TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. 2011-03442

BETWEEN

GERARD ANTROBUS CLAIMANT

AND

NEAL & MASSY AUTOMOTIVE LIMITED DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER

APPEARANCES

Mr. Lennox Sanguinette, Attorney-at-Law for the Claimant
Mr. Faarees Hosein, Advocate instructed by Andrea Orie, Attorneys-at-Law for the Defendant

REASONS

Introduction

1. In mid-2008, the Claimant, Mr. Gerard Antrobus bought a new Tiida from the Defendant, Neal and Massy Automotive Ltd. (N.M.A.L). He experienced many difficulties with his new vehicle, and returned to the Defendant on some twenty five (25) occasions, seeking repairs. Ultimately, Mr. Antrobus abandoned the vehicle on the compound of the Defendant. He instituted these proceedings pursuant to the provisions of the ***Sale of Goods Act Ch 82:30***.
2. On the 14th July, 2017, I gave judgment for the Claimant. My reasons for so doing are set out below.

Procedural History

3. The Claimant, Gerard Antrobus instituted these proceedings by his Claim Form and Statement of Case on the 9th September, 2011. He sought the following relief:

> *"(i) Damages for breach of contract in relation to defects in HCK 3855.*
>
> *(ii) Damages for loss of earnings.*
>
> *(iii) Interest…*
>
> *(iv) Costs…"*

4. The Claimant was granted permission to amend his Statement of Case, which he did on the 30th January, 2012. By his Amended Statement of Case, the Claimant made this plea:

> *"2. On or about August, 11, 2008 acting on the assurance of the defendant that HCA 3855 was a brand new Nissan Tiida free from defects and a vehicle suitable for use as a hire taxi, the Claimant purchased the car HCA 3855."*

The Claimant listed the alleged defects and at paragraph 21, made this allegation:

> *"21. The defendant at the time of the contract was well aware that the Claimant was purchasing the car for use in his business as a taxi driver and that certain implied conditions were expected. Namely that the vehicle should be of reasonable quality and durability for that of a car for hire…"*

5. The Defendant filed its Defence on the 5th December, 2011. At length, the Defendant applied to strike the Claim on ground that it failed to disclose a reasonable cause of action. Parties filed written submissions in support of and in opposition to the application to strike.

6. On the 11th March, 2014, the Court struck out paragraphs 10-25 of the Amended Statement of Case on the ground of prolixity, but refused to enter summary judgment.

7. The trial was heard on the 1st February, 2016, the Claimant testified on his own behalf, while David Jardim and Allister Gordon and Curtis Browne testified on behalf of the Defendant.

8. Following the trial, parties were allowed time to file written submissions[1].

Facts

9. In August, 2008, Mr. Antrobus visited the showroom of N.M.A.L in Morvant, and spoke to an employee of the Defendant. Mr. Antrobus, could not at first recall the name of the employee. However, while under cross examination, Mr. Antrobus recalled that he had spoken to Mr. Allistar Gordon, a New Car Sales Representative for Nissan vehicles. This was consonant with the evidence of Mr. Gordon, who stated in his witness statement that the claimant sought him out and indicated that he wished to buy a new Tiida. Mr. Gordon also testified that he was aware that the Claimant was purchasing the vehicle for use as a taxi.[2]

10. Mr. Antrobus enquired about the Nissan Tiida Motor Vehicle and asked Mr. Gordon whether the Tiida was suitable for use as a taxi. Mr. Gordon told Mr. Antrobus that the Tiida was suitable for use as a taxi and admitted under cross examination that any new motor vehicle would be suitable for use as a taxi.

11. Mr. Antrobus, obtained financing from Scotiabank, in order to pay the purchase price for a brand new Tiida. On the 11th September, 2008, Mr. Antrobus conducted a pre-delivery inspection and was told that his vehicle was in good working order and took delivery of his

[1] Closing Submissions for the Defendant were filed on the 27th May, 2016. Written Submissions for the Claimant were filed on the 7th October, 2016. Submissions in Reply were filed for the Defendant on 16th December, 2016

[2] See the Witness Statement of Allistar Gordan filed on 19th September, 2014

new Tiida, registered as HCK 3855. On that day, Mr. Gordon gave Mr. Antrobus his Warranty Information Booklet.

12. Mr. Antrobus began using the vehicle as a taxi, plying the route between Morvant and Port-of-Spain.

13. Two weeks after the purchase, Mr. Antrobus returned to the Defendant on the 22nd September, 2008 with complaints that the brakes were not holding and that the gears were not changing smoothly. The Defendant conducted the required repairs.

14. In the months which followed, it became necessary for Mr. Antrobus to return to the Defendant with complaints concerning the new vehicle, on some twenty five (25) occasions.

15. On each occasion, the Defendant, through its employees assisted Mr. Antrobus, conducted the required repairs and returned the vehicle to him. Mr. Antrobus, on most occasions, was not required to pay for repairs.

16. There was no dispute as to the dates on which Mr. Antrobus returned to complain and these are set out in the table below:

Date	**Complaint**
1. 22nd September, 2008	Brakes not holding properly and gears not changing smoothly.
2. 10th October, 2008	Right rear door was sticking. Windshield wipers vibrating and horn not working.
3. 13th October, 2008	Rubber on the left rear door was hanging loose and front brakes not holding properly.
4. 20th October, 2008	Left back rubber coming loose.
5. 7th November, 2008	Horn not working.

6. 4th December, 2008	Left rear door rubber falling off; air and oil filter not changed and brakes not functioning. Vehicle kept overnight.
7. 2nd January, 2009	Vehicle not starting, battery defective.
8. 26th February, 2009	Hearing rolling noise from the rear.
9. 2nd March, 2009	Unusual heaving rolling noise.
10. 22nd April, 2009	Horn not working.
11. 6th May, 2009-7th May, 2009	Left rear door rubber hanging loose. Screeching noise using wipers, rear tyres junking and pinging noise from the engine.
12. 8th May, 2009	Oil leak at the left front wheel.
13. 29th May, 2009	Horn not working.
14. 15th July, 2009	Knocking noise from the steering wheel.
15. 12th October, 2009	Vehicle not starting.
16. 22nd November, 2009	Engine misfiring and knocking noise from the suspension.
17. 11th December, 2009	Handbrake coming up too high; Noise from fan belt Brakes noisy. Rear door rubber burst.
18. 30th December, 2009	Brakes noisy.

19. 17th March, 2010	Transmission giving trouble. Car kept for 2-3 weeks. Claimant given an extended warranty.
20. 20th April, 2010	Horn not working.
21. 5th May, 2010	Noisy brakes.
22. 17th June, 2010	Boot rubber burst and rattling front vehicle over rough roads.
23. 13th June, 2010	Renewal of transmission.
24. 6th August, 2010	Engine misfiring.

17. It was not disputed that the vehicle incurred significant mileage, higher than that of the average customer and that Mr. Antrobus missed some recommended services[3].

18. Nevertheless, under cross-examination, Mr. Curtis Broome, technical analyst for N.M.A.L., admitted that one hundred and eighty kilometers (180 km) per day for two trips per day was not excessive.

19. After having returned to N.M.A.L. on some twenty five (25) occasions, the Claimant visited the Defendant towards the end of August, 2010, and spoke to the General Manager, David Jardim[4]. The Claimant told Mr. Jardim that he did not want the vehicle anymore.

20. Mr. Jardim told the Claimant that the vehicle was already two (2) years old and that in the space of two years, the vehicle had incurred significant mileage, that is to say, in excess of

[3] See paragraph 8 of the witness statement of Curtis Broome
[4] See paragraph 4 the witness statement of David Jardim filed on the 19th September, 2014

130,000 km[5]. However, the Defendant offered to obtain a sale of the vehicle. Mr. Antrobus asked that the vehicle be sold for Eighty Five Thousand dollars ($85, 000.00).

21. The demand of Eighty Five Thousand dollars ($85,000.00) proved to be too high. Offers were not exceeding Sixty- Seven Thousand ($67, 000.00). The Defendant in the interest of good customer relations, offered to buy the vehicle free from all encumbrances. It transpired however, that there were sums owing to the Scotiabank.

22. The defendant wrote to the Claimant by a letter dated 17th January, 2011, requesting that the Claimant retake possession of the vehicle by 28th January, 2011, failing which the Claimant would be required to pay a daily fee of One Hundred dollars ($100.00) for every day that the vehicle remained on the Defendant's compound.[6]

23. The Defendant indicated further that no steps would be taken to restrain Scotiabank from exercising its right to possession. Scotiabank in fact repossessed the vehicle from the compound of N.M.A.L. on the 27th January, 2011. The Defendant wrote to Mr. Antrobus on the 31st January, 2011 and informed him that the vehicle had been repossessed[7].

Submissions and Law

25. Parties relied on the very scholarly and useful submissions of their respective attorneys-at-law[8]. It was common ground that the claim was built on the provisions section 16 of the ***Sales of Goods Act***[9].

[5] See paragraph 9 of the witness statement of David Jardim filed on the 19th September, 2014
[6] See the letter dated 17th January,2011 from David Jardim, Chief Executive Officer of Neal and Massy Automotive Limited to the Claimant
[7] See letter dated the 31st January, 2011, exhibited to the witness statement of Daivd Jardim as "DJ 4"
[8] See paragraph 8 supra
[9] Sale of Goods Act Chap 82:30

The Sale of Goods Act, Chap. 82:30 ("the Act")

26. Section 16 of ***the Act*** provides as follows:

> *"(1) Except as provided by this section and section 17 and subject to any other written law, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.*
>
> *(2) Where a seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality except that there is*
>
> *no such condition—*
>
> *(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or*
>
> *(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.*
>
> *(3) Where the seller sells goods in the course of a business and the buyer expressly or by implication makes known*
>
> *(a) to the seller, or*
>
> *(b) …… ...*
>
> *any particular purpose for which the goods are being bought there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose …except where the circumstances show that the buyer does not rely, or that it is not reasonable for him to rely on the skill or judgment of the seller…"*

27. These sections of the ***Sale of Goods Act***[10] received the authoritative consideration of Jones J (as she then was) in ***Hoyte v. Toyota Trinidad and Tobago Limited***[11]. In ***Hoyte*** supra, the learned Justice Jones (as she then was) had this to say:

> *"11. The Sale of Goods Act Chap 82:30 ("the Act") sets out the conditions to be implied with respect to the sale of goods. With respect to the quality or fitness for any particular purpose of goods supplied under a contract for sale the Act provides that there is no implied condition or warranty with respect to those goods except where the seller sells goods in the course of a business. Where, as in this case, the seller sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of merchantable quality. This condition does not however apply with respect to (a) defects specifically drawn to the buyer's attention before the contract is made; or (b) if the buyer examines the goods before the contract is made with respect to defects which that examination ought to reveal4. In this regard it is not in dispute that Hoyte examined the Vehicle prior to its purchase. As a result there is no implied condition as to merchantable quality with respect to the defects which ought to have been revealed by his examination."*[12]

28. In ***Hoyte***[13], one finds allegations of the operation of an express condition, based on the representations of the Defendant's agent as well as the implied condition as to merchantability, as prescribed for the ***Sale of Goods Act***[14].

[10] Sale of Goods Act Chap 82:30
[11] CV 2012-02049
[12] Hoyte v. Toyota Trinidad and Tobago Limited CV 2012-02049 at paragraph 11
[13] Hoyte v. Toyota Trinidad and Tobago Limited CV 2012-02049
[14] Sale of Goods Act Chap 82:30

Issues

29. Four issues arose for the Court's consideration. The first was whether the Defendant breached the implied condition that the vehicle HCK 3855 was of merchantable quality in accordance with section 16(2) ***Sale of Goods Act***[15].

30. The second issue to be determined was whether the Defendant had breached the implied condition that the vehicle HCK 3855 was reasonably fit for use as a taxi, as provided by section 16(3) ***Sale of Goods Act***[16].

31. The third issue was whether the Claimant was entitled to rescission of the agreement for sale.

32. The fourth issue was whether the Claimant was entitled to damages and if so, what was the appropriate quantum.

Discussion

33. In the discussion which follows, I have considered each of the issues identified above and have set out the reasons for my decision on each issue.

34. It was my view, that the Claimant was not entitled to relief in respect of the implied condition as to merchantability, which is invested in a buyer by section 16(2) of the ***Sale of Goods Act***[17]**.** My reason for so deciding was that the Claimant failed to plead his entitlement to this implied condition[18].

35. It is elementary that the Claimant is required to plead all material facts on which he relies. See Rule 8.6 ***Civil Proceedings Rules 1998***[19]. His failure to do so, was in my view, fatal and

[15] Sale of Goods Act Chap 82:30
[16] Sale of Goods Act Chap 82:30
[17] Sale of Goods Act Chap 82:30
[18] See the Amended Statement of Case filed herein on 27th January, 2012.
[19] Rule 8.6 Civil Proceedings Rules 1998 provides: *"(1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.*

I held that the Claimant was not entitled to rely on section 16(2) ***Sale of Goods Act***[20] in respect of the vehicle HCK 3855.

36. I turned to consider the Claimant's contention that he was entitled to an implied condition of the fitness of HCK 3855 for the purpose of use as a taxi.

37. Learned Counsel, Mr. Hosein cited and relied on ***Medivance Instruments Ltd. v. Gaslane Pipeworks*** [2002] EWCA Civ. 500, where Neuberger, J. considered the distinction between the test of merchantable quality and that of fitness for purpose. Lord Neuberger had this to say:

> *"The test of merchantable quality is comparatively general: merchantability is to be assessed by reference to the nature of the article and the likely sort of uses to which it would be put."*[21]
>
> *"Fitness for purpose on the other hand is directed to the specific purpose for which the purchaser is acquiring the article, at least the extent to which that purpose is known to the seller."*[22]

38. Learned Counsel, Mr. Hosein also cited and relied on a decision of the House of Lords in ***Slater v. Finning Ltd***[23] where Lord Steyn had this to say:

> *"Under Section 14(3), in a case where the buyer made known his purpose there is a prima facie implied condition of fitness which the seller can defeat only by*

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(2) The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case."

[20] Sale of Goods Act Chap 82:30

[21] See Medivance Instruments Ltd v Gaslane Pipeworks Services Ltd and Another [2002] EWCA CV. 500 at paragraph 16

[22] Ibid

[23] Slater v Finning [1996] 3 All ER. 398

proof that the buyer did not rely, or that it was unreasonable for him to rely, on the skill or judgment of the seller."[24]

39. Guided by the words of Lord Steyn in ***Slater***[25], I held the view that two elements were required, when a litigant alleged a breach of the implied condition of fitness for purpose. According to ***Slater***[26]**,** there must be a case where the buyer had made known his purpose. It was my view that it fell to the buyer to prove that he had made known his purpose. If this is established, it then falls to the seller to prove that the buyer did not rely on the former's skill and judgment or that it was unreasonable for the buyer so to rely. I therefore proceeded to examine the evidence in order to ascertain whether, the Claimant had made known the purpose of his purchase and whether the defendant, as seller, proved that the buyer did not rely, or that it was not reasonable for the buyer to rely, on the skill and judgment of the seller.

40. In the instant Claim, Mr. Antrobus testified that he enquired about the Nissan Tiida and that he told one of the Defendant's employees that he, the Claimant, wished to operate the Tiida as a taxi. Mr. Antrobus stated that he asked the employee whether it would be suitable for use as taxi. The employee, later identified as Mr. Gordon, allegedly stated that the Tiida was suited for use as a taxi.

41. Mr. Gordon testified in his witness statement that Mr. Antrobus visited the showroom on the 18th August, 2008, and specifically sought out Mr. Gordon as the person who "fixed up" the Claimant's brother. At paragraph 8 of his witness statement, Mr. Gordon, stated that he was aware that the Claimant was purchasing the car for use as a taxi.

[24] Ibid at paragraph 408(f)
[25] Slater v Finning [1996] 3 All ER. 398
[26] Ibid

42. In the course of cross examination, Mr. Sanguinette asked Mr. Gordon whether he would have encouraged Mr. Antrobus to purchase the vehicle if it was not suitable for use as a taxi. Strangely, Mr. Gordon found this question to be confusing. Mr. Gordon eventually agreed that any new car could be used as a taxi.

43. It was significant however, that Mr. Gordon never denied that Mr. Antrobus told him that he wished to purchase a vehicle for use as a taxi. It was therefore my view, that it fell to the Defendant to prove that the Claimant did not rely on the advice of the Defendant's agent. The Defendant made no attempt to disprove that the claimant relied on the advice of Mr. Gordon.

44. Accordingly, it was my view and I held, that the Defendant's agent was fully aware that the Claimant was purchasing the vehicle for use as a taxi and that the Claimant was seeking and relying on his advice.

45. I therefore proceeded to consider whether the Defendant had established on a balance of probabilities, that the Claimant had not relied on the advice of Mr. Gordon or that it was not reasonable for the Claimant to so rely.

46. I examined the evidence which was adduced on behalf of the Defendant and found no attempt to allege that Mr. Antrobus had not relied on his conversation with Mr. Gordon.

47. Mr. Antrobus was cross examined as to his many years of experience as a taxi drive and admitted that he had more than twenty (20) years' experience plying for hire. There was no suggestion however, that Mr. Antrobus ever owned or drove a Tiida. There would have therefore been no basis for him to connect his experience as a taxi driver with the suitability of the Tiida.

48. Accordingly, it was my view and I held, that the Defendant had not proved that Mr. Antrobus had not relied, or that it was not reasonable for him to rely, on the guidance provided Mr. Gordon.

49. The Claimant, in my view satisfied both elements identified by Neuburger in ***Slater***[27]. He had made known to Mr. Gordon, as he Defendant's agent, the purpose for which he was purchasing the vehicle and the Defendant was unable to prove that Mr. Antrobus did not rely on the guidance of Mr. Gordon in deciding finally to purchase HCK 3855

50. Accordingly, it was my view and I held that Mr. Antrobus was entitled to rely on the warranty provided at Section 16(3) of the ***Sale of Goods Act***.[28]

Breach of the Warranty

51. Having decided that Mr. Antrobus was entitled to rely on section 16(3) of the ***Sale of Goods Act***[29], I proceeded to consider whether there was a breach of the implied condition that HCK 3855 was reasonably fit for use as a taxi.

52. In ***Roger v. Parish*** [1987] QB 933, a case cited by learned Counsel, Mr. Sanguinette, Lord Justice Mustill described the purpose of the purchaser of a new motor vehicle:

> *"that the purpose would not be merely driving a vehicle from one place to another but doing so with an appropriate degree of comfort, case of handling and reliability…"*

53. Where the specific purpose is for use as a taxi, it was my view that the purchaser would be entitled to expect more. No evidence was led, and indeed none was necessary, as to the

[27] Slater v Finning [1996] 3 All ER. 398
[28] Sale of Goods Act Ch. 82:30
[29] Sale of Goods Act Ch. 82:30

phenomenon of the route taxi in this jurisdiction. A taxi driver in Trinidad or Tobago, would offer his vehicle for hire on chosen routes and would ply his route many times throughout the day and often at night, receiving cash payment at their chosen destinations. It was therefore my view, that where the specific purpose of purchasing a vehicle was for use as a taxi, it would be appropriate to add to the description of Lord Mustill, the qualities of reliability and durability over frequently travelled long distances.

54. The uncontroverted evidence, was that the Claimant was never able to relax and enjoy his new purchase. Two (2) weeks following his purchase, he returned to the Defendant with complaints. He continued to complain until he eventually surrendered and abandoned the vehicle at the Defendant's compound.

55. It was therefore my view and I held that there was a breach of the condition implied by Section 16(3) of the ***Sale of Goods Act***[30] and there will be judgment for the Claimant.

The Right to Reject

56. I proceeded to consider whether the Claimant had a right to reject the vehicle. In this regard, the question which arose was whether the Claimant was entitled to reject the vehicle after two years had elapsed from the date of purchase.

57. Section 35 of the ***Sale of Goods Act***[31]confers on the buyer, a reasonable opportunity of examining the purchased goods. The section which immediately follows, identifies those situations in which a buyer is deemed to have accepted the goods. Section 36 provides:

> *"36. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or except where section 35 otherwise provides, when the*

[30] Sale of Goods Act Chap 82:30
[31] Ibid

goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, ***or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.*** *" [emphasis mine]*.

58. It was my view that by implication, the accentuated portion of the quoted section, allows the buyer to reject the goods before the lapse of a reasonable time.

59. These sections were considered in ***Danley Maharaj v. Sterling Services***[32], in which Seepersad J held that the purchaser of a Mercedes Benz, who was compelled to seek repairs on eight (8) occasions, was entitled to reject the vehicle. Although ***Danely Maharaj supra*** was, on appeal at the time of my decision, I found the authorities cited in that case to have been useful.

60. Seepersad J referred to the statement of Lord Hope of Craighead in ***J and H Ritchie Ltd. v. Lloyd Ltd.***[33], where Lord Hope of Craighead formulated this question:

> *"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 preordained 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."*[34]

[32] CV2015-00219
[33] J and H Ritchie Ltd. v. Lloyd Ltd. (2007) 2 WLR
[34] Ibid at page 676

61. I had already decided that there was a breach of the implied condition of fitness for purpose. The question which then arose was whether the lapse of two years was a reasonable time for the purpose of section 36[35].

62. Mr. Sanguinette relied on ***Geofrey Alan Smith v. Statstone Specialist Ltd [2015] EWCA***, where recission was allowed three years after purchase. Mr. Sanguinette relied as well on ***Truk(UK) Ltd. v. Tokmakidis Gmbh***[36] where the Court held that a reasonable time for rescission was flexible.

63. In my view, the evidence in this case shows the Claimant as struggling and trying to make good his new purchase. He would have been entitled to reject the Tiida after the first two (2) weeks. The fact that he endured for two (2) years should not be seen as a factor against him, since any benefit which he derived from the vehicle was diminished by the countervailing effect of having to make frequent and repeated visits to the Defendant.

64. I agreed with learned counsel, Mr. Hosein, that the complaints were minor. It was my view however, that it was necessary to consider the frequency of minor problems over a relatively short period of two years. When taken together, relatively minor problem assumed a major proportion.

65. Accordingly it was my view that the Claimant was entitled to return the car and claim its initial value of one hundred and twenty-seven thousand dollars ($127,000.00).

66. In respect of the Claim for loss of earnings, such being special damages, must be specifically pleaded and proved. This was not done and accordingly there will no award for loss of earnings.

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[35] Sale of Goods Act Chap 82:30

[36] Truk(UK) Ltd. v. Tokmakidis Gmbh [2000] 2 All ER (Comm) 592

Order

67. Judgment for the Claimant.

68. The Defendant to pay to the Claimant the sum of one hundred and twenty-seven thousand dollars ($127,000.00) as damages for breach of contract with interest from September, 2010 to the date of the judgment at the rate of two point five percent (2.5%)

69. Cost agreed in the sum of thirty one thousand, three hundred and eighty three dollars and seventy five cents ($31,383.75) and stay of execution of twenty eight days.

Dated this 5th day of February, 2018.

M. Dean-Armorer
Judge