IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV03578

BETWEEN	COLE'S FARM STORE LTD	CLAIMANT
AND	CHINA MOTORS LTD	DEFENDANT

Ms. Janet Taylor and Ms. Kadia Wilson, instructed by Taylor, Deacon and James for the claimant.

Ms. Stacy-Ann Young, instructed by Clark, Robb and Company for the defendant.

Sales of Goods Act S. 15 – in course of the seller's business – reasonably fit for such purpose – merchantable quality – new vehicle – rejection – remoteness of damages.

Heard: 15th April 2010 and the 11th February 2011

Campbell, J.

(1) The claimant is a company, with its registered offices at Santa Cruz, in the Parish of St. Elizabeth. The company operates a store that sells farm products, chemicals, pesticides and fertilizer. It is just one of two such stores in that area, which is ringed by a farming community. It is a distributor for one of the larger livestock feed brands and supplies smaller stores throughout the parishes of Manchester, Westmoreland and St .Elizabeth. A part of its business is the delivery of its goods to its customers.

(2) In 2006, directors of the company decided to acquire a truck to facilitate delivery. They applied for and obtained a loan from RBTT Bank Jamaica Ltd. to finance the purchase of the

delivery truck. On the 7th November 2006 Mr. Cole, a director of the claimant, purchased a JAC truck, from the defendant, for $1,249,000.00.

(3) The defendant was in the business of importation of motor vehicles, sales and servicing. It had started the importation of JAC trucks in December 2004. The vehicle was a two ton left-hand drive, standard gears, diesel engine, drop-side truck.

(4) Mr. Cole, states that he had a general drivers' licence since 1978 with which to drive trucks and other heavy duty equipment. According to Mr. Cole, the problems with the JAC truck started on its "maiden journey" from the defendant's sale lot. The clutch pedal would remain depressed and not return to its original position when the pressure was released. He said that he contacted a Mr. Lindsay of the defendant, who advised him that the problem would be corrected. A number of other concerns arose; the driver's seat rocked, the steering wheel wobbled, the vehicle swayed from side to side and the air conditioning did not work.

(5) The truck was taken for its scheduled first servicing on the 9th January 2007, it was not challenged that the defendant was advised of all the concerns that Mr. Cole had with the vehicle. After servicing the truck, it functioned properly for a period. However, soon after, the clutch pedal spring fell out and the pedal remained depressed after being floored. The defects that had been observed prior to the first servicing on the 9th January 2007 had returned.

(6) On the 8th March 2007, Mr. Cole testified that, whilst driving the truck, he heard a loud noise from the engine and the vehicle stopped. He made no attempt to restart the engine, and called a wrecking service that towed the vehicle to the defendant's sale lot. As the vehicle was being hoisted onto the wrecker, Mr. Cole testified that he noticed that the undercarriage showed severe rotting and rusting. The vehicle has since remained at the defendant's sale lot. Mrs. Cole,

a director of the claimant, wrote to the defendant that same day, highlighting the concerns of the claimant in respect of the truck. The Coles, contend that there was no response to Mrs. Cole's letter. Mrs. Cole state that it was after she had made a complaint to the Consumer Affairs Commission (which was copied to the defendant) that the defendant responded with the assurance that efforts were being made to address the complaints under the terms of the warranty.

(7) Mrs. Cole said that not having heard from the defendant any further, she was obliged to rent a truck to continue the business of the claimant's operations. On the 21st March 2007, she requested that the company be given a full refund of the purchase price of the vehicle. The managing director of the defendant responded and alleged that the problems being experienced were driver related and are customarily caused when a driver engages a wrong or too low a gear for the speed being travelled." The letter proceeded to offer to sell the truck once it had been repaired. A later letter from Mr. Townsend repeated the offer for sale and the allegation of "the driver's fault", as being the cause of the engine damage.

(8) On the 7th September 2007, the claimant filed a Writ of Summons, claiming for breach of contract and /or negligence in that the defendant provided the claimant with a defective two-ton JAC truck, causing the claimant to suffer inconvenience, consequential loss and damage. The claimant considered the contract rescinded as the defendant company was in breach of its duty to provide it with a motor truck in good working condition.

(9) The defendant denied that there were recurring problems, put the claimant to strict proof and alleged that the claimant contributed to any negligence that may be found, by not exercising the requisite care and skill in driving the truck and that the claimant failed to mitigate their loss

and damage. The defendant said there was no breach of contract as the motor vehicle sold to the claimant was fit for its intended use and purpose and that the initial complaints were not material defects to render the motor vehicle unsuitable.

Was the vehicle defective?

(10) The answer as to whether the vehicle was defective will depend upon, the intentions of the parties as contained in their agreement. Was it a new vehicle or second that was the subject of the agreement? What was it that they agreed should be the quality of the vehicle that the claimant's company purchased? There were limited express terms of the contract between the parties, in evidence before the Court. Such as were in evidence, was contained in a Memorandum of Registration, (memorandum) a single page document, presented to the purchaser at the time of purchase. The first line of this memorandum reads, "**Your JAC vehicle is manufactured from the finest materials with the latest Automobile Engineering Techniques and the most advanced methods of quality control**."

(11) Further on it states that, to ensure continued performance and prolonged life of your vehicle, JAC offers you a generous warrantee, details of which are explained in the **Manufacturers Limited Warrantee** and **Your Car Care Plan**. The car care plan was not in evidence before the court. Outside of these terms expressly adopted, there may be others imported into the contract "from custom or they may rest upon statute or they may be inferred by the judges to reinforce the language of the parties and realize their manifest intention" (Cheshire and Fifoot, Seventh Edition, page 135).

(12) Section 15 (a) of the Sales of Goods Act is thus imported into the contract.

Section 15 (which only applies to sales) provides;

> "Which it is in the course of the sellers business to supply, whether he be the manufacturer or not."

The term excludes the private seller. The evidence of Mr. Haresh Ramchandi is clear that the business of the defendant is the importation sales and service of pick-ups, trucks, etc. Mr. Reid's evidence supports Mr. Ramchandi on this point, as he outlines, the servicing aspect of the business of the claimant. The stationary of the claimant describes them as being the sole authorized Dealers in Jamaica for JAC. An analysis of the **Davies v Summer** (1984) 3 All ER and **R & B Customs Brokers Ltd. v United Dominions Trust Co.** (1988) 1 All ER 847, in both cases the term as used in other legislation was analysed by the English courts, and it appears that they will be satisfied if either (a) the transaction is an integral part of the business; or (b) if incidental to the business, there is sufficient regularity of similar transactions. I find that the sale was an integral part of the business of the claimant.

(13) JAC is a two-ton utility vehicle with a drop side that specifically facilitates delivery, the purchaser being a farm store, the defendant is imputed with knowledge of the particular purpose for which the vehicle is bought. The receipt issued by the claimants acknowledging the purchase price from the claimant fixes the defendant with that knowledge. Section 15(a) of the Act, in those circumstances, implies a term *that the goods shall be reasonably fit for such purpose*.

The standard under S. 15 (b) of the Act, the implied condition requires that the *goods shall be of a merchantable quality.* The test of merchantability had required that goods must be fit for purposes or purposes for which they were commonly bought. Where there was more than one purpose, merchantability required that they be fit for one of those purposes. The English legislation has introduced the standard of *satisfactory quality*.

(14) In the English SOGA, 1994, Section 14(2A) provides;

> Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price if relevant) and all the other relevant circumstances.

The legislation in S. 14(2) defines quality of the goods and enumerates certain aspects of quality, some of which, as I have pointed out, are absent from the local legislation, but which, amongst others would be valuable tools in making an assessment under the Jamaican legislation.

a) fitness for all common purposes, (the local legislation still requires fitness for one of the common purpose. (b) appearance and finish (c) freedom from minor defects (d) safety, and (e) durability.

(15) The evidence of Mr. Cole is that the vehicle was engaged in the business of the claimant when all the complaints arose. There has been no challenge to this aspect of the case. Neither has there been a challenge that the problem started on the vehicles first trip. It was questioned whether the claimant had examined the vehicle. Mr. Cole testified that he had not, he was of the view there was no necessity to do so, this being a new vehicle. It is settled that a higher standard is required of a "brand-new "good than from those described as "second-hand." In **Rogers v Parish (Scarbourogh) Ltd (1987) QB933**, the car suffered from a number of minor defects and was held to be unmerchantable. The English Court of Appeal underlined the importance of the descriptions "new" and "Range Rover". Deficiencies which might be acceptable in a second-hand vehicle were not to be expected in one purchased as "new". The court went on to say that the brand "Range Rover" conjured up a particular set of expectations. In the present case, although a new car, the unfamiliarity with the brand JAC, and the fact that the vehicle was being imported only for the second year, would not allow the purchasers, to my mind, to have expectations, above what a reasonable person would expect of a new vehicle. The vehicle was a

brand new truck and as such, the claimant would properly have anticipated a vehicle free of the defects that they had experienced.

(16) The House of Lords, in **Stewart v Perth and Kinross Council (2004) UKHL16** (1 April) 2004), approved the importance of the descriptions of the vehicle laid down in "**Rogers v Parish**. The court had an appeal by a local authority, which was authorized under statute, to licence dealers in second-hand vehicles. The dealer had twice had his licence renewed before the authority's refusal, which brought the matter to court. The live issue before the court was whether the Licensing Auhority had the authority to subject the dealer to certain conditions.

> "There was no requirement under the common law or under the Sales of Goods Act 1979 for the dealer to make any representations to the purchaser about the mileage, condition or state of repair of the vehicle. If nothing as said on either side the position under the law as it stood in 1990 was that the dealer was bound only by the implied condition in section 14 (2) of the 1979 Act that the vehicle that he supplied under the contract was of merchantable quality within the meaning given to that expression by section 14(6). The mere fact that there were defects in the vehicle at the time of delivery would not necessarily mean it was not of merchantable quality, bearing in mind that the standard to be achieved depends on the market at which the vehicle is aimed and that deficiencies might0 be acceptable in a vehicle which is being sold as a second –hand vehicle *Rogers v Parish Ltd. (1987) QB 933, per Mustil LJ.* If the purchaser made known to the dealer that he wanted to purchase the goods for use as a vehicle, so as to show that he relied on his skill or judgment, the dealer would be bound also by the implied condition in Section (14) 3 that it was reasonable fit for the purpose as a vehicle to drive along the road: See ***Bartlet v Sidney Marcus*** (1965) 1 WLR 1013, 1016C per Lord Denning NMR. It is obvious that there was a considerable overlap between the two implied conditions."

(17) Where the market that the dealer is aiming at is the "new car" market, it is reasonable to assume that both parties would expect the delivery to be free from minor defects. Freedom from minor defects are more relevant to a new vehicle, as against a second-hand one. **In Roger v**

Parish, the defects in the Range Rover included misfiring, oil leaks, paint scratches and engine noise. These were referred to as minor defects, but the car was still found to be unmerchantable.

Before us, there was a laundry list of defects, a clutch-pedal that would not spring back, the vehicle swaying from side to side, the steering wheel wobbling, driver's seat sliding back and forth when driving, terrible noise from the engine and shutting down while driving. There was challenge as to whether the defects listed, other than the two last named defects, were complained of after being repaired at the first servicing. Mr. Cole also cited a rotting and rusting undercarriage, which he claimed he observed for the first time when the truck was being hoisted into the wrecker.

(18) The damage to the engine was accepted by both sides although the cause of the defect was a point of contention. The defendant alleged that the damage to the engine came about because of want of skill and care on the part of the driver of the vehicle. The claimants contended that the driver, a director of the company, was a competent driver who had been driving standard gear heavy vehicles for more than 25 years. The defendants did not challenge his competence, but contended through their mechanic, that on the occasion that the vehicle was shut down on the road, someone other than Mr. Cole was at the wheels. I find as a matter of fact that the driver of the vehicle was Mr. Cole. In any event, the mechanic for the claimant has testified that if the driver uses his foot to raise the defective clutch then that could result in damage to the engine. It is accepted that the pedal-clutch was defective. It appears, based on the evidence of Mr. Reid, that the engine damage could come about as a result of the driver using his foot to raise the defective clutch. The state of the clutch –pedal, I find, was due to the breach of the implied condition that the vehicle should be fit for the purpose of being operated in the

business of the claimant. That the breach existed at the time of delivery of the vehicle. I find that the cause of the damage to the engine was the defective clutch pedal.

(19) The claimant has rejected the goods. The term of the agreement that was breached is a condition which gives the purchaser the right to reject the goods and terminate the contract. Even where the goods are rejected, the purchaser might claim for any losses he suffered as a result of the breach. The claimant here has done both.

(20) The fact that the breach of the condition existed at the time of delivery, the right of rejection would have arisen at that time. The fact that the vehicle was accepted after repairs, to my mind, is not an intimation of acceptance, it is not a waiving of the right to reject the goods. Section 35, Sales of Goods Act, provides that the buyer is deemed to have accepted the goods ……., or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he had rejected them. In **J & H Ritchie Ltd. v Lloyd Ltd**. **(Scotland) 2007 UKHL** 9, a farmer had sued for the refund of purchase price of a harrow that had developed a problem. He had sent the harrow to be repaired and on its return to him, he inquired as to the reason for the fault, the defendants refused to give him any information, he rejected the harrow. The court held the buyer was justified in so doing, the dealers having failed to inform him, although, as it transpires, the harrow was repaired to excellent condition. Lord Hope of Craighead, at paragraph 13;

> "What happens to the right of rejection if the repairs which the buyer asked for or agreed to is carried out? The buyer is not deemed to have accepted the defective goods merely because he asked for or accepted repairs. But is he bound in every case to accept and pay for goods simply because they are said by the seller, following their repair, to conform to the contract. If not, in what circumstances does the buyer lose the right to reject, and in what circumstances the right remains exercisable…….. The

> problem is not capable of being solved satisfactorily by a pre-ordained code. In the absence of express agreement, the answer must depend on what terms, if any, are to be implied into the contract at this stage, bearing in mind that the seller was in breach at the time of delivery and that the buyer retains the right to resile because the goods were not in conformity with the contract."

(21) Counsel for the claimant submitted that the claimant's rejection of the goods within three months is a valid one. The Court was referred to **Truk (UK) v Tokmakidis Gmbh** (2000) 2 All ER (COMM) 594, where the court held that a period of six months after purchase was held to be a reasonable time in which to reject a vehicle which had defects. The claimants having failed to satisfactorily repair the vehicle on the occasion of the first servicing, what assurance could they possibly give the claimants that there would not be a recurrence of the defects. In addition, the problems had become the cause for greater concern with the failure of the engine. The replacement with a new engine may have gone some way in assuaging the claimant's concern. What confidence would the claimant have that just as the problems indicated prior to the first servicing had resurfaced, that the engine would not shut down and in circumstances that may well imperil the goods and their personal safety. The vehicle has demonstrated a lack of durability, and has caused the directors of the claimant to lose confidence in its capability.

Damages

(22) In any assessment of damages, there are two fundamental principles to be observed; the remoteness of damage and the measure of the damage so determined. The first principle recognizes that a line needs to be drawn as to the extent of the liability for a particular breach. It may be possible to show an injury from some distant cause. As Lord Wright pointed out in **Liesbosch Dredger v Edison** (1933) AC 449 at 460. ". . . in the varied web of human affairs

the law must extract some consequences as relevant, not perhaps on the grounds of pure logic, but simply for practical reasons."

(23) The second principle is concerned with the quantification of the damages. The hallowed principle is that once the damage, having been found not to be excluded on the grounds of being too remote (See **Haddley v Baxendale** (1854) (Exch 341), then the innocent party ought to be restored to the position he would be in as if the breach had not taken place, *restitution in integrum*.

Haddley v Baxendale lays down that, in considering the question of remoteness of damage,

> "It is *such as may be may fairly and reasonably be considered either arising naturally, i .e, according to the usual course of thing , or such as may reasonably have been in the contemplation of both parties at the time they made the contract."*

(24) The lost of the cost of the motor truck, cost of insurance, licensing and registration expenses, were urged on the Court by Counsel for the claimant as arising naturally from the defendant's breach. Counsel relied on **Douglas v Glenvarigil Co. Ltd. (2010) CSOH** 14 for the award of wasted insurance and taxes, but distinguished the case on the point of the right of rejection as resting primarily on the prolonged period the therein claimant had retained the vehicle before the purported rejection. I accept these submissions and make an award in terms of the heads 1-5 of the particulars of claim.

In respect of the claim for the cost of rental of replacement vehicle, counsel for the defendants submitted that the amount claimed was unreasonable; the claim for rental being $1,560,000.00 for a period of nine months, when the vehicle purchased was for $1,249,000.00. Further, there was no rental agreement shown to the court, other than the receipts from the rental

company. He submitted also that the claimants should not be unjustly enriched, having had the use of the vehicle for a period of approximately four months.

(25) It must have been in the contemplation of the parties at the time the contract was entered into, that the claimant would have had to rent a replacement to carry on his business, in the event the vehicle became unserviceable as a result of the breach of the dealers. I would make an award for replacement rental for the period of 9th April to 13th September 2007. That is a period that, the court is of the view, would allow the plaintiff sufficient time to take steps to mitigate the high cost of the replacement of the vehicle. This is moreso considering the claimant at the end of that period would have instituted an action against the defendant. The claimant did derive some benefits for the period from the 7th November 2006 to the 8th March 2007, a period of four months whilst in possession of the vehicle. The benefit derived is the amount they were paid for the replacement service - $12,000 per day. The award for replacement is therefore for a period of one month, being the difference for the period of five months award and the four months of benefits derived. The month will be a total of 24 days for a total of $288,000.

(26) It must also be imputed to the parties that they must have been aware that the financing of the purchase of the vehicle would incur a cost to the purchasers. The application for the interest on the loan is granted. It seems to me that if the claimant is to be put back in the situation as if the breach had not happened, then those rates are applicable. See **Design Matrix Limited & Orville Dixon v L. Phillips**, Supreme Court (unreported) 19th April 2002. The court had the benefit of exhibit 2 from the RBTT, which had interest rate on the loan at a rate of 18.5 per cent per annum. I make an award that the rate of 18 per cent be applied on the amount of $1,249,000.00 from 7th November 2006 to the 13th Sept 2007.