

**(1) George Ryan and
(2) Paul Ryan**

Appellants

v.

Strickland Jarvis

Respondent

FROM

**THE COURT OF APPEAL OF
ANTIGUA AND BARBUDA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 29th June 2005

Present at the hearing:-

Lord Hoffmann
Lord Millett
Lord Phillips of Worth Matravers
(The Master of the Rolls)
Lord Rodger of Earlsferry
Lord Carswell

[Delivered by Lord Hoffmann]

1. Mr Strickland Jarvis is a motor vehicle dealer who trades from premises in Martin's Village, St John's, Antigua. In 1993 his Isuzu jeeps, pick-ups and trucks were selling rather slowly. Some time in August or September he had a conversation with Mr Paul Ryan, who sold Honda cars in St John's. Mr Ryan and his father Mr George Ryan traded through a company called Antigua Motors Ltd which had recently acquired spacious new premises. Mr Paul Ryan told Mr Jarvis that Isuzu commercial vehicles would usefully complement his Honda cars and suggested a joint venture by which Mr Jarvis would

provide Isuzus for sale by Antigua Motors. Mr Jarvis found this attractive because he thought his stock was more likely to sell in St John's than in Martin's Village.

2. The parties entered into an oral agreement on terms which were subsequently written down by Mr Paul Martin and signed by him and Mr Jarvis. This document must be quoted in full, with some obvious mistakes corrected:

"AGREEMENT BETWEEN GEORGE & PAUL RYAN OF ANTIGUA MOTORS LTD AND STRICKLAND JARVIS OF JARVIS AUTO SUPPLY

This document serves to support the verbal agreement between the above named parties in which it is intended that Antigua Motors Ltd will retail Isuzu vehicles under the following conditions for a period of twelve months.

1. A 35/[65] profit share basis. 35 percent for Antigua Motors Ltd and [65] percent for Jarvis Auto Supply. Profit is accrued after all expenses are deducted. A monthly statement will be printed of all accounts.

2. To correctly document all transactions of the sale and maintenance of the vehicles, charges and cost, and to operate totally separate accounts from Antigua Motors Ltd. Jarvis Auto Supply will give Antigua Motors Ltd documents relative to the costs, duty and taxes for all vehicles.

3. The agreement consist[s] of the sales of all vehicles currently in stock as well as any model we wish to order during a period of one year. Vehicles will be of commercial type light trucks vans and buses.

4. The expenses will include predelivery inspection, preparation of vehicles, repairs, salesman commission, a fee for handling the accounts, and any other cost incurred for the sale of the vehicles.

5. Sale prices will be agreed between both parties on each vehicle current or imported during the term.

6. No trade-in will be taken without positive agreement between the parties, documents will also be agreed.

7. All cost for warranty work will be recovered from the supplier via Jarvis Auto Supply, and after sales service will be carried out by Antigua Motors Ltd on site. First and second services will be labour free and termed as an expense. A one year warranty will apply to each vehicle sold.

8. Jarvis Auto Supply will import a limited supply of spare parts for the vehicles during the period, [from] which Antigua Motors Ltd could purchase from time to time as required. Antigua Motors Ltd will only stock fast moving items [such] as filters, brake parts etc on site on a consignment basis.

9. Jarvis Auto Supply will provide Antigua Motors Ltd with brochures of all Isuzu products, parts catalogues, workshop manuals and possible special tools and equipment during the period. Also Antigua Motors Ltd would like to be granted the opportunity to have direct contact with suppliers to obtain information needed from time to time. During the period Jarvis Auto Supply will also be Sales Agent for the products and could recommend customers to Antigua Motors Ltd for purchases of Isuzu vehicles.

10. At the end of this period any or both parties could form a company for the sales of the above products on a 50/50 share basis. Jarvis Auto Supply agrees not to differ from the above agreement during the period. At the end of the period a final financial statement will be prepared. During the period profits due to each party will be paid and

payment for actual vehicles paid on a monthly basis."

3. This document was signed by Mr Jarvis on 8 October 1993. Mr Paul Ryan's signature is against the date "10/06/93". He said in evidence that he signed in October and may therefore have been writing the date in American style.

4. In late September or early October, before the document had been signed, Mr Jarvis transferred his Isuzu stock, consisting of 11 vehicles, to the premises of Antigua Motors, which sold them at various dates between then and May 1994. But it sold no other Isuzu vehicles supplied by Mr Jarvis during the period of the agreement. Instead, in late 1993, it bought six vehicles from various sources in the Caribbean (Miami, Trinidad and Grenada). Subsequently it sold a number of vehicles which it had imported directly from Japan under an exclusive dealership agreement concluded with Isuzu in December 1993. In November 1994 it rendered an account of the proceeds of Mr Jarvis's vehicles which it had sold and sent him a cheque for \$396,501,79.

5. Mr Jarvis was dissatisfied with the account for three reasons. First, it was late. Secondly, he said that there was a shortfall of \$67,535.22 on the amount due to him out of the proceeds of sale of his 11 vehicles. Thirdly, he said that he should have been paid his share on the profit realised on the sale of the other vehicles. On 11 October 1995 he commenced an action against the Ryans, claiming payment of the \$67,535.22 shortfall, winding up of what he alleged to have been a partnership constituted by the agreement, the usual accounts and inquiries and damages.

6. In his statement of claim, Mr Jarvis particularised what he alleged to have been wrongful conduct on the part of the Ryans in respect of their purchases of other vehicles. He said that it was an implied term of the agreement that the Ryans would not prevent him from obtaining the vehicles which he was to supply for the purposes of the partnership venture. His suppliers were, as the Ryans

knew, Cruzan Motors TC Ltd of St Croix, US Virgin Islands and Southern Sales Service Company of Trinidad. Both were accredited Isuzu dealers and agents, entitled to supply vehicles for sale in Antigua. However, in fundamental breach of the agreement, the Ryans prevented him from obtaining supplies by negotiating a dealership with Isuzu which gave them the exclusive right to distribute Isuzus in Antigua.

7. The defence denied that the Ryans had acted in breach of the agreement. It alleged that Mr Jarvis had represented that he was the exclusive agent for the sale of Isuzu vehicles in Antigua and Barbuda but that the representation was, to his knowledge, false. Mr Jarvis had been unable to provide the vehicles ordered by Antigua Motors. When the Ryans found out by direct inquiry from Isuzu that he was not an accredited agent, they decided to obtain the vehicles themselves. They accordingly obtained the exclusive dealership for Antigua.

8. The pleadings thus show that it was common ground that the agreement contemplated that for the initial period of a year, Mr Jarvis would supply Antigua Motors with the Isuzu vehicles required for the purposes of its trade and that the Ryans would buy only from him. The dispute centred upon two matters. First, the Ryans said that they agreed to buy only from him because he had falsely represented that they had no choice: he was the only person who could supply them with Isuzu vehicles in Antigua. Secondly, Mr Jarvis said that his admitted inability to supply vehicles was caused by the action of the Ryans who, in breach of an implied term, had persuaded Isuzu to give them the exclusive dealership for Antigua. Both of these allegations were in issue. And then, of course, there was the minor question of the alleged shortfall in accounting.

9. The action was tried by George J over various days between 3 November 1999 and 1 June 2000. Judgment was given on 21 March 2001. The judge recited extracts from the pleadings and his notes of evidence. Mr

Jarvis's claim, he said, was that he had been appointed authorised dealer in Antigua by Cruzan Motors, who also traded as Hexagon and were authorised by Isuzu to distribute vehicles in an area which included Antigua. But he had no documents to substantiate this allegation. The evidence was simply that over some years Cruzan had supplied him with vehicles.

10. The judge's conclusion was:

"I am satisfied on a balance of probabilities and find as a fact that prior to the agreement the plaintiff falsely held out to the defendants that he had the exclusive dealership for Isuzu vehicles in Antigua and Barbuda and that this was a material factor which induced the defendants to enter into the partnership agreement in October 1993."

11. On the question of whether Mr Jarvis had been able to supply vehicles in accordance with the agreement, the judge recited the evidence of Mr Paul Ryan, which he said he accepted in preference to that of Mr Jarvis. Mr Paul Ryan had said that he had gone to Mr Jarvis with an order for vehicles but that he had been unable to obtain them from Cruzan. "They had none in stock and they could not order as I requested right hand drive vehicles and Cruzan supplied left hand drive". The judge concluded:

"Apart from the misrepresentation referred to earlier in this judgment, the plaintiff's clear failure/inability to supply vehicles ordered by the defendants, in breach of condition 3, went to the roo[t] of the contractual agreement and effectively put an end to the partnership ab initio..."

12. The judge treated the contract as having been rescinded for misrepresentation but said that in any case the Ryans were entitled to terminate the contract for breach even where there was no rescission ab initio. He found that there had been no underpayment in respect of the vehicles originally supplied by Mr Jarvis and dismissed the action.

13. Mr Jarvis appealed to the Court of Appeal (Sir Dennis Byron CJ and Satrohan Singh and Redhead JJA) which allowed the appeal. It did so mainly on the basis of a telex dated 13 October 1993 from Isuzu to Mr Paul Ryan:

"Thanks your fax Oct 12. As you pointed out, we also understand that Hexagon is inactive and no order placement from them in the past year. So if you are interested in marketing our products in Antigua we will have to notice it to Hexagon and get their understanding. Before starting business we need information for your company such as total sales, capital, product lines you are handling, detail of your facility, employees etc. These information is necessary to find out your capability of handling our products. After receiving such information we will provide quotation to you. At first let us advise you one important matter, that is payment term. We accept orders in advance payment or letter of credit since we have no credit facility. Best regards."

14. Redhead JA, who gave a judgment with which the other members of the court agreed, regarded this telex, coming so soon after the signature of the agreement, as demonstrating bad faith on the part of the Ryans. The deal with Isuzu, must, he said, have been in contemplation at the time they signed. They were guilty of double dealing and double crossing. On the other hand, Mr Jarvis's evidence, that he could not obtain supplies from Cruzan because of the deal between the Ryans and Isuzu, had "the ring of truth". He therefore set aside the judgment for the Ryans and entered judgment for Mr Jarvis.

15. It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record. The Court of Appeal was well aware of this and it seems clear that

they would not have taken such a course if it were not for the powerful impression made upon them by the telex of 13 October. Redhead JA said that in arriving at his findings, the judge could not have had this document in mind.

16. It is therefore necessary to look in rather more detail at the history of the telex. The discovery originally given by the Ryans was exiguous. The pleadings plainly raised an issue about the circumstances in which Antigua Motors had obtained the Isuzu dealership and one would have expected all written communications between the Ryans and Isuzu in the last four months of 1993 to be disclosed or, if not, to be requested on behalf of Mr Jarvis. But the only document disclosed by the Ryans which came into existence during the period of the agreement was a bill for repairing one of Mr Jarvis's vehicles. The affidavit of documents was sworn on 21 January 1998 and between then and the commencement of the trial in November 1999 Mr Jarvis's advisers do not appear to have done anything to press for more disclosure.

17. During the trial, on 17 April 2000, Mr Bernard Galloway, an accountant who worked for Antigua Motors, was called by the plaintiff on subpoena duces tecum to produce accounting records of the company's dealings in Isuzu vehicles during the period of the agreement. He appears to have produced some records and failed to produce others, apparently because they had been lost in a hurricane. But nothing seems to have been said about communications between the Ryans and Isuzu. Mr Galloway then withdrew and Mr George Ryan began to give evidence. He produced the letter of intent from Isuzu dated 24 December 1993, in which they said that they proposed to appoint Antigua Motors their agent in Antigua - a document which had not previously been disclosed. Counsel for the Ryans (Mr Brown) asked for the letter to be admitted in evidence and Mr Watt QC for Mr Jarvis said that he had no objection "provided that any letters from the defendant

to Isuzu are disclosed". The court then adjourned for the day.

18. Later that afternoon, Mr Paul Ryan sent an e-mail to Isuzu:

"As you know we had severe storm in the last few years which has damaged the roof of our offices and showroom causing much damage to all our paperwork etc. Please send us our faxes to you and IMODC [the Isuzu company with dealt with overseas distributorships] relating to our request to you to offer Isuzu dealership to Antigua Motors Ltd."

19. Next morning, Mr Watt applied for an order for special discovery under RSC Ord 24, r.7. The application was made orally but, as recorded in the judge's notes, it was for production of -

"all the records pertaining to the sale of the eleven vehicles and more particularly the records disclosing the amount of vehicles imported by the defendant from sources other than the plaintiff and other than Cruzan Motors and Sunshine Motors."

This application appears to have been more concerned with the remedy of an account if Mr Jarvis was successful than with the progress of negotiations between the Ryans and Isuzu. At any rate, the judge said that he would defer ruling upon the application until Mr George Ryan had concluded his evidence.

20. Mr George Ryan concluded his evidence on 2 May. The judge gave no ruling on the application for special discovery and no one appears to have asked him to do so. But when Mr Paul Ryan went into the witness box, he produced, in the course of his evidence in chief, the fruits of his e-mail to Japan:

"I communicated with Isuzu Motors in Japan via our trading company. I do not have records of these communications at hand. Our initial communication with our trading company was verbal. The following documents were destroyed. I did try to recover copies of them during these proceedings from Japan by e-mail. I

received a reply. The documents were too old and were no longer in existence. The date of my e-mail is 17 April and the reply is 18 April. [These were then produced]. Apart from this we have another document from Isuzu Motors dated October 13 1993. It is addressed to me."

21. The last document was plainly the telex of 13 October. It does not appear to have been given an exhibit number but copies must have been made available to the plaintiff's advisers because they included it in the bundle which they afterwards prepared for the Court of Appeal.

22. Mr Paul Ryan was cross-examined at some length but nothing was said about the telex. Indeed, very little of the cross-examination (as recorded by the judge) was directed to the circumstances in which the Ryans had obtained the Isuzu dealership. He said that there had been a meeting with Mr Jarvis in November 1993 when "he told us of his inability to supply vehicles". Mr Ryan said he regarded this as the end of the agreement, except that it was agreed that Antigua Motors would continue to sell the vehicles already delivered. In re-examination he said:

"At some point in time I came [to] the conclusion that Mr Jarvis could not supply the vehicles I wanted and I spoke to him. At some point in November 1993 I brought the agreement to an end. We terminated our agreement with Mr Jarvis in November 1993 and during the same month Antigua Motors established a relationship with Isuzu in Japan ... [T]here would not have been an overlap of the agreement with Mr Jarvis and the dealership arrangement between Antigua Motors Ltd and Isuzu Motors of Japan."

23. Mr Watt QC told their Lordships, and they of course accept, that he was unaware of the existence of the telex until after the trial. How this can have happened is unclear. Mr Paul Ryan clearly identified it at the time when he must have handed it in. Anyone listening to Mr Ryan's evidence must have realised, when he spoke of a communication of

13 October from Isuzu addressed to him, that it might be highly relevant to one of the main issues in the case.

24. In these circumstances their Lordships consider that it was wrong of the Court of Appeal to make what was in effect a finding of dishonesty ("double crossing and double dealing") against Mr Paul Ryan on the basis of a document which he had volunteered in evidence and been given no opportunity to explain. The judge who heard Mr Ryan said that he "generally speaking impressed as a witness of truth". Although it is true that the telex shows that the Ryans had been making some sort of inquiries about the status of the Antigua dealership as early as 12 October 1993, that would not necessarily be inconsistent with an intention to continue with the agreement if Mr Jarvis was in fact able to supply. Their Lordships simply do not know what significance could have been attached to it if the matter had been explored.

25. Another question which might have been explored, if it was to be suggested to Mr Paul Ryan that he always intended to supplant Mr Jarvis as dealer, was why in that case he should have thought it necessary to enter into the agreement. He could have discovered at any time that Hexagon had not been selling many vehicles to Antigua. Indeed, he could have inferred that from the state of Mr Jarvis's ageing stock. Why did he need to take over those vehicles and pay Mr Jarvis 65% of the profit on selling them? Why should he have accepted orders from customers which then required him to scurry round the Caribbean obtaining supplies from other dealers at reduced profit margins? The conspiracy theory has problems which needed to be investigated.

26. In *Akerhielm v De Mare* [1959] AC 789, 806, Lord Jenkins said, in a well known passage:

"... their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of a judge at first instance when the decision

under review is founded upon the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *The Hontestroom* [1927] AC 37; *Watt (or Thomas) v. Thomas* [1947] AC 484; *Yuill v. Yuill* [1945] P 15, 19; *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds."

27. This was not a case in which fraud was being alleged, but the principle stated by Lord Jenkins appears to their Lordships to be relevant because the Court of Appeal, in reversing the judge's acceptance of Mr Paul Ryan's evidence, did so on the ground that the telex proved him to have been dishonest. In these circumstances, their Lordships consider that the judge's findings of fact based on credibility should not have been disturbed.

28. The Court of Appeal also found that even if the Ryans had been entitled to rescind the agreement for misrepresentation, they had not communicated their intention to do so. Furthermore, an intention to rescind was inconsistent with continuing to sell Mr Jarvis's old stock and rendering an account in November 1994. Their Lordships do not think it necessary to enter into the question of whether the Ryans could have rescinded the contract ab initio. What the Ryans did was to make it clear that because Mr Jarvis was unable to supply them with Isuzu vehicles, they regarded themselves as no longer obliged to buy only from him. Their Lordships consider that Mr Jarvis's obligation to supply vehicles and the Ryans' obligation to

buy vehicles only from him were concurrent. Therefore, so long as he failed to perform his obligation to supply, the Ryans were not obliged to buy vehicles only from him. This was so, even though they continued to sell Mr Jarvis's old stock.

29. That leaves the alleged shortfall of \$67,535.22. This is a mysterious figure. There has been no explanation of how it relates to the account provided by the Ryans. Mr Watts was unable to illuminate the question. The judge rejected the complaint and the Court of Appeal accepted it: neither gave any reasons. On the face of the account, there are no obvious errors. There are no discrepancies between the final account and the earlier accounts which cannot be explained by subsequent events. For example, the final account has an item for "extra duty" which does not appear in the earlier account but which could have been paid on the sales of the last three vehicles, not included in the earlier account. Their Lordships consider that as the Ryans produced an account, it was for Mr Jarvis to explain what was wrong with it. In the absence of any such explanation or evidence in support, the allegation of a shortfall must fail.

30. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed with costs before the Board and in the Court of Appeal and the judgment of George J restored.

