

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 632 of 2022

BETWEEN:

ROGER CHANG T/A CAPITAL FACTORY

Claimant

AND

[1] Arron Arnold

[2] Eugene Myers

Defendants

Appearances:

Mr. Estevan Perera for the Claimant

Mr. Arron Arnold, the 1<sup>st</sup> Defendant represented himself

2<sup>nd</sup> Defendant absent and unrepresented

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2024: January 31

March 27  
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**Judgment**

**Liability on a contract made by an agent, implied contract**

[1] **GOONETILLEKE, J.:** The claimant, a company registered under the laws of Belize, filed a claim on 31<sup>st</sup> October 2022, naming the 1<sup>st</sup> defendant as the only defendant, claiming a sum of **Thirty-Six Thousand Nine Hundred and Thirty-Five Dollars and Thirty-Five Cents (\$36,935.35)** for goods supplied, and interest thereon till the date of payment.

- [2] An amended claim form dated 13<sup>th</sup> January 2023 was filed thereafter adding the 2<sup>nd</sup> defendant and amending the claim to make both 1<sup>st</sup> and 2<sup>nd</sup> defendants liable for the sum claimed.
- [3] The amended claim form which added the 2<sup>nd</sup> defendant, could not be served on the 2<sup>nd</sup> defendant. Therefore, an application was made by the claimant for substituted service to serve the 2<sup>nd</sup> defendant by publication in the newspapers. This mode of service was approved and ordered by the Court on 17<sup>th</sup> April 2023. An affidavit of service dated 8<sup>th</sup> May 2023 was filed by the claimant to indicate that the alternate service was effected by publication in the newspapers on the 28<sup>th</sup> of April 2023 and the 5<sup>th</sup> of May 2023.
- [4] As there was no acknowledgement of service by the 2<sup>nd</sup> defendant. The claimant by application dated 31<sup>st</sup> May 2023, moved for default judgment against the 2<sup>nd</sup> defendant in a sum of **Forty Thousand Two Hundred and Thirty-Three Dollars and Eighty-Five Cents (\$40,233.85)** which included court fees and costs. In consequence thereof, a default judgment was entered against the 2<sup>nd</sup> defendant on 20<sup>th</sup> July 2023, for a sum of **Forty Thousand Two Hundred and Thirty-Three Dollars and Eighty-Five Cents (\$40,223.85)** and interest thereon at **six per cent (6%)** per annum from the date of judgment till payment in full. There was no application for vacation of the default judgment. However, the court varied the default judgment on 12<sup>th</sup> October 2023, by entering a default judgment against the 2<sup>nd</sup> defendant on terms to be determined by the court.
- [5] The court, thereafter, proceeded to hear the matter and a case management conference was held on 21<sup>st</sup> July 2023. The 1<sup>st</sup> defendant appeared in person and filed his defence. The trial was held on 31<sup>st</sup> January 2024. The court heard the evidence of Mr. Roger Chang on behalf of the claimant and the evidence of Mr. Arron Arnold and Mr. Deon Flowers, on behalf of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant had listed the 2<sup>nd</sup> defendant as a witness and produced an unsigned witness statement of the 2<sup>nd</sup> defendant. However, the 2<sup>nd</sup> defendant did not appear in court to give evidence nor to defend the claim against him. The 1<sup>st</sup> defendant had also listed one, Mr. Thomas

Urbina, as a witness who also did not appear in court to give evidence. At the conclusion of the trial, parties were given an opportunity to file written submissions. The written submissions on behalf of the claimant and the 1<sup>st</sup> defendant were filed on 5<sup>th</sup> February 2024.

- [6] For the reasons set out herein below, judgment is entered against the 1<sup>st</sup> defendant in a sum of **One Thousand Five Hundred and Twenty-Six Dollars and Seventy Cents (\$1,526.70)** and judgment is entered against the 2<sup>nd</sup> defendant in a sum of **Thirty Thousand Four Hundred and Nine Dollars and Sixty-Five Cents (\$35,409.65)** with interest on both sums payable at a rate of **six per cent (6%)** per annum from the 18<sup>th</sup> July 2022, till payment in full.

#### **Particulars of the claim**

- [7] The claimant states that between the 7<sup>th</sup> of June 2022 and the 2<sup>nd</sup> of July 2022, the 1<sup>st</sup> and 2<sup>nd</sup> defendants engaged the claimant by an oral agreement to purchase several items of construction material from the claimant. Eight invoices were issued for a total of **Thirty-Six Thousand One Hundred and Two Dollars and Eighty-Five Cents (\$36,102.85)**.
- [8] The claimant states further that by telephone conversation in or about June 2022, the 1<sup>st</sup> defendant informed that he wanted to purchase material from the claimant. In order to do so, an Atlantic Bank online portal had to be used by the 1<sup>st</sup> defendant by creating an account. Payment was to be made by card, using the online portal.
- [9] The claimant states that 1<sup>st</sup> defendant sent a picture of his social security card to the claimant by WhatsApp message on or about 7<sup>th</sup> June 2022 together with a list of items he intended to purchase. Consequently, the account for payment to the claimant was created that same day.
- [10] Thereafter, on that day, the 7<sup>th</sup> of June 2022, the claimant provided the 1<sup>st</sup> defendant with a quotation by WhatsApp message and the first payment of **One Thousand Five Hundred and Twenty-Seven Dollars and Seventy Cents (\$1,527.70)** was received the same day. On the following day, the 8<sup>th</sup> of June 2022, the 1<sup>st</sup> defendant and the

2<sup>nd</sup> defendant called over to the premises of the claimant to collect the goods. The 1<sup>st</sup> defendant was given a copy of the invoice containing his name, the goods, and the cost and he accepted it. The 1<sup>st</sup> defendant signed the 'waybill' for delivery of the goods which were then loaded into the vehicle in which the 1<sup>st</sup> and 2<sup>nd</sup> defendants had arrived.

[11] The 2<sup>nd</sup> defendant represented to the claimant that he was engaged in construction work for the 1<sup>st</sup> defendant and that he would be making further purchases for the 1<sup>st</sup> defendant using the same process. The 1<sup>st</sup> defendant was present at the time and did not deny that further purchases would be made on his behalf.

[12] Seven (7) more purchases were made thereafter, between 8<sup>th</sup> June 2022 and 2<sup>nd</sup> July 2022 using the same process of the online portal. Delivery of goods was taken by the 2<sup>nd</sup> defendant. The waybills for the second to eighth invoices were signed by the 2<sup>nd</sup> defendant.

[13] The claimant also repaid the 2<sup>nd</sup> defendant, **Three Hundred Dollars (\$300.00) and Five Hundred and Thirty-Three Dollars and Fifty Cents (\$533.50)** in cash, on two separate occasions, for sums charged and paid for by credit card. This was done as the goods paid for by card were not supplied due to not being available. These repayments in cash were made when the 2<sup>nd</sup> defendant came to collect the goods.

[14] On or about the 18<sup>th</sup> of July 2022, the payments made for the eight invoices in respect of the goods supplied were cancelled by Atlantic Bank on the basis that the payments had been fraudulently made on the card without the authorization of the cardholder.

[15] The claimant therefore claims the sum of **Thirty-Six Thousand Nine Hundred and Thirty-Six Dollars and Thirty-Five Cents (\$36,936.35)** being owed to the claimant for the goods supplied.

#### **Defence of the 1<sup>st</sup> Defendant**

[16] The 1<sup>st</sup> defendant's position is that he never knew or consented to the materials being purchased in his name or for an account to be created in his name for purchases with the claimant.

- [17] The 1<sup>st</sup> defendant states that he bought material from the 2<sup>nd</sup> defendant and that he went once with the 2<sup>nd</sup> defendant to pick up the material for himself from the premises of the claimant, thinking that the goods had already been paid for by the 2<sup>nd</sup> defendant.
- [18] According to the 1<sup>st</sup> defendant, the purchases on the first invoice for **One Thousand Five Hundred and Twenty-Six Dollars and Seventy Cents (\$1,526.70)** was not exclusively for the 1<sup>st</sup> defendant. It contained material for the 2<sup>nd</sup> defendant which the 2<sup>nd</sup> defendant had ordered in bulk together with the material for the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant states that his material in that invoice of **One Thousand Five Hundred and Twenty-Six Dollars and Seventy Cents (\$1,526.70)** only amounted to **Six Hundred and Seven Dollars and Twenty-Nine Cents (\$607.29)** and that the rest of the material was for the 2<sup>nd</sup> defendant.
- [19] The 1<sup>st</sup> defendant states that after the purchase in the first invoice issued by the claimant, he had no involvement whatsoever with either the 2<sup>nd</sup> defendant or the claimant and was surprised to receive a demand for the sum claimed.
- [20] The position of the 1<sup>st</sup> defendant is that the 2<sup>nd</sup> defendant is a 'con man', who created the account with the claimant using the name of the 1<sup>st</sup> defendant and paid for the goods with someone else's credit card and thereafter collected the goods from the claimant.
- [21] The first defendant also counterclaimed for **One Thousand Dollars (\$1,000.00)** as compensation for loss of reputation as the demand for the sum claimed had been seen by one of his neighbours who had taken delivery of the demand letter and persons at his workplace had also been informed by the claimant that the 1<sup>st</sup> defendant was in default of payment.
- [22] The 1<sup>st</sup> defendant also stated that the claimant ought to have done his due diligence prior to delivering goods to the 2<sup>nd</sup> defendant and probably knew that the transaction was 'shaded'.

### **Issues to be determined**

[23] The following issues arise to be determined from the pleadings:

- A. Did the 2<sup>nd</sup> defendant act as an agent for the 1<sup>st</sup> defendant?
- B. Did the 2<sup>nd</sup> defendant use the information of the 1<sup>st</sup> defendant with his consent to create an account with the claimant?
- C. Was there a contract between the claimant and the 1<sup>st</sup> defendant?
- D. Did the 2<sup>nd</sup> defendant, without the consent or knowledge of the 1<sup>st</sup> defendant order goods on the second to eighth invoices in the name of the 1<sup>st</sup> defendant?
- E. Did the 2<sup>nd</sup> defendant misrepresent to the claimant that he had the consent of the 1<sup>st</sup> defendant to order goods on his behalf?
- F. Was there a contract between the claimant and the 2<sup>nd</sup> defendant?
- G. Did the 1<sup>st</sup> defendant collaborate or collude with the 2<sup>nd</sup> defendant to defraud the claimant?
- H. Is the 1<sup>st</sup> defendant liable to pay the claimant for goods sold on the invoices? If so for how much and to what extent?
- I. Is the 2<sup>nd</sup> defendant liable to pay the claimant for goods sold on the invoices? If so for how much and to what extent?
- J. Did the 1<sup>st</sup> claimant suffer loss of reputation as a result of the demand by the claimant to pay for the goods?

### **Evidence**

[24] Mr. Roger Chang gave evidence on behalf of the 1<sup>st</sup> respondent's company which bears his name. He was cross-examined by the 1<sup>st</sup> defendant.

- [25] It was the evidence of Mr. Chang that he had spoken on the telephone with whom he believed to be the 1<sup>st</sup> defendant and that a WhatsApp message with a picture of his social security card bearing No. 00039339 was sent, whereupon the account was opened with the claimant in the name of the 1<sup>st</sup> defendant. The WhatsApp message with the picture of the social security card of the 1<sup>st</sup> defendant is exhibited marked RC-1. The telephone number on which these WhatsApp messages were sent and the conversations in regard to the transactions took place, is 613-5321. This telephone number is exhibited on the invoices marked RC-3 and RC-5. The exhibit marked RC-4 is a waybill which bears the signature of the 1<sup>st</sup> defendant. The exhibits marked RC-2 and RC-6 are printouts of the Atlantic Bank payment portal receipts indicating the name of the 1<sup>st</sup> Defendant, Arron Thomas Jay Arnold.
- [26] According to Mr. Chang, the 1<sup>st</sup> defendant came to collect the goods on the first invoice and signed the waybill for the goods. The 2<sup>nd</sup> defendant then informed Mr. Chang that he was doing construction work for the 1<sup>st</sup> defendant and would be making further purchases in the same manner. This was said in the presence of the 1<sup>st</sup> defendant who did not deny it.
- [27] The 2<sup>nd</sup> defendant thereafter ordered and collected goods on the second to eighth invoices issued in the name of the 1<sup>st</sup> defendant and signed the respective waybills for the goods.
- [28] Mr. Chang also stated that he had returned cash to the 2<sup>nd</sup> defendant in respect of invoices which had been charged and paid for, but goods were not supplied due to non-availability.
- [29] Mr. Chang also stated that on or about 18<sup>th</sup> July 2022, Atlantic Bank had cancelled the payments due to the fraudulent use of a credit card, as the owner of the card had not consented to the payments made. He stated that the name of the cardholder is not displayed on the Atlantic Bank credit card receipts.

- [30] In cross-examination, Mr. Chang did state however that the 1<sup>st</sup> defendant was initially reluctant to sign the first waybill for the goods that he collected on 8<sup>th</sup> June 2022 but that he did so thereafter. He also stated that he had not met the 1<sup>st</sup> and 2<sup>nd</sup> defendants prior to meeting them on the 8<sup>th</sup> of June 2022 when they came to pick up the goods on the first invoice. He said that it was the 2<sup>nd</sup> defendant who introduced the 1<sup>st</sup> defendant to him on that date.
- [31] Upon the court questioning Mr. Chang, he stated that he had had several telephone conversations in regard to the transactions and that he thought he was contracting with the 1<sup>st</sup> defendant. However, Mr. Chang confirmed to the Court that having met the 1<sup>st</sup> and 2<sup>nd</sup> defendants, he recognised the voice of the person on the telephone with whom he had conversed as that of the 2<sup>nd</sup> defendant.
- [32] Mr. Chang also answering the court stated that when Atlantic Bank had cancelled the payment, he called the telephone number 613-5321 which is the number that is recorded on the invoices and the number on which he had spoken previously to the 2<sup>nd</sup> defendant. Mr. Chang had called that number on five or six separate occasions after the cancellation of the payment and the 2<sup>nd</sup> defendant had answered and agreed to pay the money. He also stated that in these conversations there was no reference to the 1<sup>st</sup> defendant.
- [33] Mr. Arron Arnold, the 1<sup>st</sup> defendant gave evidence and was cross-examined by Mr. Estevan Perera, counsel for the claimant.
- [34] Mr. Arnold confirmed that he had given his social security card to the 2<sup>nd</sup> defendant. It was his position that he did not have the money to complete his newly built house and that he was ready to sell his television through the 2<sup>nd</sup> defendant in exchange for goods to be purchased. He states that he gave his social security card to the 2<sup>nd</sup> defendant to trade the television as a set-off for the goods to be purchased by the 2<sup>nd</sup> defendant on his behalf.
- [35] He stated that he travelled with Mr. Deon Flowers by bus to meet the 2<sup>nd</sup> defendant and in cross-examination, he admitted that while on the bus he had seen the invoice



of the claimant on his phone with all the materials listed and that he signed it upon collecting the goods. He also admitted that he did not correct or bring to the attention of the claimant that the address and telephone number on the invoice were not his. He said he was unaware that his social security card was used to create an account with the claimant. He said he was not sure whose phone number was on the invoice.

[36] Mr. Arnold also told the court under cross-examination that he did not know how payment was made to the claimant and that he did not ask how payment was made. He also admitted that he had not told the claimant to close the account with his name after the first purchase.

[37] Mr. Arnold also stated under cross-examination that if he had informed the claimant that the 1<sup>st</sup> invoice was not correct in regard to the details of the 1<sup>st</sup> defendant, the other invoices would probably not have been issued.

[38] He also stated that he did not know whose credit card was used for payment of the invoices but believed it was the card of the 2<sup>nd</sup> defendant's girlfriend.

[39] Mr. Deon Flowers who assisted the 1<sup>st</sup> defendant in the construction of his house, gave evidence to state that he had gone with the 1<sup>st</sup> defendant to collect the goods. His evidence was unhelpful as he stated that he was not privy to and did not hear any conversation between the 2<sup>nd</sup> defendant and the claimant nor the 1<sup>st</sup> defendant and the claimant.

## **Analysis**

**First Issue:** Did the 2<sup>nd</sup> defendant act as an agent for the 1<sup>st</sup> defendant?

[40] The evidence of Mr. Chang indicates that the conversations that he had on the telephone in regard to the orders for purchases were with the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant in his evidence confirmed that he did not directly deal with the claimant and that the 2<sup>nd</sup> defendant bought the goods from the claimant. The 1<sup>st</sup> defendant was to pay for the goods by trading his television with the 2<sup>nd</sup> defendant. The fact that the 1<sup>st</sup>

defendant signed for the invoice, even though he states he did so reluctantly, indicates that he had accepted goods ordered on his behalf by the 2<sup>nd</sup> defendant.

[41] I, therefore, hold that in regard to the first invoice, the 2<sup>nd</sup> defendant acted as an agent of the 1<sup>st</sup> defendant.

**Second Issue:** Did the 2<sup>nd</sup> defendant use the information of the 1<sup>st</sup> defendant with his consent to create an account with the claimant?

[42] The 1<sup>st</sup> defendant did give his social security card to the 2<sup>nd</sup> defendant, this is admitted. The 1<sup>st</sup> defendant's evidence as to the purpose of giving the social security card for the trading of his television is not plausible on a balance of probability. It is more probable that he was aware that it was being used to create an account with the claimant. This is confirmed by the fact that the 1<sup>st</sup> defendant stated that while he was on the bus to collect the goods, he did telephone the claimant and ask if the 2<sup>nd</sup> defendant had ordered goods on his behalf.

[43] I, therefore, hold that on a balance of probability, the 1<sup>st</sup> defendant consented to the use of his social security card to create an account to order goods from the claimant.

**Third Issue:** Was there a contract between the claimant and the 1<sup>st</sup> defendant?

[44] It has been established in evidence that the 2<sup>nd</sup> defendant did all the talking both on the phone and in person with regard to transactions with Mr. Chang. However, the 1<sup>st</sup> defendant was aware that there was an invoice generated in his name and he did come to collect those goods which he states were only partly his, the other goods being for the 2<sup>nd</sup> defendant's. The 1<sup>st</sup> defendant also signed for the goods upon collection. As regards the 1<sup>st</sup> invoice, the 2<sup>nd</sup> defendant acted as the agent of the 1<sup>st</sup> defendant.

[45] I, therefore, hold that there was a contract between the 1<sup>st</sup> defendant and the claimant in regard to the goods on the 1<sup>st</sup> invoice. When the 1<sup>st</sup> defendant signed the waybill for the goods, he did not protest nor tell the claimant that part of the goods was his

and that the other goods were not his. He signed for it all. He has therefore to accept responsibility for the purchase and cannot resile from that position.

**Fourth Issue:** Did the 2<sup>nd</sup> defendant, without the consent or knowledge of the 1<sup>st</sup> defendant order goods on the second to eighth invoices in the name of the 1<sup>st</sup> defendant?

- [46] The evidence in regard to this issue is that the 2<sup>nd</sup> defendant told Mr. Chang that he was the contractor for the 1<sup>st</sup> defendant and would be ordering more goods in the same manner and that the 1<sup>st</sup> defendant did not dispute this position with Mr. Chang.
- [47] The 1<sup>st</sup> defendant states, however, that he was unaware of this conversation. The 2<sup>nd</sup> defendant did not attend the trial nor file a defence. Hence, there is only the version of Mr. Chang and the 1<sup>st</sup> defendant on this issue and the evidence of both these witnesses is contrary to each other. The evidence of Mr. Deon Flowers is that he did not hear any conversations between Mr. Chang, the 1<sup>st</sup> defendant or the 2<sup>nd</sup> defendant. He states, however, that the 1<sup>st</sup> defendant did not load the goods on the vehicle, which places the 1<sup>st</sup> defendant in the vicinity of the 2<sup>nd</sup> defendant and Mr. Chang.
- [48] I find that there is no reliable evidence to establish the exact content of the conversation between the 2<sup>nd</sup> defendant and Mr. Chang on the issue of the 2<sup>nd</sup> defendant ordering further goods on behalf of the 1<sup>st</sup> defendant with the knowledge and consent of the 1<sup>st</sup> defendant. The burden of proof rests on the party that asserts the particular facts or position<sup>1</sup>. In this instance, it is the claimant who asserts this position that the 2<sup>nd</sup> defendant ordered the goods on the 2<sup>nd</sup> to 8<sup>th</sup> invoices with the knowledge and consent of the 1<sup>st</sup> defendant. This is based on the conversation that took place between the 2<sup>nd</sup> defendant and Mr. Chang on 8<sup>th</sup> June 2022, in the presence of the 1<sup>st</sup> defendant. The burden of establishing that fact is therefore on the claimant. In a civil case, the standard of proof is on a balance of probability.

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<sup>1</sup> In *Re B (Children)*, Re [2008] UKHL 35

[49] Having considered the available evidence, I am inclined to the view that the claimant has on a balance of probability, failed to prove that the 2<sup>nd</sup> respondent ordered goods on the 2<sup>nd</sup> to 8<sup>th</sup> invoice with the knowledge and consent of the 1<sup>st</sup> defendant. It is probable that the first invoice was issued based on the knowledge and consent of the 1<sup>st</sup> defendant. However, the other invoices and the extent of the goods so ordered, are not matters that have been proved on balance of probability to have been done with the knowledge and consent of the 1<sup>st</sup> defendant. As Lord Hoffman stated in *In Re B (Children)*<sup>2</sup>:

*“If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened”.*

[50] I, therefore, hold that the consent or knowledge of the 1<sup>st</sup> defendant for the goods ordered on the second to eighth invoices has not been proved. Therefore, the goods on the second to eighth invoices were ordered by the 2<sup>nd</sup> defendant without the knowledge and consent of the 1<sup>st</sup> defendant.

**Fifth Issue:** Did the 2<sup>nd</sup> defendant misrepresent to the claimant that he had the consent of the 1<sup>st</sup> defendant to order goods in regard to the 2<sup>nd</sup> to 8<sup>th</sup> invoices on his behalf?

[51] The only evidence available in order to answer this issue is the evidence of Mr. Chang who stated that all conversations with regard to the ordering of goods were with the 2<sup>nd</sup> defendant. The words uttered by the 2<sup>nd</sup> defendant in the conversations had with

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<sup>2</sup> [2008] UKHL 35

Mr. Chang amount to hearsay evidence as the 2<sup>nd</sup> defendant did not give evidence. It is probable that as the account had been opened in the name of the 1<sup>st</sup> defendant and as the goods on the 1<sup>st</sup> invoice were collected by the 1<sup>st</sup> defendant in the presence of the 2<sup>nd</sup> defendant, Mr. Chang believed the 2<sup>nd</sup> defendant represented the 1<sup>st</sup> defendant. The several invoices issued after the first invoice were also paid for using the same account and credit card lending credence to the transaction, thereby allowing further goods to be ordered by the 2<sup>nd</sup> defendant.

[52] I hold therefore on a balance of probability that the 2<sup>nd</sup> defendant gave the impression to the claimant that he had the consent of the 1<sup>st</sup> defendant to order goods in regard to second to eighth invoices.

**Sixth Issue:** Was there a contract between the claimant and the 2<sup>nd</sup> defendant?

[53] Mr. Chang in his evidence was in no doubt that the goods on the second to eighth invoices were ordered by the 2<sup>nd</sup> defendant. It was the second defendant who had signed for and collected the goods on these invoices and it was the 2<sup>nd</sup> defendant who accepted the refunds made by Mr. Chang for goods paid for but were not available. The only fact that ties the 1<sup>st</sup> defendant to the transactions on the second to eighth invoices is that the goods were ordered through an account in the name of the 1<sup>st</sup> defendant.

[54] Therefore, in the absence of any express or implied consent on the part of the 1<sup>st</sup> defendant to order these goods, these transactions amount to an implied contract between the claimant and 2<sup>nd</sup> defendant. As stated by Lord Pearce in **McCutcheon v. MacBrayne (David) Ltd.**<sup>3</sup> “*It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances a similar contractual result will follow*”. The several transactions on the second to eighth invoices with one successfully following the other, all executed by the 2<sup>nd</sup> defendant, the goods collected and invoices signed by the 2<sup>nd</sup> defendant, point to an implied contract between the 2<sup>nd</sup> defendant and the claimant.

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<sup>3</sup> [1964] 1 W.L.R 125 at 138

[55] I therefore hold that there were separate implied contracts between the claimant and the 2<sup>nd</sup> defendant in regard to the second to eighth invoices.

**Seventh Issue:** Did the 1<sup>st</sup> defendant collaborate or collude with the 2<sup>nd</sup> defendant to defraud the claimant?

[56] The evidence on this issue is not conclusive. The admitted fact is that the 1<sup>st</sup> defendant did lend his social security card to the 2<sup>nd</sup> defendant. It is also in evidence that the account for ordering goods from the claimant was opened in the name of the 1<sup>st</sup> defendant on the basis of his social security card. The issue of collaboration of the 1<sup>st</sup> defendant with the 2<sup>nd</sup> defendant to defraud the claimant is an issue that arises from the claimant's pleadings. The burden of establishing this position therefore rests on the claimant.

[57] On a balance of probability, I find that this position has not been established. There are three probable scenarios: the *first* is that the 1<sup>st</sup> defendant did not know that an account had been opened in his name to order goods. This is the 1<sup>st</sup> defendant's position. The *second* is that 1<sup>st</sup> defendant was aware of his social security card being used to open an account to order goods with the claimant but consented only as regards the goods ordered on the first invoice and did not know about or expect further goods to be ordered thereafter. The *third* probability is that the 1<sup>st</sup> defendant gave his social security card to the 2<sup>nd</sup> defendant in the full knowledge that goods would be ordered on that account in successive transactions which would then be used to defraud the claimant. None of these probabilities has been clearly established by the evidence. The failure to establish such positions benefits the 1<sup>st</sup> defendant as the burden of establishing that position rests with the claimant. In any event, I find the third scenario not probable because when the fraud comes to light, it is the 1<sup>st</sup> defendant who would be left with the liability for the goods as his name appears on the account. The 1<sup>st</sup> defendant conducted his own defence and he seemed a man who could not have been unaware of the adverse consequences that would flow from such deliberate fraudulent transactions using his name. He would not want to be in such a position.

[58] I therefore hold on a balance of probability that the 1<sup>st</sup> defendant did not collaborate or collude with the 1<sup>st</sup> defendant to defraud the claimant.

**Eighth Issue:** Is the 1<sup>st</sup> defendant liable to pay the claimant for goods sold on the invoices? If so for how much and to what extent?

[59] As held in regard to the third to seventh issues, the 1<sup>st</sup> defendant is responsible for the goods ordered and signed for on collection from the claimant, in regard to the first invoice. The 1<sup>st</sup> defendant is not responsible for the goods ordered and collected and signed for by the 2<sup>nd</sup> defendant on the second to eight invoices.

**Ninth issue:** Is the 2<sup>nd</sup> defendant liable to pay the claimant for goods sold on the invoices? If so for how much and to what extent?

[60] As held in regard to the fourth to seventh issues, the 2<sup>nd</sup> defendant is responsible for the goods ordered and signed for on collection from the claimant, in regard to the second to eighth invoices.

**Tenth issue:** Did the 1<sup>st</sup> claimant suffer the loss of reputation as a result of the demand by the claimant to pay for the goods?

[61] This issue arises from the 1<sup>st</sup> defendant and therefore the burden of proof lies on the 1<sup>st</sup> defendant. No evidence was led on this issue as to who received information about the outstanding debt of the 1<sup>st</sup> defendant and as to what extent that affected his reputation in the community and his workplace. In any event, it has been held above, that the 1<sup>st</sup> defendant is liable to the extent of the first invoice.

[62] I, therefore, hold that the issue of loss of reputation of the 1<sup>st</sup> defendant as a result of the demand letters of the claimant has not been proved.

## Disposition

- [63] The 1<sup>st</sup> defendant is liable for the amount on the first invoice for an amount of **One Thousand Five Hundred and Twenty-Six Dollars and Seventy Cents (\$1,526.70)** and interest thereon from 18<sup>th</sup> July 2022, the date on which Atlantic Bank, cancelled the payment transaction.
- [64] The 2<sup>nd</sup> defendant is liable for the amount on the second to eighth invoices totalling to an amount of **Thirty-Five Thousand Four Hundred and Nine Dollars and Sixty-Five Cents (\$35,409.65)** (total of all invoices<sup>4</sup> \$36,936.35– \$1,526.70 the amount on the first invoice) and interest thereon from 18<sup>th</sup> July 2022, the date on which Atlantic Bank, cancelled the payment transaction.
- [65] As the claimant has been successful in this action, the claimant is entitled to costs. However, as the liability of the 1<sup>st</sup> and 2<sup>nd</sup> defendants is separated, the defendants shall pay costs in proportion to the amounts to be paid on the claim.
- [66] The percentage of the liability of the 1<sup>st</sup> defendant for costs of the claimant is 4.13 %  $(1,526.70 / 36,935.35 \times 100)$ <sup>5</sup>. Rounded off the 1<sup>st</sup> defendant is liable for **4%** of the cost of the claimant.
- [67] The percentage of the liability of the 2<sup>nd</sup> defendant for costs of the claimant is 95.87 %  $(35,409.65 / 36,935.35 \times 100)$ <sup>6</sup>. Rounded off the 2<sup>nd</sup> defendant is liable for **96 %** of the cost of the claimant.
- [68] **IT IS HEREBY ORDERED THAT**
- (1) The claim is allowed;

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<sup>4</sup> As claimed in the Application of claimant dated 31<sup>st</sup> May 2023 for entry of default judgment against the 2<sup>nd</sup> defendant.

<sup>5</sup> Liability on the amount of the first invoice divided by the total claim on all invoices, multiplied by one hundred, to arrive at a percentage.

<sup>6</sup> Liability on the amount of the second to eight invoices divided by the total claim on all invoices, multiplied by one hundred, to arrive at a percentage.



- (2) The 1<sup>st</sup> Defendant shall pay a sum of **One Thousand Five Hundred and Twenty-Six Dollars and Seventy Cents (\$1,526.70)** to the claimant with interest thereon at a rate of **six per cent (6%)** per annum from 18<sup>th</sup> July 2022;
- (3) The 2<sup>nd</sup> Defendant shall pay a sum of \$ 35,409.65 to the claimant with interest thereon at a rate of 6% per annum from 18<sup>th</sup> July 2022;
- (4) The 1<sup>st</sup> defendant shall pay the claimant **four per cent (4%)** of costs of the claimant to be assessed;
- (5) The 2<sup>nd</sup> defendant shall pay the claimant **ninety-six per cent (96%)** of costs of the claimant to be assessed.

**Rajiv Goonetilleke**  
High Court Judge