to whom he, Mr. Scott, assigned the vehicle.

[112] The appellants acknowledged that:

(1) NCB failed to register the bill of sale within 30 days of its execution.

(2) NCB failed to obtain the title for the motor vehicle from Mr Scott in order to record the encumbrances on it.

(3) NCB failed to cause to be endorsed on the title, the fact that it had filed a lien on it on 12 June 2007 at the Island Record Office.

[113] These omissions together contributed to Mr Toushane Green being presented

with an unencumbered title to the motor vehicle, bearing the stamp of the tax office. The title from all appearances appeared to be valid.

[114] It is true that the respondent did not provide evidence to meet the application for summary judgment. However, it is the appellants who seek to obtain summary judgment and therefore the burden rests on them to prove that their rights against the respondent are unassailable and could not be properly challenged by any evidence to be produced at a trial.

[115] By choosing to apply for summary judgment, the appellants must accept the burden of proving that the claimant has no real prospect of succeeding on the claim (rule 15.2 of the CPR). This would have to include proof that Mr Green did not inherit protection from section 3 and also proof that the failure to record the bank's lien on the title did not provide protection to Mr Green. There was no such evidence.

[116] The bank has merely asserted that it holds a bill of sale and relied thereafter on the interpretation of the statutes. The bill of sale was registered beyond the 30 day period required by section 3 of the Act. There is no evidence as yet from the appellants to prove that the assignment which ultimately led to the final assignment of title to Mr Green was not for the benefit of a creditor of Mr Scott who had originally granted the bill of sale to the bank. In my view, the application for summary judgment is at a premature stage of the proceedings. The priority of interests cannot be determined without a trial.

[117] The observation of Lord Judge in the oft-cited case of **Swain v Hillman and anor** [2001] 1 All ER 91 bears repetition:

> "… To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step."

[118] The argument has been put forward that there was no contention at the summary judgment application that the title of the bank's customer, Mr Shawn Scott, was not valid. The proceedings progressed on the presumption that the bank prepared its documentation based on a title that was valid. The inference must be that the bank was asserting that Mr Shawn Scott's title was valid. Mr Toushane Green also asserts that the title on which he relied is valid. Mr Scott's title was never produced during the proceedings. However the title on which Mr Green relied was presented for scrutiny and was in fact examined by the learned judge. It is of more than passing interest that no evidence or submission provides a basis to prefer the assertion of the bank that Mr Scott's title is valid, rather than the assertion of Mr Toushane Green, that his title is valid.

[119] The learned judge, in my view, correctly addressed her mind to an assessment of Mr Green's case to determine its probable ultimate success or failure (**Gordon Stewart v Merrick Samuels** SCCA No 2/2005 delivered 18 November 2005 page 6). She concluded that she was not clear as to what the ultimate result of a trial would be (page 33 of judgment). The judge had so concluded because in her view, the claimant had raised cogent arguments concerning his claim. I see no basis to interfere with the exercise by the judge of her discretion and would defer to it. Neither do I regard her

determination as being so aberrant that it must be set aside on the ground that "no reasonable judge regardful of his duty to act judicially could have reached it" (**Hadmor Productions Ltd. v. Hamilton** at page 1046).

[120] It appears to me that there are issues to be addressed by both parties and that the learned trial judge was correct in her determination that the matter should proceed to trial. I would therefore dismiss the appeal.

PHILLIPS JA

ORDER

By a majority (Lawrence-Beswick JA (Ag) dissenting)

Appeal allowed. The order of Straw J made on 21 March 2013 set aside. Summary judgment granted to the appellants against the respondent. Costs to the appellants, both here and in the court below, to be taxed if not agreed.