

**IN THE SUPREME COURT OF BELIZE, A.D. 2011**

**CLAIM NO. 78 of 2011**

	<b>(AARON KROHN</b>	<b>CLAIMANT</b>
	<b>(</b>	
<b>BETWEEN</b>	<b>(AND</b>	
	<b>(</b>	
	<b>(JOSE TUN</b>	<b>1<sup>st</sup> DEFENDANT</b>
	<b>(ALI SAFA</b>	<b>2<sup>nd</sup> DEFENDANT</b>
	<b>(WALID JUNDI</b>	<b>3<sup>rd</sup> DEFENDANT</b>
	<b>(THE ATTORNEY GENERAL</b>	<b>INTERESTED PARTY</b>
	<b>(THE COMPTROLLER OF CUSTOMS</b>	<b>INTERESTED PARTY</b>

Before: Hon. Justice Minnet Hafiz-Bertram

Appearances: Mr. Kareem Musa for the Claimant  
Mr. Michael Peyrefitte for the first Defendant  
No appearances for the second and third Defendants  
Mr. Hawke and Ms. Iliana Swift for the Interested Parties

**J U D G M E N T**

**1. Introduction**

1.1 The Claimant, Aaron Krohn claims the sum of \$14,074.89 from the first Defendant, being monies expended by him which he paid to the Belize Customs Department to release a blue in color 2004 Isuzu D-Max motor vehicle (hereinafter referred as “motor vehicle”) that was confiscated by the said Department because it was alleged that the motor vehicle was stolen goods and was uncustomed. He also claims damages for breach of contract.

1.2 Mr. Krohn paid the first Defendant, Mr. Jose Tun \$25,000. for the vehicle but, Mr. Tun denies that he is the seller. He claims that Mr. Krohn was aware that he held the vehicle as collateral for a loan given to the third Defendant, Walid Jundi. He claims that he had also given a loan to the

second Defendant, Ali Safi and held the vehicle as collateral. The Certificate of title for the motor vehicle was however, in the name of Mr. Tun. He claims that he was doing business with an Open Transfer which was acceptable at the time at the Belize Traffic Department, hence the reason the vehicle was not transferred back to the true owner.

1.3 When the claim was initiated, Jose Tun was the only Defendant. Based on the allegations raised by Mr. Tun in his Defence, the Court at the case management conference in these proceedings ordered that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be added as parties to the Claim. Also, the court ordered that the Attorney General and the Comptroller of Customs to be named as Interested Parties so that evidence can be given in relation to the investigation and confiscation of the motor vehicle.

1.4 The second Defendant, Ali Safa and the third Defendant Walid Jundi could not be found and were not served with the claim.

## 2. **Statement of Case**

2.1 Mr. Krohn claims that on the 4<sup>th</sup> day of February, 2010, he agreed to purchase a blue in color 2004 Isuzu DMax motor vehicle from the 1<sup>st</sup> Defendant, Jose Tun at a purchase price of \$25,000.00. The said purchase price was paid to him on 4<sup>th</sup> February, 2010 and he executed a transfer of title to Mr. Krohn who thereafter took possession of the vehicle. The motor vehicle was later confiscated by the Belize Customs Department as being stolen goods on 10<sup>th</sup> July, 2010.

2.2. Mr. Krohn claims that in August of 2011, he mitigated his losses by negotiating with the Customs Department to pay the customs duties in order to have the vehicle released. The Department agreed to accept

\$10,000.00 in Customs Duties on the motor vehicle and \$2,000.00 in administrative fees which he paid and the vehicle was released to him.

- 2.3. He claims that the vehicle was impounded for over a year at the Customs Department and upon its release to him on 5<sup>th</sup> day of August, 2011, he had to conduct repairs to the motor vehicle in the sum of \$1,294.89 as stated in the particulars of the statement of claim. He also had to pay an indemnity bond of \$680.00 since the vehicle is considered stolen goods.
- 2.4. Mr. Krohn further claims that as a result of the confiscation by the Customs Department he was deprived of ownership, use and enjoyment of the said motor vehicle between the period July 10<sup>th</sup>, 2010 to August, 5<sup>th</sup>, 2011 and as a result suffered loss and damage. Also, since the vehicle is considered stolen his use and enjoyment is restricted to Belize.
- 2.5. The first Defendant, Mr. Jose Tun in his defence says that the Claimant has no claim against him because he was aware that the motor vehicle was a collateral for a loan agreement between himself and Mr. Jundi, the third Defendant.

### **Witnesses**

- 3.1 Mr. Krohn, the Claimant gave evidence on his own behalf. Mr. Tun, the first Defendant gave evidence on own his behalf.
- 3.2 Mr. Adrian Gibson of the Belize Customs Department, gave evidence in relation to his investigation and confiscation of the motor vehicle.

4. **Issues for determination**

Mr. Peyrefitte in written closing submissions raised several issues which can be stated as follows:

1. Whether there was a contract of sale for the motor vehicle from Mr. Jose Tun as “Seller” to Mr. Krohn as “Buyer.”
2. Whether Mr. Tun breach the implied warranty that Mr. Krohn should enjoy quiet possession of the motor vehicle when it was seized by the Customs Department.
3. Whether Mr. Tun is liable for damages.

**Issue 1: *Whether there was a contract of sale for the motor vehicle from Mr. Jose Tun as “Seller” to Mr. Krohn as “Buyer.”***

5. Mr. Jose Tun in his defence says that Mr. Krohn has no claim against him because he was aware that the motor vehicle was a collateral for a loan agreement between himself and Mr. Jundi.
6. Mr. Khron in his witness statement stated that in February of 2010 he was looking to purchase a motor vehicle since his job as a travelling sales representative for Robert Nicolait and Associates required transportation. During his search, he was referred to Houssam Chamas who informed him that a friend of his had a vehicle for sale at a purchase price of \$25,000.00. Mr. Chamas then had the third Defendant, Mr. Jundi take him to the home of another individual by the name of Haisam Diab where he was shown the motor vehicle and he was offered to take a test drive.

7. Mr. Krohn stated that he was satisfied with the condition and function of the motor vehicle so he went back to Mr. Chamas to negotiate the price with him. Mr. Chamas informed him that the owner was unwilling to negotiate any further and that the final purchase price for the motor vehicle was \$25,000.00.
8. He further stated that he informed Mr. Chamas that he was willing to make the payment by way of a Holy Redeemer Credit Union check. Mr. Chamas thereafter requested Mr. Jundi to take him to Mr. Diab to see whether the form of payment was acceptable. Mr. Diab with some hesitation at first, stated that the payment by check would be acceptable.
9. At paragraphs 12 to 15 of his witness statement, Mr. Krohn stated that he was then taken to the New Horizon building where he met the first Defendant, Mr. Tun who requested that he make the check payable to him. He made the check out as requested for the sum of \$25,000.00 and he received a receipt in his name which is exhibited as “**AK 1**”. He then went with Mr. Tun to the Belize Traffic Department to effect the transfer of ownership over to him.
10. Mr. Krohn’s evidence is that whilst standing in front of the clerk at the Traffic Department, Mr. Tun made a very unusual and suspicious suggestion to him that he change the license plates on the motor vehicle. He stated that when he asked Mr. Tun the reason for doing so, he smiled and said that it was his personal practice and custom to do so. Mr. Krohn stated that he did not understand what he meant by this and so he did not change the license plates as suggested by Mr. Tun.

11. Mr. Krohn's evidence is that it was not clear in the beginning from whom he was buying the vehicle. He said that in 'a *round about way*' he thought he was buying the vehicle from Diab.
12. He further stated that Mr. Tun did not tell him that he was holding the motor vehicle as collateral for a loan he made to Jundi. It was after the vehicle was confiscated by the Customs Department that he went to complain to Mr. Tun who then informed him of the loan agreement.
13. The evidence of Mr. Tun, the first Defendant, in his witness statement at paragraph 9, accepted that Mr. Krohn paid \$25,000. to him and he gave him a receipt. Also, he accepted that he went with Mr. Krohn to the Traffic Department to do the transfer. However, his evidence is that the vehicle was a collateral for a loan.
14. Mr. Tun stated that that on 30<sup>th</sup> November, 2009, he loaned \$12,000. to the second Defendant, Ali Safa who is in the business of selling vehicles and he accepted the motor vehicle as collateral to secure the loan which was to be repaid on 14<sup>th</sup> December, 2009. The vehicle was then transferred to him by Mr. Safa and this was done at the Belize City Traffic Department. He stated when the loan was repaid he returned the vehicle to him along with an open transfer which he signed.
15. He further stated that on 26<sup>th</sup> January, 2010, the third Defendant, Mr. Jundi who is also in the business of selling vehicles brought to him the same motor vehicle along with the open transfer that he had given to Mr. Safa and requested a loan of \$15,000. Thereafter, he went to the Traffic Department to verify that the title for the motor vehicle was still in his name. Mr. Tun stated that having so confirmed, he agreed to lend to Mr. Jundi the \$15,000. and he accepted the motor vehicle as collateral for the loan which was to be repaid in one week.

16. Mr. Tun stated that on 4<sup>th</sup> February, 2010, Mr. Jundi returned to his office accompanied by Mr. Krohn who was introduced to him as the purchaser of the vehicle. He stated that he told Mr. Krohn that the vehicle was held by him in regards to a loan agreement with Mr. Jundi and that payment would have to be made to him since the title was in his name. At paragraph 8 of his witness statement, he stated that he agreed with Mr. Jundi and Mr. Krohn to accept the payment of \$25,000. directly from Mr. Krohn and to pay \$10,000. to Mr. Jundi after deducting \$15,000. owed to him. On the same day, 4<sup>th</sup> February, 2010 Mr. Krohn paid him the \$25,000. and he gave him a receipt. He thereafter went with him to the traffic department and transferred the motor vehicle to him.

**Submissions by Mr. Musa**

17. Learned Counsel, Mr. Musa submitted that it was established that Mr. Tun did not inform Mr. Krohn that he was not the true owner of the motor vehicle nor did he declare that he was merely holding the vehicle as collateral for a loan given to Mr. Jundi. Further, that Mr. Tun admitted under cross-examination that he only produced a purported loan agreement to Mr. Krohn after the Customs Department had already confiscated the motor vehicle from Mr. Krohn in July of 2010.
18. Learned Counsel submitted that Mr. Tun is *estopped* from attempting to cast blame for the sale of the stolen vehicle unto a third party (2<sup>nd</sup> Defendant) when such material facts as to the ownership of the vehicle were not disclosed to Mr. Krohn prior to sale. He relied on

**Halsbury's Laws of England, Fourth Edition, Volume 41 at para. 153** where it says that such attempts are considered fraud on the buyer. It states:

*Seller's want of title. A person who, not being the owner, sells goods, not purporting to do so as agent of the owner, or otherwise than as owner of the goods, is estopped, as between himself and the buyer, from afterwards alleging that he was not the owner at the time of the sale. Furthermore, if the buyer has not repudiated the contract, and the seller becomes the owner of the goods after the sale, his right of property thereupon vests in the buyer.*

*Non-disclosure by the seller to the buyer of a want of title of which the seller is aware, and the buyer is not, is fraud on the buyer*

19. Therefore, Mr. Musa contended that this attempt by Mr. Tun to deflect responsibility for the sale of a stolen vehicle to Mr. Krohn cannot succeed since it is clear from the evidence that:

- (i) *Title to the motor vehicle was vested in the 1<sup>st</sup> Defendant's name;*
- (ii) *The 1<sup>st</sup> Defendant requested that payment be made in his name;*
- (iii) *The Holy Redeemer check in the sum of \$25,000.00 was made payable to the 1<sup>st</sup> Defendant (solely);*
- (iv) *The 1<sup>st</sup> Defendant accompanied the Claimant to the Belize Traffic Department to effect transfer of ownership to the Claimant.*
- (v) *The 1<sup>st</sup> Defendant did not declare to the Claimant any purported loan arrangement with the 2<sup>nd</sup> Defendant;*
- (vi) *The 1<sup>st</sup> Defendant, despite his allegation that he was not the true owner, has still not elected to file an ancillary claim against the 2<sup>nd</sup> Defendant.*



20. Learned Counsel, Mr. Musa further submitted that Mr. Tun admitted under cross examination that upon transferring title to the motor vehicle to Mr. Krohn he did in fact suggest to him that he change the license plates on the motor vehicle. When asked why he would make such an unusual suggestion, Mr. Tun responded by saying that it was just his “tradition or superstition” and that he would buy boledo (lottery) with the numbers from the license plates.
  
21. Learned Counsel contended that it is equally suspicious that the documents from the Traffic Department also indicate that title to the motor vehicle was transferred twice in one day. Further, according to Mr. Tun he had agreed to provide a loan to the 2nd Defendant on the 30<sup>th</sup> of November, 2009 and his evidence is that Safa repaid the loan within two weeks as agreed and he returned the vehicle to him along with an open transfer document that he signed. Mr. Musa submitted that the evidence however, did not corroborate Mr. Tun’s allegation since title remained in Mr. Tun’s name from November 30<sup>th</sup>, 2009 to February of 2010, when he transferred ownership to Mr. Krohn. If indeed, the title still belonged to Ali Safa, Mr. Tun would have transferred ownership back to Safa when he supposedly paid off his loan in December of 2009.

**Submissions by Mr. Peyrefitte for the first Defendant**

22. Learned Counsel, Mr. Peyrefitte submitted that Mr. Tun did not agree to sell the motor vehicle to Mr. Krohn as he was under a title transfer collateral agreement as a Lender. Further, there was no written sale agreement between Mr. Krohn and Mr. Tun nor was there any sales transaction between them. Learned Counsel submitted that Mr. Krohn was aware and was informed of Mr. Tun’s role as lender and as to the reason title to the motor vehicle was held by him. Therefore, Mr. Peyrefitte contended that Mr. Tun is not the seller of the motor vehicle and

Mr. Krohn is *estopped* from claiming against Mr. Tun because he had knowledge of the transaction.

23. Learned Counsel further submitted that the third Defendant, Walid Jundi was the seller and the buyer was Mr. Krohn. He relied on **section 5** of the **Sale of Goods Act, Chapter 261** of the **Laws of Belize, Revised edition** which states that where there is no written contract, a contract may be implied based on the conduct of the parties. Mr. Peyrefitte further submitted that this concept was tested in the case of **John Quan v Davlin Ltd. and David Kalai, Claim No. 559 of 2009** in which the Judge found that a contract existed between Quan and Kalai even though Kalai was not a party to the contract because all discussions and negotiations in regard to the subject matter of the contract was between Quan and Kalai.
24. Mr. Peyrefitte submitted that there was no intention by Mr. Tun to create any legal relationship with Mr. Krohn and this is evidenced by the signed agreement between Jundi and Tun in which Jundi acknowledged that \$25,000. was being accepted by Tun on his behalf and that Jundi was receiving \$10,000.00 from that amount. (This agreement is exhibited to Mr. Tun's defence and it is dated the 5<sup>th</sup> February, 2010). Further, that Mr. Krohn's evidence shows that there was never any negotiation or agreement between himself and Mr. Tun and Mr. Krohn did not deny that Mr. Tun informed him that he was a lender and he held title under a loan agreement between himself and Mr. Jundi. Also, that that the only interaction that they had in respect of the motor vehicle was on 4<sup>th</sup> February, 2010 when Mr. Tun agreed to transfer title to Mr. Krohn.

### **Determination**

25. Mr. Tun's defence is that Mr. Krohn has no claim against him because he was aware that the motor vehicle was a collateral for a loan agreement between himself and Mr. Jundi. Mr. Tun's evidence is that he told Mr.

Krohn that the vehicle was held by him in regards to a loan agreement with Mr. Jundi and that payment would have to be made to him since the title was in his name. He accepted that Mr. Krohn paid \$25,000 to him and he gave him a receipt. Also, he accepted that he went with Mr. Krohn to the Traffic Department to do the transfer. The question to be answered is, "Who is the seller?"

26. I find Mr. Krohn to be a credible witness and I accept his evidence that it was after the motor vehicle was confiscated by the Customs Department and he went to complain to Mr. Tun that he was informed of the loan agreement which he had with Jundi. The evidence on a whole about the sale of the vehicle is very disturbing as Mr. Krohn has shown by his evidence that he had to go through a number of persons before meeting with Mr. Tun who had title for the vehicle.
27. Firstly, Mr. Krohn met with Mr. Chamas who informed him that a friend had a vehicle for sale at a purchase price of \$25,000.00. It was clear that Mr. Chamas was not the owner because he informed Mr. Krohn that the owner was unwilling to negotiate any further and that it is the final price. Secondly, Mr. Krohn met with Mr. Jundi who is the third Defendant but there were no negotiations with him. Mr. Jundi's role as requested by Mr. Chamas was to take Mr. Krohn to Mr. Haisam Diab's house to see the motor vehicle. Diab was the third person he met. He 'test drive' the vehicle and was satisfied with it but, there were no negotiations with Mr. Diab nor Mr. Jundi. Strangely, Jundi took him back again to Mr. Chamas who is not the owner to negotiate the price and he was informed that the owner was unwilling to negotiate a lower price.
28. Mr. Krohn then spoke about the form of payment with Mr. Chamas. Mr. Jundi was again asked by Mr. Chamas to take Mr. Krohn right back to Diab to find out if a Holy Redeemer Credit Union cheque was acceptable

- payment. Mr. Diab stated that the form of payment is acceptable. This gives the impression that Mr. Diab is the owner of the vehicle. But, this did not end here as Mr. Krohn was taken on yet another journey to meet Mr. Tun, the fourth person, who requested that he pay him the \$25,000. and who later transferred the vehicle to him.
29. The evidence shows that Mr. Chamas knew the sale price of the motor vehicle as \$25,000.00. but he had no authority by the owner to negotiate a lower price. The vehicle was at Mr. Diab's house who stated that the form of payment is acceptable but he was in no position to negotiate either. Jundi acted as the escort to take Mr. Krohn around, but, he was not involved in the negotiations in relation to the purchase price nor the form of payment. Mr. Tun who had title received payment and transferred the title of the motor vehicle to Mr. Krohn. In my view, the evidence shows that Mr. Tun is the seller and not Jundi as claimed by him.
30. I did not find Mr. Tun to be a credible witness. I find that he was being very untruthful when he said that he told Mr. Krohn at the time of the sale that the vehicle was held by him in regards to a loan agreement. Mr. Krohn had no clue of this loan agreement until after the vehicle was confiscated by the Customs Department. Mr. Tun in his defence stated that an agreement was entered between himself and Jundi which he exhibited as "**J.T.3**". He admitted under cross-examination that he only produced the loan agreement to Mr. Krohn after the Customs Department had confiscated the motor vehicle. The agreement is dated the 5<sup>th</sup> February, 2010. Mr. Krohn received the Certificate of Title on 4<sup>th</sup> February, 2010. This purported agreement did not exist at the time of the sale.

31. Further, Mr. Tun's evidence that the Title to the vehicle remained in his name after a loan was given by him to Ali Safa is not believable. That purported loan was paid off on 14<sup>th</sup> December, 2009 according to his evidence. Mr. Tun however, had no interest in transferring title back to Mr. Safa. In cross-examination, he said he gave Safa an open transfer and that is how Jundi came to use the same vehicle to take a loan. He said that he did not transfer the vehicle back to Safa because, "*Well, that is his option. Once he paid me, I couldn't care less, what he did with it. I gave him the option to transfer. If he wanted to give it to his mother, to his father, to his uncle.*" This is the answer of Mr. Tun who according to his evidence had once purchased an uncustomed vehicle and had to do an out of court settlement with the Customs Department. He kept the Certificate of Title in his name although he claims that he no longer owns the vehicle. He allowed an open transfer signed by him to float around and the vehicle used as collateral for a loan. The court finds Mr. Tun's evidence of the loan agreement and the open transfer to be a very elaborate scheme to hide the true owner of the vehicle.
32. Mr. Krohn's evidence which the court finds credible is that Jundi did not take any part in the negotiations. He was taking Mr. Krohn on 'a merry go around.' It begs the question as to why he would do that when he is the owner of the vehicle. There is no evidence before the court which shows that Mr. Jundi is the owner of the vehicle. However, there is evidence which shows that five persons held Certificate of Title for a motor vehicle with the same Vin number. The transfers were as follows:

Transfer of ownership

33. The documentary evidence before the court shows that the following persons had title to the motor vehicle.
1. Orticio Tush
  2. Orticio Tush transferred ownership to Mustapha Assad.

3. Mustapha Assad transferred ownership to Ali Safa.
  4. Ali Safa transferred ownership to Jose Tun
  5. Jose Tun Transferred ownership to Aaron Krohn.
34. The documentary evidence before this court which was admitted into evidence by consent shows that the five persons listed above were registered owners of Isuzu D-Max vehicle with Vin Number MPATFR54H4H500616. The 'Notification of Transfer of Ownership of a Motor Vehicle' from the Department of Traffic Enforcement, Belize City shows that on 30<sup>th</sup> November, 2009 the ownership of the vehicle changed twice in one day. The motor vehicle was transferred by Mustapha Assad to Ali Safa. He was given a Certificate of registration for the vehicle on the same day. Ali Safa the registered owner of the vehicle thereafter, disposed the vehicle to Jose Tun on the same day. On that very day, Jose Tun received a Certificate of Registration for the motor vehicle which shows that the Isuzu D-Max with Vin Number MPATFR54H4H500616 was registered to him.
35. The last 'Notification of Transfer of Ownership of a Motor Vehicle' from the Department of Traffic Enforcement, Belize City, shows that on 4<sup>th</sup> February, 2010 Jose Tun transferred the motor vehicle to Aaron Krohn who on that day also received a Certificate of Registration for the vehicle. Before the vehicle was sold to Mr. Krohn, the person with ownership as shown by the Certificate of Registration was Mr. Tun. Mr. Tun's evidence that he gave Ali Safa an open transfer and so he did not have ownership of the vehicle is not credible. The court finds that Mr. Tun was the owner of the Isuzu D-Max with Vin Number MPATFR54H4H500616 which was registered to him.

**The Law**

36. The **Sale of Goods Act, Chapter 261** at Part II provides for the formation of contract and ‘Contract of Sale’. Section 3 of the Act provides for sale and agreement to sell. In this case there was a sale of a vehicle. Section 3(1) provides for a contract of sale. It states:

*3. (1) A contract of sale of goods is a contract whereby the **seller** transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.*

37. The evidence is that Mr. Tun transferred the title of the car to Mr. Khron after he paid him \$25,000.00 and for which he received a receipt. There is no dispute that Mr. Krohn paid to Mr. Tun \$25,000.00 as purchase price for the vehicle. Mr. Tun gave a receipt to him which is exhibited as “**A.K. 1**”. It states:

*No. 2/36167*

*Feb. 4<sup>th</sup> 2010.*

*Received from Aaron Krohn*

*Twenty five thousand dollars*

*2004 Isuzu DMax MPATFR54H4H500616*

*\$25,000.00*

*Signature of Jose Tun*

38. Learned Counsel, Mr. Peyrefitte relied on **section 5** of the **Sale of Goods Act** and submitted that where there is no written contract, a contract may be implied based on the conduct of the parties and I agree with him. **Section 5(1)** provides for contract of sale and how made. It states:

*5.(1) Subject to this Act, a contract of sale may be made in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied by the conduct of the parties.*

39. The evidence is that Mr. Chamas informed Mr. Krohn of the sale price of \$25,000. But, this was just for information as Mr. Chamas did not hold himself out as the owner nor the agent. Instead, he sent Mr. Krohn on a road trip with Mr. Jundi. The form of payment was discussed with Diab, and nothing else. Jundi as shown by the evidence although present did not discuss the price nor the form of payment. As such, no contract of sale can be implied by the conduct of the said persons.
40. The court does not agree with Learned Counsel, Mr. Peyrefitte that Jundi was the seller. The evidence shows that Mr. Tun was the seller and Mr. Krohn was the buyer. Mr. Krohn paid to Mr. Tun \$25,000. for the vehicle and he received a receipt from him which shows that it was for the motor vehicle. Mr. Tun then took Mr. Krohn to the Belize City, Traffic Department and he transferred title to him. Mr. Jundi took Mr. Krohn to meet several persons as shown by the evidence but, it can be implied by the conduct of Mr. Tun that he sold the motor vehicle. He is therefore, the seller. According to the Interpretation section of the **Sale of Goods Act**, "Seller" means "a person who sells or agrees to sell." In the case at hand, the person who sold is Mr. Tun and not Mr. Jundi. As such, I respectfully disagree with Mr. Peyrefitte that there was never any agreement between Mr. Tun and Mr. Krohn and that Mr. Tun was not the seller.
41. The case of **John Quan** relied on by Mr. Peyrefitte can be distinguished from the case at hand. In that case, a written agreement between the parties for the purchase of a boat shows that "Davlin Ltd" is the buyer and



Mr. Quan as the seller. Mr. Quan signed the agreement which was drafted by Kalia without noticing he was dealing with a company, that is, Davlin Ltd. Kalai, one of the Directors of Davlin Ltd. held all discussions with Mr. Quan concerning the purchase of the boat. Mr. Kalai spoke of his tax free status and there were negotiations for tax free engines. At all times he held himself out as the buyer. Mr. Kalia was also registered as the owner of the boat after it was purchased. At no time, was Mr. Quan informed that Kalai was negotiating on behalf of Davlin Ltd. But, since the agreement executed shows that Davlin Ltd. was the purchaser, the court could not exclude Davlin Ltd as the buyer. The court found that Kalia and Davlin Ltd. were so intertwined in the purchasing of the boat that the two could not be separated. It was under such circumstances that the court found that both Davlin Ltd. and Mr. Kalai are the purchasers of the boat.

42. In the case at hand, it is clear that Mr. Krohn is the buyer. It is also clear from the evidence that Mr. Tun who held title was the seller. Jundi was at no time involved in any negotiations with Mr. Khron although he was taking him around to meet Chamas, Diab and Tun. The purported written loan agreement has no bearing in this case. Mr. Tun has admitted under cross-examination that he only produced the agreement to Mr. Krohn after the Customs Department had confiscated the motor vehicle. He could not produce it at the time of the sale because it did not exist as it is dated the 5<sup>th</sup> February, 2010.
43. Even if there was an oral agreement at the time between Mr. Tun and Mr. Jundi, I agree with Learned Counsel, Mr. Musa that Mr. Tun is *estopped* from attempting to cast blame for the sale of the stolen vehicle unto Jundi when ownership of the vehicle were not disclosed to Mr. Krohn prior to sale. **Halsbury's Laws of England, Fourth Edition, Volume 41 at para. 153** applied. Accordingly, the court finds that there was a contract of

sale for the motor vehicle from Mr. Jose Tun as “Seller” to Mr. Krohn as “Buyer.”

**Issue 2: *Whether Mr. Tun breach the implied warranty that Mr. Krohn should enjoy quiet possession of the motor vehicle when it was seized by the Customs Department.***

44. Learned Counsel, Mr. Musa submitted that Mr. Tun sold a stolen, uncustomed motor vehicle to Mr. Krohn and as such, the recourse available to him is governed by the **Sale of Goods Act, Chapter 261 of the Laws of Belize, Revised Edition, 2000**. The court agrees with this submission. He referred to **section 14** of the Act which states:

*In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is-*

- (a) *An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;*
- (b) *An implied warranty that the buyer shall have and enjoy quiet possession of the goods;*
- (c) *An implied warranty that the goods will be free from any charge or encumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made. (emphasis added)*

45. Learned Counsel submitted that pursuant to **section 14** there is an implied condition on the part of Mr. Tun who is the seller that he had a right to sell the motor vehicle and an implied warranty that the buyer shall have and enjoy quiet possession of the goods. However, it had been proven that he did not have such right as the motor vehicle turned out to

be stolen from Guatemala and was not declared to the Belize Customs Department upon entry into Belize.

46. Learned Counsel, Mr. Musa further submitted that since Mr. Tun breached the implied condition that he had the right to sell vehicle, Mr. Krohn had the right to treat the contract as repudiated and recover the purchase price of \$25,000.00. Mr. Krohn in the claim before the amendment had claimed \$25,000. He later amended the claim to recover damages since he entered into negotiations with the Belize Customs Department and he paid the duties for the uncustomed vehicle so that it could be released to him. The breach therefore, was converted to a breach of warranty.

Breach of warranty as opposed to breach of conditions of sale

47. Learned Counsel, Mr. Musa submitted that since Mr. Krohn waived his right to treat the breach as a breach of a condition, the breach is then converted to and treated as a breach of a warranty which gives rise to a claim for damages. He relied on **Halsbury's Laws of England, Fourth Edition, Volume 41 at para. 64** where the distinction was shown between warranties and conditions of sale.

**64. Warranties, conditions and innominate or intermediate terms distinguished.** Where a stipulation in a contract of sale is a warranty, its breach may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated; but, where a stipulation in a contract of sale is a condition, its breach may give rise not only to a claim for damages but also generally to a right to treat the contract as repudiated. Where, however a

*seller is in breach of any one of three of the terms implied in a contract of sale by the Sale of Goods Act 1979 or of any one of the three conditions implied in a contract for the transfer of property in goods, or, as the case may be, in a contract for the hire of goods by the Supply of Goods and Services Act 1982 and where the breach is so slight that it would be unreasonable for the buyer to reject the goods, then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but as breach of warranty...” (emphasis added).*

48. Learned Counsel further relied on **Halsbury’s Laws of England, Fourth Edition, Volume 41 at paragraphs 65 and 66** which state that the buyer can waive the condition and treat the breach as a warranty:

**65. Parties’ voluntary election as regards conditions.** *Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may, where the breach of condition would entitled him to reject the goods, waive the condition or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated. The position of the seller is the same in relation to a condition to be fulfilled by the buyer.*

*A party will be treated as having waived a stipulation if his conduct is reasonably interpreted by the other party and relied on by him as amounting to a waiver,*

*provided that it clearly and unambiguously bears that interpretation, even if the first party did not intend to waive the stipulation.*

*66. **Buyer's compulsory election.** Subject to the buyer's right of partial rejection, where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.*

The court is in agreement with the legal submissions as stated by Learned Counsel, Mr. Musa.

#### **Submissions by Mr. Peyrefitte**

49. Learned Counsel Mr. Peyrefitte submitted that even if the status of seller can be imputed to Mr. Tun, it has not been shown by the Claimant, Mr. Krohn that it was the same motor vehicle transferred to him was seized by the Customs and Excise Department. Thus, Mr. Krohn has not shown that there has been a breach by Mr. Tun of the implied warranty that he enjoy quiet possession of the motor vehicle. As such all loss and damage that flowed from the Claimant being dispossessed of the vehicle from July 2010 to August 2011 is not attributable to Mr. Tun.
  
50. Learned Counsel submitted that a customs declaration exist which shows that a blue 2004 Isuzu D-Max bearing Vin number MPATFR54H4H500616

was imported, declared and the duty paid in September of 2003. Further, that the subsequent transfers and registration of the motor vehicle bears the same description and Vin number.

51. Learned Counsel submitted that the Belize Customs Vehicle Appraisal Form dated August 4, 2011 which was signed by Mr. Gibson shows that the vehicle is actually a 2007 model and the correct Vin is MPATS77H7H504474. Further, that Mr. Gibson could not establish that the 2007 model vehicle he seized from Mr. Krohn was imported by Bravo Motors but mentions that the 2004 vehicle was lawfully imported and declared to customs.
  
52. Learned Counsel, Mr. Peyrefitte further submitted that one of the earlier titles to the vehicle dated January 12, 2005 in the name of Orticio Tush bears the VIN number MPATFR54H4H500616 which is the same Vin as the 2004 vehicle. He contended that a 2007 vehicle could not have been transferred in 2005 because it was not in existence. Further, all the transfers show that the 2004 D-Max existed. Learned Counsel contended that if at some point after 2007, a 2004 Blue Isuzu D-Max VIN number MPATFR54H4H500616 was switched with a 2007 Blue Isuzu D-Max MPATS77H7H504474, then the 2007 vehicle would be uncustomed but it also means that the 2004 vehicle has not been shown to be uncustomed.
  
53. Learned Counsel further contended that Mr. Tun transferred on behalf of Ali Safa and Walid Jundi, a customed and legitimate 2004 Blue Isuzu D-Max VIN number MPATFR54H4H500616 to Mr. Krohn and not a 2007 Blue Isuzu D-Max. Further, Mr. Krohn did not establish that the vehicle he got possession of in February 2010 is the same vehicle that was seized by Customs some months later and which is the same vehicle he is driving today.

54. Learned Counsel, Mr. Peyrefitte submitted that if Mr. Tun transferred the 2004 vehicle it has not been shown that the vehicle was uncustomed. As such, if he is the "Seller", Mr. Krohn has failed to establish that there a breach by Mr. Tun of the implied warranty that he enjoy quiet possession because there is no proof that he transferred a 2007 vehicle to him.

**Is the motor vehicle seized by Customs Department the same vehicle purchased by Mr. Krohn from Mr. Tun?**

55. Learned Counsel, Mr. Peyrefitte submitted that Mr. Krohn has not proven that it was the same vehicle transferred to him by Mr. Tun was seized by the Belize Customs Department. I disagree with Learned Counsel's submission as it has been proven by the evidence of Mr. Krohn and Mr. Gibson that it is the same vehicle.
56. Mr. Krohn's evidence is that on 10<sup>th</sup> July, 2010 whilst driving to his home in Placencia he was pulled over by personnel from the Belize Customs Department and was informed that the motor vehicle that he was driving was uncustomed and potentially stolen. Mr. Gibson also informed him that he was tasked to find and impound the vehicle. He stated that he later found out from the personnel at the Customs Department that the vehicle had two Vin numbers and was stolen in Guatemala.

The Investigation by Customs Officer

57. Mr. Adrian Gibson , Customs examiner Grade 1 in the Customs and Excise Department stated in his witness statement that his duties include but are not limited to the investigations of customs fraud and evasion of custom duties. He stated that in June of 2010, he visited the Belize Traffic Department where he perused several files for vehicles registered by the said department. During the said investigation he took

- information relating to license registration number C-36167 for further investigation. He further stated that on 10<sup>th</sup> July he was in Placencia near the airstrip when he noticed a blue Isuzu D-Max pick-up truck with the said licence plate and so he intercepted the vehicle which was being driven by Mr. Krohn.
58. At paragraph 7 of his witness statement, he stated that upon receiving Mr. Krohn's permission to inspect the vehicle and having done so, he located the vehicle identification number which appeared to be tampered with, and this raised his suspicion that the vehicle could be uncustomed and so he decided to take the vehicle into custody for further investigation. He gave Mr. Krohn a custody receipt which he exhibited to his witness statement as "**A.G. 1**".
59. Mr. Gibson said that normally vehicles have two VIN numbers, one on the chassis which is called a confidential VIN and one on the windshield. However, in third world countries it is only on the chassis. Further, the vehicle in question is a third world vehicle and its VIN was located under the vehicle, between the front door and the rear door of the passenger side. He stated that when he inspected the vehicle it appeared to be tampered. Mr. Gibson explained to the court what he meant by tampering. He said that the VIN number was not uniform. When it comes from the dealer the number is usually uniform, that is, in a straight line. But, in this case, it appeared that the VIN number was slanted. He said that since Bravo had sold the vehicle with the same VIN number to Ortisio Tush from Independence Village, he decided to take the vehicle to them to see if it was the same vehicle.
60. Mr. Gibson stated that on 12<sup>th</sup> July, 2010 he took the vehicle to Bravo Motors of Bravo Investments Limited for verification since they are the agent for Isuzu motor vehicles and they invariably assists the Customs



and Excise Department with identification of Isuzu motor cars and trucks. He stated that the vehicle was physically inspected by Delroy Hamilton who is an employee of Bravo Motors. He also gave him several copies of documents which were on the file at the Belize City Traffic Department to aid him with the verification. He further stated that he was not able to establish that the motor vehicle was imported and declared to Customs and Excise Department by Bravo Investments Limited.

61. Mr. Gibson exhibited a letter shown as “**Exhibit AG 2**” from Delroy Hamilton in which he stated that he did an inspection of the vehicle and stated his findings and concluded that the VIN number does not belong to the vehicle in question.
  
62. During trial, Mr. Peyrefitte raised objections to the evidence of Mr. Gibson given in relation to the information received from Mr. Hamilton from Bravo Motors, which he said is hearsay. The court overruled that objection and continued to hear the evidence. The court was of the view that this evidence is admissible as it forms part of an official investigation by the Customs Department. Further, Mr. Gibson was physically present when Hamilton did the research on the computer. Mr. Gibson’s evidence is that Mr. Hamilton showed him on the computer the correct VIN number for the motor vehicle that was confiscated and further he saw that it was not a 2004 model as shown on the documents received from Mr. Tun, as the motor vehicle was completely different. He also gave him a print out of the information and he confirmed that the VIN number on the confiscated vehicle had been tampered .
  
63. Mr. Gibson also did further investigation to verify the information received from Mr. Hamilton. At paragraph 11 of his witness statement, Mr. Gibson stated that the Customs Investigation Unit also sought the assistance of the Belize Police Department’s Interpol database. He received a

memorandum from that Department exhibited as “**AG 1**” which shows that checks were made through INTERPOL database and the results show that a 2004 ISUZU D-Max, Blue in color, Engine No. 376142 VIN number MPATS77H7H504474, L/P C-36167 resulted positive as it was stolen from Guatemala.

64. Mr. Gibson stated that he interviewed and recorded statements from Mr. Krohn, Walid Jundi, Jose Tun and Wen Chen Lin. That after completion of his investigation, he was of the view that the vehicle was uncustomed and that it was stolen from Guatemala.
65. Mr. Gibson’s evidence which I find credible is that the motor vehicle sold to Mr. Krohn is not a 2004 Isuzu D-Max. I find Mr. Gibson to be an impressive witness. During cross-examination, he explained how he was able to do a thorough investigation to uncover that the Title transferred by Mr. Tun shows on paper a 2004 Isuzu D-Max vehicle but in reality it was an entirely different vehicle, that is, a 2007 model which was stolen from Guatemala. Mr. Gibson did not find any evidence during his investigation at Bravo that this 2007 motor vehicle was imported and declared to Customs and Excise Department by Bravo Investments Limited. As such, it is reasonable to conclude that the vehicle was uncustomed.
66. Mr. Gibson’s evidence proves that the 2004 VIN number MPATFR54H4H500616 from a different vehicle which was legitimate and was originally sold by Bravo to Mr. Tush was placed on the stolen motor vehicle in question for which no duties was paid. As such, I respectfully disagree with Learned Counsel, Mr. Peyrefitte’s argument that the motor vehicle is the real 2004 Isuzu D-Max vehicle with the proper VIN number. I find that the vehicle which was transferred to Mr. Krohn by Mr. Tun was the same vehicle that was seized by the Customs

Department. As a consequence, the court finds that Mr. Tun breached the implied warranty that Mr. Krohn should enjoy quiet possession of the motor vehicle when it was seized by the Customs Department. **Section 14** of the **Sale of Goods Act** applied.

**Issue 3: Whether Mr. Tun is liable for damages and if so, the quantum.**

67. It has been proven above that Mr. Tun breach the implied warranty that Mr. Krohn should enjoy quiet possession of the motor vehicle when it was seized by the Customs Department. This breach of warranty may give rise to a claim for damages as shown in paragraph 47 above. Learned Counsel, Mr. Musa further relied on **Halsbury's Laws of England, Fourth Edition, Volume 41** at **para. 312** which states:

*Buyer exposed to penalty or damages. Where, as a result of the breach of warranty, the buyer, is through using the goods in the normal manner contemplated by the seller, exposed to proceedings for a penalty or other penal proceedings or to an action for damages, he may, for so long as he is entitled as against the seller to rely on the warranty, recover the penalty or the damages, his costs and his other losses from the seller. At least where no criminal offence is committed, this will be the case, even if the buyer is liable in negligence to a third person” (emphasis added).*

68. Learned Counsel submitted that the case of **Stock v. Urey (1955) NI 71** is cited in the footnote to this paragraph and it is an instance where tax and duty payable on illegally imported goods were recoverable by a

Claimant. In this case, it was held that the sum paid to the Customs authorities was the proper measure of the “loss directly and naturally resulting” from the breach of the implied warranty for quiet possession and of the implied condition, treated as a warranty, that the seller had the right to sell the car, and that accordingly the whole of such sum was recoverable by the purchaser notwithstanding that it exceeded the purchase price.

69. It has been proven that Mr. Krohn had to pay to the Customs Department the duties for the stolen vehicle so that it could be released to him. This is a loss suffered as a result of the breach of the implied warranty for quiet possession and of the implied condition, treated as a warranty, that Mr. Tun had the right to sell the car.
  
70. Mr. Krohn also claims other losses which he said resulted as a consequence of the breach. I agree with Learned Counsel Mr. Musa’s submission that that Mr. Krohn is entitled to recover the penalty or damages or other loss against the Seller, Mr. Tun. This however, must result as a consequence of the breach of the implied warranty that Mr. Krohn should enjoy quiet possession of the motor vehicle when it was seized by the Customs Department.

### **Quantum of damages**

#### *Duties and administrative fees*

71. Mr. Krohn at paragraphs 27 and 28 of his witness statement stated that he paid \$10,000. in customs duties and an additional \$2,000.00 in administrative fees to the Customs Department. He exhibited as “**AK 2**”, “**AK 3**”, and “**AK 4**” the receipts from the Customs Department.

72. The court has examined the said exhibits which show Receipts from Customs Department showing payment made by Mr. Krohn. The receipts shows the following payments:

“AK 2”	-	\$ 2,000.00
“AK 3” (Release Receipt)	-	\$ 7,073.45
“AK 4”	-	<u>\$ 2,926.55</u>
Total		<u>\$ 12,000.00</u>

The court awards to Mr. Krohn \$12,000. for the duties and administrative fees paid to the Customs Department.

*Loss of income*

73. Mr. Krohn at paragraphs 31 to 33 of his witness statement stated that after his vehicle was confiscated from him on the 10<sup>th</sup> July, 2010, he was faced with no other option but to resign as a travelling salesman with Robert Nicolait & Associates because he did not have transportation. He stated that he was earning \$2,000.00 plus commission per month selling water filtration equipment and solar generation equipment. He said that he began looking for alternative employment but it was not until December of 2011, six months later that he found a job as a dive instructor.

74. This is not a case where Mr. Krohn was dismissed from his job. He had a job but stated that he resigned because he did not have transportation as a travelling salesman. In my view, it would have been reasonable for Mr. Krohn to get alternative transportation so that he could continue to do his job. As such, damages will not be awarded for loss of income.

*Repairs to motor vehicle*

75. Mr. Krohn claims that since the vehicle was impounded for over a year at the Customs Department, he conducted repairs after its release on 5<sup>th</sup>

August, 2011. The particulars of the repairs are stated in the claim at paragraph 4. At paragraph 30 of his witness statement he stated that because the motor vehicle was parked and neglected at the Belize Customs Department for one year and one month, he had to replace two tires which were blown out at a cost of \$877.84, filters and parts for the motor vehicle at a cost of \$192.05 and a new battery at a cost of \$225.00. The copies of the receipts for these items are exhibited as “**AK 6**”, “**AK 7**” and “**AK 8**”. I am satisfied on the evidence that Mr. Krohn has proven that he did repairs to the vehicle on its release. The court awards \$ 1,294.89 to Mr. Krohn for repairs done to the motor vehicle.

#### Indemnity bond

76. Mr. Krohn at paragraph 29 of his witness statement stated that he had to take out an indemnity bond with the Customs Department in the sum of \$680.14. He received a receipt from Home Protector Insurance Company Ltd. for the indemnity bond shown as Exhibit “**AR 5**”. In my view, Mr. Tun should compensate Mr. Krohn for the payment of this bond as it was as a consequence of payment of duties on the stolen vehicle sold by him. The court therefore, awards to Mr. Krohn \$680.14 for the payment of the indemnity bond.

#### Use of motor vehicle restricted to Belize and inconvenience

77. Mr. Musa submitted that despite the fact that the Claimant has mitigated his losses by paying less duty than is required by law, the fact remains that he must now also contend with a defected title and the possibility that the true owner of the vehicle from Guatemala would take action to reclaim the vehicle from him. This, Learned Counsel contended is also grounds for recovering general damages against the 1<sup>st</sup> Defendant for the inconvenience caused.

78. In my view, Mr. Krohn has made a choice to pay the custom duties and keep the stolen vehicle for his use instead of repudiating the agreement and claim the purchase price of vehicle. Mr. Krohn had knowledge that the vehicle is restricted to Belize because it was stolen from Guatemala and that he could be exposed to proceedings from the true owner of the vehicle. It is for this reason he had to sign the indemnity bond. In my view, he willingly put himself in this position to suffer some inconvenience. As such, I find that he is not entitled to damages under this head.

79. Summary of damages awarded

Duties and administrative fees	-	12,000.00
Indemnity Bond	-	680.14
Repairs	-	<u>1,294.89</u>
Total		<u>\$13,975.03</u>

**Out of Court settlement**

80. Mr. Peyrefitte in cross-examination of Mr. Gibson raised an issue that Customs engaged in an *ultra vires* procedure when they settled with Mr. Krohn and made him pay the customs duties. It was put to Mr. Gibson by Mr. Peyrefitte that the Comptroller of Customs cannot enter into an out of court settlement when dealing with a person who is not an importer. Mr. Gibson accepted that Mr. Krohn would not be considered as an importer of the vehicle but, that he is a person who has acquired a vehicle. He testified that Belize does not have a treaty with Guatemala and as such when a vehicle is confiscated that was stolen from Guatemala, the purchaser of a stolen vehicle is allowed to pay duty.

81. The Comptroller of Customs is not a Defendant in these proceedings. They are one of the Interested Parties. Further, it was not pleaded by Mr. Tun that the Customs Department acted *ultra vires* when they settled out of court with Mr. Krohn. As such the court, is not required to determine an issue that was not pleaded.
82. I note also, that Mr. Tun has benefitted from an out of court settlement with the Customs Department in the past. When he was asked in cross-examination if he was aware that his name has come up in the past in investigations at the Customs Department, he said: *“No, I am not. I am aware that I had purchased a vehicle, like Mr. Krohn in the past and the Customs Department seized the vehicle from me and I had to go through the same thing that Mr. Krohn is going through. However, I just paid it. I paid to Government of Belize Customs Department and I move on.”* Mr. Tun’s challenge during trial to Mr. Krohn’s out of court settlement with the Customs department is in my view, grasping at straws. Further, it can be seen from Mr. Tun’s defence that he was willing and I must commend him for this, to settle the matter based on the interest of time. He made a proposal for settlement but Mr. Krohn made a counter proposal which he found impracticable and subsequently refused.

### **Summary of findings**

83. The court finds that there was a contract of sale for the motor vehicle from Mr. Jose Tun as “Seller” to Mr. Krohn as “Buyer.”

The court finds that the vehicle which was transferred to Mr. Krohn by Mr. Tun was the same vehicle that was seized by the Customs Department. As a consequence, the court finds that Mr. Tun breach the implied warranty that Mr. Krohn should enjoy quiet possession of the motor vehicle when it was seized by the Customs Department .



Damages awarded to the Claimant is \$13,975.03.

84. **Order**

Damages awarded to the Claimant is \$13,975.03. to be paid by the first Defendant.

Cost awarded to the Claimant to be paid by the first Defendant is \$ 3,493.76.

Interest at 6% per annum from 18<sup>th</sup> January, 2012 to the date of judgment.

Dated this 29<sup>th</sup> day of January, 2013

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Minnet Hafiz-Bertram  
Supreme Court Judge