JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 121 OF 1998

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**TIBBY'S AUTO SUPPLIES**	**1ST DEFENDANT/APPELLANT**
AND	**PRAISE TOURS AND AUTO RENTALS LIMITED**	**2nd DEFENDANT/APPELLANT**
AND	**BOSWORTH MULLINGS**	**1ST PLAINTIFF/RESPONDENT**
AND	**DENISE MULLINGS**	**2ND PLAINTIFF/RESPONDENT**

C. Dennis Morrison, Q.C. and **Miss Carol Davis** instructed by Davis, Bennett & Beecher-Bravo for the appellants

Mrs. Sandra Minott-Phillips instructed by Myers Fletcher & Gordon for the respondents

February 14, 15, 16, 17, 18, 2000 and DECEMBER 20, 2001

DOWNER, J.A.

Harrison, J.A. will deliver the first judgment.

HARRISON, J.A.

This is an appeal from the judgment of Pitter, J., on September 30, 1998, when he entered judgment for the plaintiffs/respondents on the claim and counterclaim for $912,402.45 plus interest and costs to be agreed or taxed.

The relevant facts are that the appellant companies were engaged in the rental of motor cars. In 1987, Owen Tibby, the managing director in

each of the appellant companies, invited the respondents to participate in the car rental business. The latter bought two or three secondhand cars which thereafter were included in the appellants' fleet of cars and rented out. The respondents were responsible for the licensing and maintenance of their own cars. They incurred a service charge of 15% and the balance of rental monies remaining in the hands of the appellants, who were responsible for the management and rental of the cars, would be paid out to the respondents.

In 1988, with the intention to increase its number of cars, the first appellant bought five Starlet motor cars from a company, Efficient Car Rentals Limited. Bills of sale on the said cars were held by the Eagle Merchant Bank Limited, to ensure that the said vehicles remained in its possession. The first appellant bought the company, Efficient Car Rentals Limited, and paid off its debts. Exhibit 11 reads, inter alia:

"HEADS OF AGREEMENT
BETWEEN
TIBBY'S AUTO SUPPLIES LTD.
&
EFFICIENT CAR RENTALS LTD.

> Tibby's Auto Supplies Ltd. (hereinafter referred to as Tibby's) in order to protect its purchase of five, (5) Toyota Starlet Motor Cars from Efficient Car Rentals Ltd., (hereinafter referred to as Efficient) for Four Hundred Thousand Dollars, ($400,000.00), which are slated for seizure by the Eagle Merchant Bank Ltd., has entered into an agreement with Efficient on the following terms:
>
> **(1)** Tibby's will settle the debts of Efficient Car Rentals Ltd. as follows:

(a) Eagle Merchant Bank
$2,800,000.00

(b) C.I.B.C. (JA.) LTD.
160,844.00

(c) Dyoll Merchant Bank
88,885.00

$3,049,729.00

(2) All vehicles in the name of Efficient Car Rentals Ltd. will be transferred to Tibby's.

The schedule is as follows:

7 1988 Toyota Starlets
2 1988 " Corollas
3 1985 " Corollas
7 1985 " Starlets
2 1985 " Coro (sic)
1 1985 " Hilux P/U
2 1984 Daihatsu Charmonts."

The first appellant also bought the company, Presto Car Rental Limited, and paid off its debts. The agreement reads, inter alia:

" HEADS OF AGREEMENT
BETWEEN
TIBBY'S AUTO SUPPLIES LTD.
&
PRESTO CAR RENTALS LTD.

Tibby's Auto Supplies Ltd. (hereinafter referred to as Tibby's) has entered into an agreement with Presto Car Rentals (hereinafter referred to as Presto) along the following lines:

(1) Tibby's will settle the debts of Presto Car Rentals Ltd. as follows:

(a) C.I.B.C. (J.A.) Ltd.
$759,256.00

(b) Dyoll Merchant Bank
495,648.00

$1,254,904.00

(2) All vehicles in the name of Presto Car Rentals Ltd. will be transferred to Tibby's.

The schedule is as follows:

10	1985	Toyota Starlets
4	1985	" Corollas
1	1985	" Corona."

Both agreements were entered into between the first appellant and the respective company and dated May 31, 1989.

Mr. Tibby said, in evidence (at page 89 of Volume 1 of the record):

> "I know Efficient Car Rentals Limited and Presto Car Rentals Limited. In 1988 Tibby's bought 5 cars from Efficient (Starlets). In 1989 those 5 Starlets serviced and improved, were being seized. The Bank that carried the bill of sales (sic) decided to redeem them.
>
> At that time had discussion which resulted in my purchasing the company and all its assets March/April '89." (Emphasis added)

At that period of time in Jamaica there was a restriction on the importation of new cars. However, car rental companies were permitted to import a number of cars proportionate to the amount of foreign exchange earned in the car rental business for the preceding year and lodged with the Bank of Jamaica. This was referred to as a quota. The first appellant obtained from Efficient Car Rentals Limited to make up for the latter's deficiency of its assets involved in the said purchase, its entitlement to a

quota to purchase new cars. Exhibit 11 reads in paragraph 8 on page 111 of Volume 2:

> "(8) In view of the shortfall between the monies paid by Tibby's and the value of the vehicles transferred, Efficient has agreed to assign to Tibby's the following:
>
> (a) 5 vehicles allowed them based on their 1987 deposits of foreign exchange.
>
> (b) All vehicles due them based on their 1988 deposits of foreign exchange."

As a consequence, the appellants placed an order for eighteen new cars, based on the quotas for cars that they then controlled. They also arranged the financing for the purchase. Mr. Owen Tibby said, in evidence, at page 92 of Volume 1:

> "We had many meetings discussing the purchase. Managers and directors of Praise Tours and Tibby's in discussion. Mr. Mullings participated in those meetings as a director of Praise Tours and Praise Travel. These were joint meetings of these companies - we were trying to join all our companies with a group of companies using the same directors. After we got the quota from Efficient, we selected the types of cars with the advice of the technical people. I then placed the orders for the cars (18). I was ordering for them for the companies Praise Tours and Tibby's. Immediately after submitting the quota to the car company I made arrangement for the financing of them. I made arrangements for lease partly from IFCOL/JCB, Weststar Finance Corporation.
>
> We also had a line of credit with JCB/IFCOL. In making these financial arrangements, I have as securities my home and everything the company had plus the leases of the cars and services." (Emphasis added)

The first appellant obtained a loan from Weststar Finance Limited, structured as a lease dated July 11, 1990, in which the latter company was the owner of the said cars and the first appellant the hirer. The said lease, exhibit 16, embraced thirteen Mazda motor cars including motor car 240A which was eventually assigned to the respondents. The schedule to the said lease between the first appellant and Weststar Finance Limited reads, inter alia:

> "Schedule to Lease No. 013/90 dated the 19th day of July, 1990
>
> Hirer: Tibby's Auto Supplies Limited (herein called 'the Hirer').
>
> Address: 103 Maxfield Avenue, Kingston 13.
>
> Effective date shall be July 24, 1990, or the date upon which the Hirer has accepted the Equipment and the Owner has paid therefor, whichever shall first occur. If the Effective Date does not occur before July 24, 1990, the Owner shall have no further obligation to lease the Equipment to the Hirer under this Schedule.
>
> Total Cost of Equipment covered by this Schedule $2,015,000.
>
> The term of this lease for each item of Equipment covered by this Schedule shall commence on the Effective Date specified above and shall continue for a period of thirty-six months. As rent for the Equipment covered by this Schedule throughout the term hereof, the Hirer hereby agrees to pay the Owner the sum of $96,272.23 per month in advance commencing on the Effective Date and any other sums per month as may be applicable under the rental agreement."

The said lease further stipulates in clauses 16 to 18, inter alia:

> "16. Assignment:

This Agreement is persona; to the Hirer and is not assignable by the Hirer who shall nor (sic) part with possession of the Equipment or assign mortgage, encumber or deal with this Agreement in any way whatever or the Hirer's interest herein on (sic) hereunder or attempt or purport so to do. The Owner may assign, mortgage, encumber, charge or deal in any way whatever with its interest in the Equipment or hereunder.

17. Default Interest and Costs:

Should the Hirer fail to pay any part of the Rental falling due during the initial period set out in the Schedule hereto herein reserved or nay (sic) other sum required by the Hirer to be paid to the Owner within seven (7) days after the due date hereof the Hirer shall pay to the Owner interest on such arrears form the expiration of the said seven (7) days until paid at the rate of twenty (20) per centum per annum.

All costs incurred by the Owner in obtaining payment of such arrears or in endeavouring to trace the whereabouts of the Equipment or in obtaining or endeavouring to obtain possession thereof whether by action or suit or otherwise shall be recovered form (sic) the Hirer in addition to and without prejudice to the Owner's right for breach of this Agreement.

18. Ownership:

The Equipment shall at all times remain the sole and exclusive property of the Owner and the Hirer shall have no right title or interest therein except as bailee."

Of these new cars bought, the 1st defendant/appellant assigned to the respondent, two motor cars namely,

(1) Mazda motor car licensed 240A

(2) Toyota Corolla motor car licensed RR 6643

This latter motor car was financed by the first appellant by way of lease No. 419/90 with the said Weststar Finance Company, presumably made in 1990 and referred to in the schedule to a restructured lease No. 621/91 dated 14th October, 1991, exhibit 19.

In 1991, the first appellant assigned to the respondents motor car 1991 Suzuki, licensed RR 0027, vide lease agreement between Weststar Finance and the first appellant. The schedule to the said lease exhibit 17 reads inter alia:

> "WESTSTAR FINANCE LIMITED
> LEASE SCHEDULE #01/91
>
> Schedule to Lease No. 002/91 (sic) dated the14th day of June 1991
>
> (1) Hirer: TIBBY'S AUTO SUPPLIES LIMITED (herein called "the Hirer").
>
> Address: 103 MAXFILED AVENUE, KINGSTON 13
>
> Hirer's Reg. No. and/or Purchase Order No.
>
> (2) Effective date shall be June 14 1991 or the date upon which the Hirer has accepted the Equipment and the Owner has paid therefor, whichever shall first occur. If the Effective Date does not occur before _____the Owner shall have no further obligation to lease the Equipment to the Hirer under this Schedule.
>
> (3) Total Cost of Equipment covered by this Schedule
>
> $1,900,000.00.
>
> (4) The term of this lease for each item of Equipment covered by this Schedule shall commence on the Effective Date specified above and shall continue for a period of THIRTY-SIX months. As rent for the Equipment covered by this Schedule throughout the term hereof, the Hirer hereby agrees to pay the Owner the sum of $86,027.78 per month in

> advance commencing on the Effective Date and any other sums per month as may be applicable under the rental agreement."

The "assignment" of the said three cars in question were by way of sale to the respondents, the cost of which the latter agreed to repay to the first appellant.

Exhibit 1, the letter dated August 29, 1990, concerning Toyota Corolla RR6643 reads, inter alia:

> "Dear Mr. Mullings,
>
> Re: Purchase of 1990 Toyota Corolla
> Chassis No. EE 900283074
> Licence No. RR6643
>
> The above vehicle was purchased on your behalf for Auto Rental purposes, by Tibby's Auto Supplies Ltd. (Car Rentals) on the 18th July 1990. The total cost is Two Hundred and Four Thousand, Seven Hundred and Twelve Dollars and Six Cents ($204,712.06).
>
> This is broken down as follows:

Purchase price	185,694.61
Security deposit	7,427.78
Terminal Value	9,284.73
Insurance & Endorsement fee	
Processing & Commitment fee	1,856.94
Licence fee	198.00
Licence Plates	250.00
Transfer fee	-
	204,712.06

> The terms and conditions governing the repayment of the above sum are as outlined below:

Asset:	1990 Toyota Corolla
Total cost:	204,712.06
Loan amount:	204,712.06

Pricing Terms
The interest rate is 23% per annum add-on for thirty six (36) months. This is charged on the principal less the terminal value.

Repayment Terms
The principal plus the interest charged is payable in two (2) parts. The purchase price and terminal value are payable over the first twelve (12) months.

The monthly payments in the first twelve (12) months will be Nine Thousand Nine Hundred and Seventy Two Dollars and Eighty Three Cents ($9,972.83). Subsequent monthly payments for the remaining twenty four (24) months will be Eight Thousand Nine Hundred and Seventy Five Dollars and Twenty Three Cents ($8,975.23).

Payments are due and payable on the 8th July 1990 and continuing for thirty five (35) consecutive months thereafter."

Letter dated October 3, 1990, exhibit 2A, corrected the amounts of $8,910.01 and $7,711.11 to read $7,958.63 and $6,759.72 respectively.

Exhibit 2, letter dated August 29, 1990, concerned Mazda RR 240A. It reads, inter alia:

"Dear Mr. Mullings,

Re: Purchase of 1990 Mazda 323
Chassis No. BG 1031105837
Licence No. RR 240A

The above vehicle was purchased on your behalf for Auto Rental purposes, by Tibby's Auto Supplies Ltd. (Car Rentals) on the 24th July 1990. The total cost is One Hundred and Fifty Two Thousand, One Hundred and Nine Dollars and Fifty Three Cents ($152,109.53).

This is broken down as follows:

Purchase price	137,000.00
Security Deposit	7,461.53

Terminal Value	3,600.00
Insurance & Endorsement fee	-
Processing & Commitment fee	3,600.00
Licence fee	198.00
Licence plates	250.00
Transfer fee	-
	152,109.53

The terms and conditions governing the repayment of the above sum are as outlined below:

Asset:	1990 Mazda 323
Total:	$152,109.53
Loan amount:	$152,109.53

Pricing & Terms

The interest rate is 25% per annum add-on for thirty six (36) months. This is charged on the principal less the terminal value.

Repayment Terms

The principal plus the interest charged is payable in two (2) parts. The purchase price and terminal value are payable over a period of thirty six (36) months. All other charges are payable over the first twelve (12) months.

The monthly payments in the first twelve (12) months will be Eight Thousand Nine Hundred and Ten Dollars and One Cent ($8910.01). Subsequent monthly payments for the remaining twenty four (24) months will be Seven Thousand Seven Hundred and Eleven Dollars and Eleven Cents ($7,711.11).

Payments are due and payable on the 24th July 1990 and continuing for thirty five (35) consecutive months thereafter."

Exhibit 4, letter dated September 12, 1991, concerned Suzuki RR 0027. It reads, inter alia:

"Dear Mr. & Mrs. Mullings,

Re: Purchase of : 1991 Suzuki Fronte

Chassis No.	:	CB15206613
Engine No.	:	F8B466796
Licence No.	:	RR0027

The above vehicle was purchased on your behalf for Auto Rental purposes, by Tibby's Auto Supplies Ltd. (Car Rentals), on the 28th June, 1991.

The total cost is One Hundred & Eighteen Thousand, One Hundred & Fifty Seven Dollars & Forty-Four Cents $118,157.44). This is broken down as follows:

Purchase Price	:	100,955.12
Security Deposit	:	10,053.46
Terminal Value	:	2,019.10
Commitment Fee	:	1,110.08
Stamp Duty & Endorsement Fee	:	857.68
Licence Fee	:	162.00
Processing Fee	:	3,000.00
		$118,157.44

The terms and conditions governing the repayment of the above sum are as outlined below:

Asset	:	1991 Suzuki Fronte
Total Cost	:	$118,157.44
Loan Amount	:	$118,157.44

Pricing & Terms

The interest rate is Twenty-Five (25%) per annum add-on, for thirty six (36) months. This is charged on the principal less the terminal value.

Repayment Terms:

The principal plus the interest charged, is payable in two (2) parts. The Purchase Price and Terminal Value are payable over a period of thirty six (36) months. All other charges are payable over the first twelve (12) months.

The monthly payments in the first twelve months will be $6,545.20. Subsequent monthly payments for the remaining twenty-four (24) months will be $4,963.62.

> Payments are due and payable on the 28th day of each month, beginning on the 28th July, 1991 and continuing for thirty five (35) consecutive months thereafter."

Each of the said agreement letters, exhibits 1, 2 and 4, referred to the rental provisions. Each contained as the concluding paragraph:

> "**Rental:**
>
> Praise Tours and Car Rentals Ltd., will rent the vehicle on your behalf. The maintenance of the vehicle is your responsibility. Monthly Statements will be provided, detailing the earnings of the car. Deductions will be made from these amounts to cover the loan repayments. Any other miscellaneous costs will also be deducted.
>
> In the event that the amounts earned for the month does not cover the monthly loan obligations, the deficit should be paid by you, as the amounts are still due and payable. Personal arrangements should be made to buffer any short fall in your payments.
>
> We trust you will find the above terms acceptable and we do look forward to a rewarding business relationship."

In addition, in respect of the said Toyota RR 6643 and Mazda 240A, there was a specific agreement, exhibit 3, between Praise Tours Limited and the respondents, described therein as "the owner" who "agreed to contract vehicle to Praise Tours" and the said second appellant agreed to rent the said cars on behalf of "the owner". The respondents agreed to pay a service charge of "fifteen percent (15%) of the rental charges", assume the responsibility for all repairs and insurance charges, and litigation in the event of an accident.

Monthly statements of rental, in respect of whichever of the said cars was rented, were submitted by the second appellant to the respondents, for the period from August 1990 to September 1992.

Statements of "car loan payment" were submitted monthly to the respondents in respect of each of the said three cars for periods from October 1990 to March 1992 by the first appellant "Tibby's Auto Supplies Limited", and from April 1992 to August 1992 by the second appellant "Praise Tours and Auto Rentals Limited (an affiliate of Tibby's Auto Supplies Limited)." These latter statements detailed the purchase price, amount owing on each car and the balance due after deduction of payments from rental monies earned.

In September 1992, as a result of a disagreement between the respondents and Owen Tibby, managing director of the appellant companies, the respondents took their cars, with the exception of the said three cars, Toyota Corolla RR 6643, Mazda RR 240A and Suzuki RR 0027, from the said fleet of rental cars. The respondents were prevented from taking the latter three cars. Owen Tibby said in evidence, at page 104 of Volume 1:

> "There were 3 cars he not permitted to take (1) the Corolla RR6643, (2) Mazda RR2408 and (3) Suzuki RR0027 - these were the ones on lease. These cars were not our cars, they were actually the banks' cars. RR6643 - IFCOL/JCB: RR2408 and RR0027 - Westcar Finance Company banks had them as security - they had a loan on them - still subject to the loans. This in 1992 - between October and November 1992. The Westcar leases remained up to 1993. The Toyota Corolla - until now to JCB. Not the only car leased to Westcar - about 19 or 20 cars.

> I don't think I could release one car. The leases were collective."

After September 1992, the appellants continued to rent the said three cars. However, no rental income was paid to the respondents. Subsequently, the Mazda RR 240A was involved in an accident. Owen Tibby said in evidence at page 105 of Volume 1:

> "The Mazda RR2408 met in an accident. As a result – car written off. Mr. Mullings was informed about this immediately. Sometime after Mr. Mullings brought a body man – March 1993. He asked me permission to take car away – I refused as we have enough facilities at 72 Half-Way-Tree Road – car belonged to the bank. I would not allow car to leave premises."

In respect of the payments on the said cars, Owen Tibby said in evidence, on page 105 of Volume 1:

> "In October 1992 Mr. Mullings had not paid off from the leasing of his cars.
>
> After the Mullings left they had no further relationship with Praise Tour or Tibbys. They had with Praise Travel.
>
> When Mr. Mullings asked me to release the 3 cars to him, I told him cars were on lease and that they were committed to the bank."

In respect of the payment of quota costs claimed by the appellant, Owen Tibby said in evidence at page 106 of Volume 1:

> "Agreement between Mr. Mullings and I that he would repay the quota cost. All the time the agreement was drawn up all these costs were not known in figures we had an idea of the quota cost – there was a base figure of $1.3M for all the cars. There were other costs too."

The appellants contend that exhibit 1 (Corolla), exhibit 2 and 2a (Mazda) and exhibit 4 (Suzuki) do "not completely set out relationship between" the appellants and the respondents in respect of the said cars. In particular, the appellants claim that the respondents are obliged to pay the increased interest costs on the loan payable by the appellants to the bank. Owen Tibby also said in evidence, at page 106 of Volume 1:

> "I look at exhibit 1. The amount of $204,712.06 was paid by Tibbys Auto Supplies. Under rental loan repayments to be made to the bank JCB/IFCOL in the other cases Westcar and subsequently Eagle, Mr. Mullings responsible for meeting all the cost RR6643. He was also responsible for meeting all the costs to the other two vehicles."

and specifically in respect of the interest charges at page 109, Volume 1:

> "The difficulties faced regarding interest rates is that they moved from 13% add on to 41%. We started with a loan from close to 18M and after 2½ years our penalties and late payment brought that debt to $28M at end of 1992. During that period we paid on an average $50,000 per day i.e. $2500 per hour - $41 per minute. This is same loan for the pending (sic) of the 3 cars which formed a part."

The statements of account from the second appellant of the loan payment by the respondents and the balances in respect of the said cars sent to the respondents and each dated August 3, 1992, showed a total balance owing in respect of the cars as $132,738.74 (see exhibits 6.24A, 6.24B and 6.24C).

The respondents contend that by October 1992 they would have fully paid off the loan in respect of the said three cars from the rental monies due to them. The appellants had refused to release the said cars to them,

claiming that an amount of money was still owing and payable by the appellants for increased interest charges, and that the entire loan to the respondents had to be repaid to the lending agencies before any release could be effected.

The grounds of appeal argued by Mr. Morrison, Q.C., summarized, are that the learned trial was incorrect in giving judgment for the plaintiffs/respondents in that he:

(1) erred in finding that exhibits 1-4 constituted the complete agreement between the parties, in that the evidence indicates an agreement that the respondents pay interest in excess of that stated in the agreement;

(2) erred in finding that exhibits 1-4 constituted the complete agreement between the parties, in that the evidence indicates an agreement that the respondents pay quota costs;

(3) erred in not making a distinction in his finding in respect of each respondent in accordance with the differing allegations of breach of contract;

(4) erred in finding against the first appellant, in that there was no evidence of the latter "facilitating or procuring or inciting" along with the second appellant, breaches of contract;

(5) erred in finding that the respondents were entitled to the return of the said cars in October 1992, because:

(a) it was not in accordance with any agreement;

(b) to the respondents' knowledge, in any event, the said cars were subject to financing agreement between that first appellant and financiers;

(c) the respondents had not paid the purchase price of the said cars;

(6) erred in finding that there were no sums due from the respondents to the appellants for loan repayments to the financiers, and other expenses in respect of the said three cars.

In support of the grounds of appeal, Mr. Morrison, Q.C., argued that there was compelling evidence from which the court could have held that there was an oral agreement that the respondents pay increased interest rates and quota costs passed on when the financiers did so, and consequently the learned trial judge erred in finding that the documents exhibits 1, 2, 3 and 4 constituted the complete agreement between the parties; it was unreasonable to find that such charges were "factored into" the written agreements in the absence of any such evidence; there was no act of inducement on the part of the first appellant to ground a finding of "facilitating or procuring" as alleged; the return of the said cars to the respondents was subject to the fulfilment of the loan repayment; the learned trial judge erred in finding that no sums were due to the appellants in view of the evidence of the accountant. He concluded that the court should look at all the evidence to discover the intention of the parties. The written documents did not contain the entire agreement, in the intention of the parties, therefore, the oral agreement should be read along with the said documents or this court should find that there existed a collateral contract, with respect to the payment of increased interest and quota costs.

Mrs. Minott-Phillips for the respondents argued that there was no evidential basis nor any inference that should be drawn, to find that the

contract was partly in writing or that there was a collateral agreement in respect of the increased interest payment or quota costs; the statements sent by the appellants to the respondents show what was deducted, that the appellants controlled the deductions and returned to the respondents the balance of earnings; the appellants, paying interest rates that "moved from 13% add-on to 41%", were making a windfall and therefore not entitled to claim any increased payment from the respondents who were subject to a rate of, a minimum of 23%; in the circumstances, there could not have been an initial oral agreement to be subject to charges of the finance company; the lease financing between the first appellant and Weststar Finance Company was exclusively for the former's benefit; the lease agreements between both pre-date the agreements reflected in exhibit 2 (Mazda) and exhibit 4 (Suzuki), which latter agreement between the first appellant and the respondents made no reference to the former. No quota acquisition cost was suffered by the appellants, who acquired the quotas of the Efficient and Presto companies to prevent the seizure of Efficient's five cars, and the respondents correspondingly purchased the Corolla and Mazda motor cars at increased purchase prices. She concluded that both appellants, by their detention of and refusal to hand over to the respondents the cars which the latter had paid for, were liable in detinue and guilty of interfering with the contractual relations of the respondents.

Where parties to a contract have reduced it into writing, parol evidence will not be admitted to vary or contradict its clear terms. However, as an exception to this rule, if the parties have agreed on any terms which

are not reflected in the written document, parol evidence is admissible to be read along with the terms of the document to constitute the complete agreement between them.

The learned author in the ***Law of Contract by Cheshire, Fifoot and Furmston***, 11th edition, referring to the effect of oral evidence on the written document, said at page 119:

> "In each case the court must decide whether the parties have or have not reduced their agreement to the precise terms of an all-embracing written formula. If they have, oral evidence will not be admitted to vary or to contradict it; if they have not, the writing is but part of the contract and must be set side by side with the complementary oral terms. The question is at bottom one of intention and, like all such questions, elusive and conjectural. It would seem, however, that the more recent tendency is to infer, if the inference is at all possible, that the parties did not intend the writing to be exclusive but wished it to be read in conjunction with their oral statements."

In the case of ***S. C. Ardennes (Cargo Owners) v. Ardennes (Owners)*** [1951] 1 K.B. 55; [1950] 2 All E.R. 517, the plaintiffs shipped their cargo of oranges from Spain on the defendants' vessel, based on an oral promise by the defendants that they would be sailing straight to London. The defendants went first to Antwerp and arrived in London later than the plaintiffs expected, thereby missing a lucrative market. Sued by the plaintiffs, the defendants sought to rely on a clause in the bill of lading that permitted the vessel to proceed "by any route and whether directly or indirectly" to London. The court held that the oral promise made by the defendants was equally a part of the written agreement and binding upon them. The plaintiffs succeeded. Clearly, the defendants, mindful of the

terms of the bill of lading, were guaranteeing that the vessel would sail directly to London.

It must, however, be evident that the parties intended that the oral evidence should be construed as a part of the contract although not incorporated in the written agreement.

Speaking of the parol evidence rule, the author in ***Interpretation of Contracts*** by Kim Lewison, Q.C., 2nd Edition, at paragraph 2.07, page 17, said:

> "...evidence is admissible to show that the writing was not intended to be the entire contract between the parties. On the face of it, this exception to the rule seems to be almost destructive of the rule itself. However, the party alleging that the written document does not represent the full contract has to counter a presumption that it does. In ***Gillespie v Cheney Egar & Co.***, [1896] 2 Q.B. 59, 62, Lord Russell of Killowen C.J. said:
>
> > 'When parties have arrived at a definite written contract, the presumption is that the writing was intended to contain all the terms of the contract; but it is a presumption only, and either party may allege an antecedent express stipulation intended to continue in force with the written contract, and may contend that the written contract was not intended to include all the terms'."

However, where any doubt exists, the subsequent conduct and acts of the parties may show whether or not any oral agreement exists, to be incorporated into, or to vary in any way the written agreement.

In discussing the scope of the rule, the author in ***Chitty on Contracts***, Volume 1, 27th edition, at paragraph 12-083, page 601, said:

> "If ...the court finds that the document is a complete record of the contract, then it will reject

> the evidence of additional terms. But it will do so, not because it is required to ignore the additional terms or the evidence said to prove them, but because such evidence is inconsistent with its finding that the document does contain the whole terms of the parties' agreement. No doubt, in practice, where a document is produced which appears to be a complete contract, a party will experience considerable difficulty in proving, on the balance of probabilities, that further contractual terms were agreed outside the written terms of the document. But extrinsic evidence of such terms is not *ipso facto* excluded."

The question, therefore, that arises is whether or not exhibits 1, 2, 3, 4 and 4a comprise the complete contract between the parties, or, on the other hand, whether there was, in addition, an oral agreement that ought to be considered and read along with the said documents to form the said contract for the payment of increased interest and quota costs.

The first appellant entered into an agreement for a loan with IFCOL Limited initially in 1988. The respondents were not a party to that loan, nor liable for its repayment. In 1990, when the Corolla motor car RR 6643 was purchased with the aid of an IFCOL loan, the liability of the respondents concerned the repayment to the appellants of the purchase price of the said car, and cannot extend to the appellants' prior indebtedness to IFCOL Limited. When the parties agreed on the terms of the contract, in respect of Corolla motor car RR 6643, and exhibit 1 was completed, the parties had thereby identified initially, and calculated the interest payable for the entire life of the loan, "36 months". No provision was made in the said exhibit 1 for the payment by the respondents of increased interest, nor was any contemplated by the parties. The provision was "Interest rate 23% add-

on..." The IFCOL Limited loan of 1988 was still outstanding and payable by the appellants. If it were in the contemplation of the parties, that an increase of interest payable on that 1988 loan should also be borne by the respondents, one would have expected the parties to have dealt with that liability in exhibit 1, which was concluded on 29th August, 1980. In its detailed recital, exhibit 1 reads, inter alia:

> "The principal plus the interest is payable in two parts...
>
> **(a)** monthly payments in the first (12) months $9972.83 **$119,673.96**
>
> **(b)** subsequent monthly payments (24) months $8975.23 **$215,405.52**
>
> **$335,079.48"**

This represents the entire total amount of the contract cost of the said Corolla RR 6643, $204,712.06 plus interest, making a total of $335,079.48 payable by the respondents. The interest rate of "23% add-on", must have been, in the circumstances, an acceptable reasonable rate in the contemplation of the parties. It was moreso, a rate to the benefit of the appellants, calculated as it was at 23% add-on for the entire period of 36 months on the original loan amount, instead of on the reducing balance of the principal. Owen Tibby, the witness for the appellants, said at page 109 Vol. 1:

> "The difficulties faced regarding interest rates is that they moved from 13% add on to 41%. We started with a loan from close to $18M and after 2½ years our penalties and late payment brought

> that debt to $28M at end of 1992. During that period we paid on an average $50,000 per day i.e. $2500 per hour - $41 per minute. This is same loan for the pending (sic) of the 3 cars which formed a part."

Mark Hutchinson, a witness for the appellants, speaking of the increased interest payable, said at page 120:

> "For vehicle RR6643 it was financed by IFCOL Lease Limited in April 1991. There was a 36 months financing arrangement on a cost of $218,266.74. During period April 1991 - March 1994 - interest rates changed on the financing - changed some 4 times. It started out in April 1991 at 23% lasting to March 1992 - in April 1992 it changed to 32% applicable for 2 months - in June 1992 there was an increase to 39% - in October 1992 it decreased to 35% - as a result of these - increases and decreases an overall additional interest cost for vehicle $51643.03¢.
>
> On vehicle RR0027 & RR240A - they were financed by Weststar."

The above evidence of Owen Tibby, at p. 109, which was heard by the learned trial judge, revealed that the appellants' loan, "at the end of 1992" had "moved from 13% add-on to 41% ...after 2½ years." The rate of interest being paid by the appellants to the finance companies in June 1990 according to the witness Owen Tibby was then "13%". Hutchinson correspondingly stated that such interest on the IFCOL lease "started out in April 1991 at 23% lasting to March 1992..."

Consequently, in August 1990 when the contracts, exhibits 1 and 2, came into effect in respect of Corolla RR 6643 and Mazda RR 240A, the rate of interest being paid by the appellants to the finance companies on their own loans was a mere 13%. On the evidence of the appellants' witness, Hutchinson, in April 1991 the IFCOL interest rate was then still "23% lasting

to March 1992." On the basis of that evidence, it was open to the learned trial judge to find that it was even more advantageous to the appellants to agree in August 1990 that the respondents pay an interest rate, calculated at a fixed rate of 23% on exhibit 1 which rate was to continue on the original principal amount for 36 months to the exclusion of any further oral agreements.

In respect of motor car Mazda RR 240A, as shown on exhibit 2, dated August 29, 1990:

> "The interest rate is 25% per annum add-on for thirty-six (36) months. This is charged on the principal less the terminal value"

and in respect of motor car Suzuki RR 0027, as shown on exhibit 4, dated September 12, 1991:

> "The interest rate is twenty-five (25%) per annum add-on, for thirty-six (36) months. This charged on the principal less the terminal value."

In respect of both the Mazda RR 240A and the Suzuki RR 0027 motor cars, although the appellants were paying at an interest rate on their loans of "23% lasting to March 1992", the respondents were paying to the appellants interest at the rate of "25% add-on" calculated on a fixed initial amount for the entire loan period of 36 months notwithstanding the fact of the reducing principal. This was evidence sufficient for the learned trial judge to find that no other rate of interest payment was contemplated by the parties and consequently the entire contract was contained within the limits of exhibits 1, 2, 2A, 3 and 4.

The entitlement to a quota to import car for the company Efficient Rentals Limited was acquired by the appellants on the purchase of the said company (see exhibit 11). The order was placed for the eighteen cars contained in the quota. According to the witness Owen Tibby:

> "I was ordering them for the companies Praise Tours and Tibby's..."

Although the appellants claim that the respondents agreed to pay "quota costs" and the witness Owen Tibby said:

> "All the time the agreement was drawn up all these costs were not known in figures we had an idea of the quota cost – there was a base figure of $1.3M for all the cars. There was other costs too",

no attempt was made to even mention the term "quota cost" in any of the agreements, exhibits 1, 2, 2A, 3 or 4, nor was any attempt made to calculate and charge such costs. For example, an apparent cost, if sincerely due, could have been calculated from the "idea... base figure of $1.3M..." divided by eighteen, the amount of the quota costs. Furthermore, the fact that "there were other costs too" was reflected in the said exhibits subsequently prepared. These "other costs" together with service charges, were all deducted by the appellants from the rental earned in pursuance of such agreements, prior to remitting the balance to the respondents.

The respondents' case was that there was no agreement to pay quota costs, although Mullings did say in evidence that he suspected that he "was paying a quota costs for ...it might be the Corolla." No amounts for quota costs were ever claimed, reflected in the monthly statements, nor deducted from the rental earned. This contention that a quota cost is due and payable

by the respondents seems to be a distinct afterthought. In so far as the learned trial judge found that the quota costs were "factored into the document", he was in error. However, in the circumstances, there is no basis for the appellants' complaint in this regard.

The said three cars were purchased by the first appellant on behalf of the respondents, who "owned" the said cars. Titles to the cars were registered, in this manner:

> (1) Corolla in the name of Tibby's/Praise Tours Car Rentals Limited
>
> (2) Mazda in the name of Praise Tours Limited (exhibit 14), and
>
> (3) Suzuki in the name of Tibby's Auto Supplies Car Rental Limited (exhibit 15).

Each of the exhibits 1, 2, 2A and 4, letters from the first appellant, recite:

> "Praise Tours and Car Rentals Limited ...will rent the vehicle on your behalf..."

The rental agreement, exhibit 3, describes the second appellant as an "Affiliate of Tibby's Auto Supplies Limited." None of the entities, therefore, in which the said cars were registered on the respective titles, was strictly, in name, either of the appellants.

The rental provisions recited in exhibits 1, 2, and 4, were done by the first appellant on behalf of the second appellant, namely,

> " ... the earnings of the car. The deductions will be made from these amounts to cover the loan repayments."

The witness Owen Tibby, who was managing director of the second appellant, and director of the first appellant and Weststar Finance Limited,

operated through the functions of the said companies, for the majority of time, as a sole individual. It was he, on his evidence, who "invited the Mullings to participate ..." in the rental venture, he placed the order for cars, under the quota, made arrangements for financing, assigned cars to the respondents, and said:

> "I paid off the leases as I am a director of Weststar Finance Limited and Tibby's –the loan was in a very untidy state and (sic) able to pay our debt or monthly payment embarrassed ... could not make the monthly payments as I had an almost fatal accident – not able to work ... company's (sic) nearly destroyed ..."

When the respondents were accused of favouring their cars for rental above the others he invited them to his home for a meeting prior to a board meeting of the appellants. The learned trial judge found, on page 40 of Volume 1:

> "It is clear that the defendants did not maintain the distinction between the two companies in so far as the acquisition of the cars was concerned. The payments by the plaintiffs for the 3 cars allocated to them by the first defendant, were conveyed by the second defendant directly to the first defendant from monies earned by the plaintiffs from the rental of their cars by the second defendant. As a result of this the second defendant was able to and did control the amount of money actually paid over monthly to the first defendant for the acquisition of the cars, for these reasons the defendant companies would be liable jointly and severally for any breaches of contract. "

There is no evidence of specific corporate resolution. Some decisions of the "Board" were made. The learned trial judge may well have correctly

inferred that the appellants were being operated by Owen Tibby as his individual operation.

The appellants, by the act of Owen Tibby, who stated "... There were three cars he not permitted to take. ... I don't think I could release one car," denied the respondents the control of the said three cars. This was an indirect way to interfere with any contractual arrangements with the said rental cars, whether with the unlikely second appellant or otherwise. When the appellants, through the medium of Owen Tibby, thereafter rented out the respondents' cars after July 1992, "the Mazda met in an accident", sending them no monies as rental, allotting no payment towards the car loan repayment account and submitting no statements after September, 1992, these were acts by both appellants facilitating breaches of the rental contract between the respondents and the rental company.

Exhibits 6.24(a) and 6.24(b) and 6.24(c) were admitted in evidence as statements from "Praise Tours and Auto Rentals Limited (An affiliate of Tibby's Auto Supplies Limited)" detailing the balance of "car loan payments", in respect of the motor cars,

Mazda RR 240A
Corolla RR 6643
Suzuki RR 0027

as $13,000.00, $51,592.99 and $68,145.76, respectively, making a total of $132,738.74.

The learned trial judge had evidence from which he could and did find the average earnings of the respondents' cars in 1992. Mr Mullings said, at page 84 Volume 1,

> "The average income earned from the 3 cars is just over $37,000.00."

and at page 78 of Volume 1:

> "In September '92 the total loan repayment less increased interest made by me were lease (sic) than that stated in the documents. All documents showed there was a small balance owing on each car. I know there was a balance on each car as of August '92. By the end of September I would have fully paid off for the cars – the latest being October '92."

The learned judge also found that the monthly expenses borne by the respondents was $5,000.00 (see page 62). The monthly net earnings from rental of the three cars for the months of August and September 1992, were $34,626.02, and (exhibit 5.27) $36,629.25 (exhibit 5.28). Neither of these amounts was paid to the respondents. There was evidence from which the learned trial judge could find the average earnings for the month of October, 1992 and the security deposit on each car refundable to the respondents. The learned trial judge accepted the evidence of the respondents that the said three cars would have been paid off by the respondents by October, 1992, with an amount of $12,402.45 owing by the appellants to the respondents. I see no reason for this Court to disturb these findings of the learned trial judge.

Accepting the evidence of the respondents' witness Colin Young, the learned trial judge found that in 1992, the values of the Corolla, the Mazda and the Suzuki motor cars, were $340,000.00, $350,000.00 and $215,000.00 respectfully, a total of $905,000.00.

Because each of the said three cars was bought on behalf of the respondents by the first appellant, the former was therefore the beneficial owners. Exhibit 1, 2, 2A and 4 contain the contractual terms of repayment by which the appellants and the respondents were bound. Having fully repaid the first appellant, there no further obligation on the respondents to make any further payment. There was no contractual relationship between the respondents and either the Weststar or the IFCOL finance companies. The appellants, by entering into the specific contracts, exhibit 1, 2, 2a and 4 with the respondents, thereby circumscribed the limits of the parties obligations namely, 36 months repayment and refund of the security " ... at the termination of the loan."

The fact that two of the said cars, the Corolla and the Mazda were subject to loans, held by the financiers, did not relieve the appellants of their responsibility that title to the said cars should have been transferred to the respondents on completion of the repayment, in October 1992. Exhibits 1 and 2 contemplated such a transfer, those documents bear a notation "Transfer fee." In any event, when exhibit 1, in particular, was created on August 29, 1990, that was the contemplation of the parties.

The lease agreement to secure a loan between the first appellant and the Jamaica Citizens Trust and Merchant Bank Limited, was entered into on October 14, 1991. The first appellant included the said Corolla RR 6643 in its schedule as security for the loan. That right was never a term of the contract (exhibit 1) made previously on June 25, 1990. Furthermore, by so including the said car as a part of the security, the first appellant was

consciously encumbering and was impeding the re-transfer of the title to the respondents, the true beneficial owners.

Accordingly, being unable or unwilling to transfer the title and hand-over the cars, on the request of the respondents on completion of the repayment of the purchase costs, the appellants committed the tort of detinue.

The finding by the learned trial judge on page 39 of volume 1:

> "... no contractual relationship exists between IFCOL, WESTSTAR, EFFICIENT AND PRESTO LTD. and the plaintiffs, the arrangements regarding the quotas and leasing are matters between Mr. Tibby, the defendant companies and those entities. There is no reference in any document that the arrangements contained in Exhibits 1, 2, 2A, 3 and 4 are hinged to the obligations which the first defendant had to Efficient Ltd. and Weststar Limited.
>
> In the absence of any express term to the effect, I find that the plaintiffs are not parties to the equipment lease agreement in Exhibits 11, 16 and 17, hence they are not affected in any way."

cannot be faulted.

The respondents owed the financiers no obligation for the repayment of the loans made to the appellants.

From the evidence led the learned trial judge found that the average rate of interest relevant to commercial matters, at the relevant period was 44.95% and consequently entered judgment for the respondent in the sum of $912,402.45 plus interest at 44.95% from 1st November, 1993 to 30th September, 1990. I agree with his findings and conclusions.

I find no merit in the grounds of appeal. I would dismiss the appeal with costs to the respondents to be agreed or taxed.

LANGRIN, J.A.

I have read in draft the judgments of Downer and Harrison JJA. and I agree with the reasoning and conclusions stated therein and have nothing to add.

DOWNER, J.A.

The main issue in this case is whether the detailed written agreement concerning the hiring and sale of motor cars between the appellant companies and the respondents governed the commercial relations between the parties. During the period when interest rates rose rapidly the appellant companies saw no need to make express provision in the relevant agreements for an upward variation of the interest rates. They had sought to persuade Pitter J. in the Court below and this Court, that there were understandings between the parties that, increased interest rates and quota costs which the appellant companies had to pay their financiers should be met by the respondents. The law on this issue as Mrs. Minott-Phillips submitted is clear. Resort to extrinsic oral evidence to create additional contractual obligations stated in the written agreements is rare.

My brother Harrison J.A. has cited the relevant passages in the textbooks on this issue and made specific references to **S.C. Ardennes (Cargo Owners) v. The Ardennes (Owners)** [1951] KB 55 and **Gillespie Brothers & Co. v. Cheney, Edgar & Co.** [1896] 2 Q.B. 59 and 62 which spell out the scope and limits of the doctrine of collateral contracts. Another helpful case cited on this issue is **J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd** [1976] 2 All ER 950.

Mr. Morrison Q.C. for the appellant companies did not succeed in persuading this Court that any such evidence existed which would create the contractual

obligations, which the appellants sought to impose on the respondents. Consequently, the finding of the learned judge below that the interest rates stipulated in the written agreement between the appellant companies and the respondents governed their relationships was correct. No reference therefore could be made to the agreements between the appellant companies and their financiers. It was on this basis that Pitter J. found for the plaintiff/respondents. The learned judge found that they had complied with their obligations. Therefore the appellants had wrongly detained their motor vehicles. The appellants were therefore liable in detinue. I agree with Pitter J. and with the reasons and conclusion of Harrison J.A. Consequently, the order below must be affirmed and the appeal must be dismissed.

ORDER

Appeal dismissed. Order of the Court below affirmed. Costs of the appeal to be paid by the appellants to be taxed if not agreed.