THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. C.V. 2015-04013

Between

FRANK GENERAL CONTRACTORS LIMITED

Claimant

And

M RAMPERSAD AUTO SUPPLIES LIMITED

Defendant

Before The Honourable Madame Justice Eleanor Donaldson-Honeywell

Appearances:

Mr. Keston McQuilkin and Ms. Krystal Ann Harper, Attorneys-at-Law for the Claimant

Mr. Prakash Ramadhar, Mr. Michael Rooplal and Mr. Andy Bhajan, Attorneys-at-Law for the Defendants

Delivered on January 19, 2017

Judgment

Introduction:

1. The matter arising for determination, following on a no case submission made by M. Rampersad Auto Supplies Limited ["the Defendant"], is whether the Defendant is liable for breach of the contract whereby a motor vehicle was sold to Frank General Contractors Limited ["the Claimant"]. More specifically the Claimant alleges breach of the Warranty Agreement that applied to the sale by the Defendant's alleged failure to repair a defective transmission in the vehicle.
2. The Claimant seeks the sum of One Hundred and Three Thousand, Eight Hundred and Sixty-Five Dollars and Sixty-Five Cents ($103,865.65) to purchase a new transmission for the vehicle, Two Thousand Five Hundred Dollars ($2,500.00) as the cost for labour and One Hundred and Nineteen, Five Hundred Dollars ($119,500.00) compensation for allegedly renting a replacement vehicle from November, 2014 to November, 2015.
3. The Defendant denies liability on the basis that the Warranty was void due to failure of the Claimant to service the vehicle regularly and that in any event, if there was any malfunctioning of the vehicle's transmission, it was not attributable to the Defendant.
4. The Claimant and the Defendant filed witness statements in support of their respective cases in accordance with directions issued during Case Management Conferences. However, on November 8, 2016 at the close of the Claimant's case the Defendant elected not to call any evidence at trial submitting that there was no case to answer. The no-case submission was argued orally on the same day with the Defendant's response thereto also made orally. Thereafter, the parties were permitted to amplify the submissions in writing. The written submissions were filed and exchanged on November 22, 2016.

Issues:

5. In the foregoing circumstances, the Court was required to determine whether or not, as contended in the Defendant's no case submission, the Claimant had at the close of evidence established to the requisite standard of proof a case in relation to the essential facts pleaded in support of the Claim. Accordingly, the following issues arose for determination:
    a. What was the requisite standard of proof in the circumstances of a no case submission having been made after the Defendant, when put to the election, chose not to call any evidence?

b. Did the Claimant establish by that standard, that when sold to the Claimant on December 4, 2013, there was a defect in performance of the transmission of the motor vehicle in that the valve body of the transmission was discovered in June, 2014 to be malfunctioning?
c. If so, did the Claimant establish by that standard that the said defect was attributable to the Defendant?
d. If it was so attributable, has the Claimant established that there is an express contractual Warranty in force and/or an implied condition that the motor vehicle was of merchantable quality and on that basis the Defendant was liable to correct the defect in the vehicle?
e. If there was such a defect in the transmission did the Claimant establish by the required standard that to correct the alleged defect in the motor vehicle what was required was *"a complete replacement of the said vehicle transmission"*, or whether same can be repaired or some part of the transmission replaced?
f. Further did the Claimant establish, to the requisite standard, that due to the alleged defect the vehicle could not be used and as a result there was need for the Claimant to rent a vehicle from a related company commencing November 6, 2014 and continuing to the present time?

Burden and Standard of Proof on No Case Submission:

6. The Claimant and the Defendant were at odds in their closing submissions as to the standard of proof required to establish that, contrary to the Defendant's submission, the Claimant had established a case for them to answer. According to the Claimant, all they had to establish was a prima facie case in order to prove that there was a case to answer. The Defendants argued for a higher standard of proof to be met by the Claimant, namely that their case had to have been proven on a balance of probabilities in order to defeat the no case submission.
7. The Defendant refuted the Claimant's position that all they had to prove was a prima facie case by underscoring that the authority relied on by the Claimant was not relevant to the instant circumstances. Counsel for the Claimant had cited **Benham Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794** at para 39 where the learned Simon Brown L.J. stated that the correct question for the Judge to consider at the end of a no case submission is:-

"Have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence, to support the inference for which they contend sufficient to call for an explanation from the defendants? This may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences to be drawn from the defendant's not calling any evidence, would not allow it *to be dismissed on a no case submission."*

8. However, as correctly underscored by the Defendant in submissions, the distinguishing factor from the instant case was that the defendant in **Benham** had not been put to an election. The Defendant contends that where a Defendant is put to its election, the relevant standard of proof to be proven by the Claimant in discharging its burden when refuting a no case submission is on a balance of probabilities.
9. The Defendant explained further at paragraphs 8 to 9 of submissions as follows:

"Indeed, according to the learned editors of **Blackstone's Civil Practice 2015** at **paragraph 61:46 [Tab 1]**:

"Under the CPR it remains the case that, in general, the judge may require a defendant to elect to call no evidence before making a submissions of no case to answer (Blinkhorn v Hall (2000) LTL 13/4/2000; Miller v Cawley [2002] EWCA Civ 1100, The Times, 6 September 2002). However, there may be circumstances where a submission may be entertained without putting the defendant to an election, as in Mullan v Birmingham City Council (1999) The Times, 29 July 1999. The power to dismiss on a submission of no case to answer without putting the defendants to their election whether to call evidence should be exercised with considerable caution (Boyce v Wyatt Engineering [2001] EWCA Civ 692, The Times 14 June 2001).

Where the court allows a defendant to make a submission of no case to answer without being required to elect whether to call no evidence, the test by which the submission is determined is whether the claim has no real prospect of success (Benham Ltd v Kythira Investments Ltd). ***On the other hand, if the defendant is put to his***

election and decides to call no evidence, the submission of no case to answer is decided on the basis of whether the claimant has established the case on the balance of probabilities (Miller v Cawley [2002] EWCA Civ 1100, The Times, 6 September 2002)*. It is a serious procedural irregularity for a judge to fail to put the defendant to its election on calling evidence, and then to decide a submission of no case to answer applying the balance of probabilities as the standard of proof (****Graham v Chorley Borough Council [2006] EWCA CIV 92, [2006] PIQR P24****)."* [emphasis added]

Zuckerman states at **paragraph 22.79** in **Zuckerman on Civil Procedure, Principles of Practice, Third Edition [Tab 2]**:-

"In ***Miller v Cawley*** *it was said that the test was that of a "reasonable prospect of success". However, while a reasonable prospect of success may be appropriate in applications of summary judgment, it may not be appropriate in the present context since the question here is whether the claimant has done enough to entitle him to put the defendant to his election. The Benham test has now been endorsed by the Court of Appeal in Graham v Chorley BC. It follows that a plea of no case to answer is likely to be entertained only in those cases where the claimant's case has suffered a serious collapse.* ***Needless to say, where the defendant has been put to his election and decided not to call evidence, the court must determine whether the claimant proved his claim on the balance of probabilities.*** *"*[emphasis added]"

10. Further citing the **White Book 2016** at **paragraph 32.1.6** the Defendant highlighted the authors summary of the explanation of Simon Brown L.J. in **Bentham at paragraph 20 of the Judgment** that:

"where a defendant makes a submission of no case to answer, is put to his election and elects to call no evidence, the issue for the judge is not whether the claimant has failed to advance a prima facie case or has "no real prospect" of

succeeding on the claim. Rather, it is the straightforward issue, arising in any trial after all the evidence has been called, whether or not the claimant has established his case by the evidence called on the balance of probabilities (Miller v Cawley [2002] EWCA Civ 1100, July 30, 2002, CA, unrep., at para.11 per Mance L.J.)."

11. The Claimant's analysis of **Benham** as establishing that only a prima facie case was required was based on an oversight in omitting to take into account a full reading of the Judgment. Paragraph 39 of **Benham** which was relied on by the Claimant as set out above must be read in the context of paragraph 23 of the Judgement. There Simon Brown L.J. specified that when he speaks about "no case submission" later in the Judgment he is referring solely to circumstances where the Defendant **has not been asked to elect not to call evidence.** He said:

> "*it is only when the judge does not put the defendant to his election that it becomes necessary to consider the difficulties arising from a submission of no case to answer. Although one talks about entertaining such a submission without putting the defendant to his election, it is in fact meaningless to refer to a submission of no case except on the basis that the defendant has not been put to his election. Strictly, therefore, it is tautologous to refer both to entertaining a submission and also to not putting the defendant to his election.* ***When hereafter I refer to entertaining a submission of no case, I am to be taken as referring to the hearing of such a submission without putting the defendant to his election.*****"** [Emphasis Added]

12. The hearing of a no case submission without putting the Defendant to the election is the rare circumstance where, after the no case submission, the Court may rule against the Defendant based on there being a scintilla of evidence to support a prima facie case **and** allow for the Defendant to go on to present its own case. Only thereafter, if the Defendant calls no witnesses could adverse inferences be drawn. In any event, whether Defence witnesses are called or not, it would be at the end of the case that a determination of the Claim would be made on a balance of probabilities as to whether the Claim has been proven.
13. The Court in **Benham** explained that if on the other hand a Defendant is electing not to call evidence before making a submission there is no point calling it a "*no case submission*". In those circumstances the entire case is really at an end so any submission thereafter can only be a closing submission. The Court must in those

circumstances decide the case applying the normal standard of proof in civil cases. Accordingly, it would not be sufficient for the Claimant herein to merely prove a prima facie case. The Claim must be proven on a balance of probabilities.

14. Paragraph 30 of **Benham** makes clear that on a Balance of Probabilities is the standard of proof to be met where a Defendant elects not to call evidence.

Disposition:

15. On a review of the authorities presented by both parties it is clear that the requisite standard of proof to be met by the Claimant, in the circumstances herein where at the close of the Claimant's case the Defence not only sought to make a no case submission but further elected not to call any evidence, is on a balance of probabilities. It is not sufficient in order to defeat the no case submission for the Claimant to have established at the close of its case a mere prima facie case with regard to all relevant facts pleaded.
16. In any event, as I will make clear in my findings below, the Claimant herein has failed to establish even on a prima facie basis the essential facts it relies on that would be relevant to the issues summarised above. Accordingly, my determination of this matter on a balance of probabilities is that the no case submission is upheld and the Claim must be dismissed.

The Evidence:

17. On December 4, 2013 Mr. Nicholas Koomalsingh, then an 18 year old Director of the Claimant Company founded by his father, acted on behalf of the Claimant Company when he purchased from the Defendant Company a *"brand new Toyota Hilux Vigo 4*4 motor vehicle bearing registration number TDB 1674 ["the Motor Vehicle"].*
18. The purchase price was Three Hundred and Forty-five Dollars ($345,000.00) and with the Claimant was a party to the Defendant's Warranty Agreement at the time of purchase. The Warranty provided for a period of three years or 50,000 km whichever came first. However, there was a condition that it was mandatory that the vehicle be brought in for service according to a set schedule, failing which the Warranty would become void.
19. Other relevant provisions of the Warranty Agreement included the following:

> "*All repairs that is [sic] left incomplete after 30 days will be the customer's responsibility unless it is authorised by the dealer."*
>
> *"Authorisation must be in written form."*

"Warranty does not provide maintenance service or cover damages suffered by unit because of lack of periodical maintenance as specified in the service requirement. "

"Replacement parts such as: clutch, disc, brakes pad, bearing, fuel filter, air filter, belts et cetera are wear and tear items and is [sic] changed necessarily in the service requirements at the customer's expense."

20. Mr. N. Koomalsingh was also the person who drove the Motor Vehicle and initially he complied with the mandatory service schedule. On February 7th, 2014 he took the vehicle for its 5000 km service. The arrival/delivery notice records that it was very dirty. Then again on March 4th, 2014 the vehicle was taken in for the 10,000 km service. This time the arrival/delivery note recorded that the right side front skirt was damaged as was the left side rear body cladding.
21. The motor vehicle was used every day by Mr. N. Koomalsingh and he admitted racking up high mileage over a short period of time. The motor vehicle sustained wear and tear including worn out brakes. He admitted that although replacement of the brakes was not the responsibility of the Defendant they did that for him free of charge "in good faith."
22. According to Mr. N. Koomalsingh, sometime in April, 2014 he had a conversation with a Mr. Rampersad to tell him he would miss two service appointments due to financial constraints. He alleges that this Mr. Rampersad told him something from which he believed the expressed provision on voiding of the warranty for failure to keep appointments to service the vehicle would not be applied.
23. Under cross-examination Mr. N. Koomalsingh admitted that he knew of the provision in the Warranty Agreement that written authorisation was required for waiver of the consequences of missing scheduled car service appointments. Despite this he inexplicably failed to ask the person he admitted was in charge of the Defendant's operations – a Ms. Ramadhin – to put the alleged waiver in writing.
24. Mr. N. Koomalsingh however, admitted under cross-examination, that the relationship of the Claimant and Defendant companies was such that credit facilities were never refused to the Claimant. In fact he agreed that credit would be extended to the Claimant by allowing for the use of post-dated cheques. He admits further that he never sought credit facilities on behalf of the Claimant at the time he allegedly spoke with Mr. Rampersad about being unable due to financial difficulties to meet two service appointments.

25. On the evidence before the Court, as put to Mr. N. Koomalsingh in cross-examination, shortly after the time when he says he sought leniency for not being able to meet two upcoming service appointments he brought in the vehicle on May 8, 2014 for the 15,000 km service. He paid Three Thousand, Nine Hundred and Ten Dollars ($3,910.00) for the service using a post-dated cheque. The transmission was serviced with oil at that time. This was the last of the regular scheduled services for which the motor vehicle was taken in.
26. The fact of the availability of credit facilities and that the Claimant took the vehicle for service after the time, it is being said he spoke with a Mr. Rampersad sheds doubt on whether he had any such conversation. This claim that the strict enforcement of the provision on voiding the warranty was waived due to inability to pay was further put in doubt when under cross-examination Mr. Koomalsingh admitted that in early June, 2014 he brought in the vehicle for repairs as it had sustained damage to the body. On June 13, 2014 Thirteen Thousand, Eight Hundred Dollars ($13,800.00) was paid for these repairs which he admits was much more than would have been required for a 20 km or 25 km service. However those two services were missed.
27. Under cross-examination Mr. Nicholas Koomalsingh admitted that failure to bring in the motor vehicle for the two scheduled service appointments could cause damage to the vehicle and void the warranty. On June 25, 2014 he brought the vehicle in for service at over 28,000 km. After the vehicle was serviced he signed off on the receipt notice which recorded that it was in good condition.
28. Sometime before the end of the same month June, 2014 and after having missed two required service appointments Mr. Nicholas Koomalsingh claims he first noticed that there was a rough changing that occurred when the vehicle's transmission started changing gears. Apparently, he did not take the vehicle in to be checked at that time as he says it was later on during mandatory 30,000 km and 35,000 km service appointments that he reported the problem. Those appointments were from September, 2014 to November, 2014. When the vehicle was taken in to the Defendant during that time, Mr. N. Koomalsingh says it was test driven and the Defendant tried to fix the problem.
29. According to Mr. N. Koomalsingh the problem was not solved. However, on the evidence presented by the Claimant, he signed off on five arrival/delivery receipt notes confirming he received the motor vehicle in good condition after each service. On none of the said receipts was it endorsed that the Claimant had a concern about the

transmission. This was so up until the final such receipt dated November 5, 2014. After that final service however, Mr. N. Koomalsingh neither collected the vehicle nor paid the bill for service. Further, he claims that it was from the next day November 6, 2014 that on behalf of the Claimant he started renting a replacement vehicle at Nine Thousand Dollars ($9,000.00) per month from Central Recycling and Trading Company Limited, a company owned by his brother Jason Koomalsingh.

30. The evidence of this alleged rental came from the testimony of Jason Koomalsingh who put into evidence invoices for rental at Nine Thousand Dollars ($9,000.00) per month. The invoices were not stamped as paid and there were no other documents such as receipts, cheque leaves or accounting vouchers from the Claimant Company to prove these Special Damages. It was however Jason Koomalsingh's testimony that the invoices were paid in cash by the Claimant. In addition to the absence of documentary proof of the significant quantum claimed for rental, there was evidence under cross-examination from both Jason and Nicholas Koomalsingh that the Claimant Company had a fleet of vehicles at its disposal. As such it was possible for a vehicle to be made available to be used by Nicholas Koomalsingh. The credibility of claim that the Claimant Company as opposed to its director personally needed to have a replacement vehicle was in doubt.
31. On November 14, 2014 Mr. N. Koomalsingh decided to contact the Defendant to get copies of service records for the motor vehicle to seek external help to fix the alleged transmission problem. After making the said request he received a response in writing from the Defendant notifying him that the 20,000 km and 25,000 km services were missed and as a result the Warranty on the motor vehicle was void. Further the letter advised that the problem reported was investigated and it was found not to be a defect but a result of *"improper and dangerous method of shifting or changing gears whilst driving."* The Defendant further asked the Claimant to have the motor vehicle collected after paying the outstanding service invoice as well as storage fees for leaving the vehicle there after December 3, 2014.
32. It was after receipt of this letter from the Defendant that the Claimant retained Reagan Rowans, Attorneys-at-Law to write to the Defendant. In a November 21, 2014 the Claimant's then Attorney wrote concerning the alleged ongoing problem with the changing of gears in the vehicle and indicating that the Claimant would collect the vehicle as soon as the requested service documents are provided. Eventually on December 3, 2014 the outstanding service bill was paid and the vehicle was collected

on a tow truck. This towing was not done because the motor vehicle could not be driven. According to Mr. N. Koomalsingh the vehicle was towed so as "not to cause further damage to the transmission."

33. Mr. N. Koomalsingh shortly thereafter on January 14, 2015 took the vehicle for assessment *"in order to have the problem repaired"*. The assessment was done by Mr. Mervyn Joseph of MAC Corporation Ltd. He was called as an expert witness for the Claimant. His January 14, 2015 Report which the Claimant relies upon, to prove that there was a defect in the transmission, does not record either the mileage or the age model of the vehicle at the time of his assessment.

    Initially under cross-examination, Mr. Joseph said that information was important and was included in the report. However, ,there is no evidence on record from Mr. Joseph with regard to age of the vehicle save for his indication in his witness statement filed herein almost two years later that *"the Claimant's motor vehicle was relatively brand new."* Based on the date of purchase when the vehicle was first seen by Mr. Joseph it would have been at least one year old.

34. Under cross-examination Mr. Joseph admitted that his Assessment Report did not indicate the mileage or age of the motor vehicle but he said that in the circumstances of his assessment that was not very important. He was allowed the opportunity to clarify this in re-examination. His explanation was that mileage would not be very important where people are very meticulous in care of their vehicle. There was no evidence called by the Claimant that would support that the motor vehicle in this case was so maintained. In fact to the contrary it was brought in for service/repairs dirty and damaged on more than one occasion. Furthermore mandatory service appointments were missed and Mr. N. Koomalsingh admitted that that could cause harm to the vehicle.

35. In the January 14, 2015 report Mr. Joseph spoke about the rough shifting on changing gears which he opined was "*not normal for a well- functioning transmission and suggests* ***a defect of sorts*** *which requires trouble shooting to identify and remedy same.*" He was equivocal in diagnosing the cause of the problem only stating conjecturally that "***most likely*** *the valve body of the transmission is malfunctioning and requires replacement*". He further qualified his assessment by expressing as a caution "*we hasten to add that our assessment is given against the background that* ***a full examination of the inner working of the transmission has not been effected*** *as this*

would require removal and dismantling of the transmission which does not fall within the scope of the request of this report."

36. Mr. Joseph did not in his report define the cause of the Claimant's complaint as manufacturer's defect and admitted in cross-examination, that he did not conduct other tests to rule out other possible causes for the alleged malfunctioning in the vehicle, for example a problem with a *"U-Clamp"* on the suspension, which could have caused complaints similar to those experienced by the Claimant. Indeed, there was no evidence that the witness checked the suspension of the subject vehicle.
37. Later on in his Witness Statement Mr. Joseph sought at paragraphs 10 and 11 to give a different explanation for not conducting the full examination essentially contending that it was not necessary to do so because based on his experience with similar vehicles in the past he was able to identify that the cause of the problem was the valve body of the transmission. Further at paragraph 13 of his Witness Statement he said that based on his inspection and experience "*the defect with the valve body*" is a "*manufacturer's defect*" due to *"bad actors"*. This conclusion however, was not reported in his January 14 assessment which formed the basis for the instant claim. Mr. Joseph admitted that he only inspected the vehicle once. There was no evidence of a follow up inspection which could have caused this change to the assessment.
38. On April 1, 2015 a pre-action protocol letter was sent by the Claimant's then Attorney-at-Law Mr. Rowans seeking redress based on the January 14, 2015 assessment report by Mr. Joseph. There was no positive response as the Defendant maintained there was no fault in the vehicle and any problem with shifting of the gears was caused by the harmful driving practices of Mr. N. Koomalsingh. New counsel was retained by the Claimant and another pre-action protocol letter was sent on July 10, 2015 by Hobsons, Attorneys-at-Law demanding that the Warranty Agreement be honoured by fixing the motor vehicle. Liability was once more denied by the Defendant's Attorney.
39. Before commencing the instant Claim the Claimant obtained a further report from Mr. Joseph. This report dated August 11, 2015 advised on the need for a complete replacement of the vehicle transmission for which a labour cost of Two Thousand, Five Hundred Dollars ($2,500.00) would be charged. The Claimant alleged the replacement transmission was sourced at a cost of One Hundred and Three Thousand, Eight Hundred and Sixty Five Dollars and Sixty-Five Cents ($103,865.65) at Toyota. However, no witness was called to support the said price. Interestingly, the transmission part cost

was obtained on August 3, 2015 as seen on the Tax Invoice even before Mr. Joseph advised on 11, 2015 that it was necessary.

40. Mr. Joseph admitted under cross-examination that the cost to repair the transmission would be cheaper than the cost of full replacement. He admitted that a valve body within a transmission can be repaired. However, by admission in his earlier report he had not dismantled the transmission to explore this option. No price for repair as opposed to full replacement was assessed by Mr. Joseph. Mr. Nicholas Koomalsingh admitted under-cross examination that no attempt was made to have the transmission repaired though he was aware that the Chaguanas Auto Supplies business was internationally recognised for servicing Toyota vehicles and repairing transmission. In fact he admits to have taken the vehicle there before going to Mr. Joseph. He says he was told the vehicle would have to be kept overnight but he refused to leave the vehicle.
41. No updated pre-action protocol letter was sent to the Defendant with the new information obtained about cost for replacement. The instant claim was filed on November 23, 2015

Findings of Fact:

At the time of sale December 4, 2013 or thereafter was there a defect in performance of the transmission of the motor vehicle?

42. The highly conjectural, equivocal and inconsistent nature of the evidence of Mr. Joseph was such that it was not possible to glean therefrom even a prima facie case that there was a manufacturer's defect in the vehicle ***at the time of purchase***. From Mr. Joseph's report I accept however, that there was a prima facie case made out that the vehicle was malfunctioning when he examined it ***one year after purchase***.
43. As to whether there was a manufacturer's defect Mr. Joseph admitted that he had not done a full examination. From his report there was no indication that he had knowledge of the age or mileage of the vehicle though he admitted that those facts were relevant. In his witness statement he said that the vehicle was "relatively brand new" which gave the impression that he was unaware of the background history of the vehicle including when it was purchased. Furthermore, he said under re-examination that age and mileage may not have been very important to his assessment whether a full examination was necessary in instances where a vehicle is treated with meticulous care. On his

testimony however there was no evidence that this was such a case as to render the mileage and history of the vehicle irrelevant to his findings.

44. The Claimant failed to bring forward any credible evidence to establish on a balance of probabilities that the transmission of the said vehicle was malfunctioning due to manufacturer's defect.

If so was the said defect attributable to the Defendant?

45. On the evidence of the Claimant's own witness, Mr. N. Koomalsingh not even a prima facie case was made out that any defect found in the vehicle by him in June 2014 was attributable to the Defendant. He admitted that by then he had missed two mandatory service appointments and that missing same could cause harm to the vehicle. At the close of the Claimant's case there was insufficient evidence on a balance of probabilities or even prima facie to establish that the problem with the motor vehicle transmission was attributable to the Defendant.

If so has the Claimant established that there is an express contractual Warranty in force and/or an implied condition that the motor vehicle was of merchantable quality?

46. Although the evidence of Mr. Nicholas Koomalsingh with regard to a conversation with an unidentified gentleman called Mr. Rampersad was severely discredited under cross-examination it did serve to provide a prima facie case that he was told that the warranty would not be voided if the Claimant missed two service appointments. The testimony was however, shown under cross-examination to be in defiance of logic in many respects. These included the unlikeliness of the Claimant needing to miss appointments due to financial constraints when services on credit were always afforded to them. Furthermore, the Claimant paid on credit for a service shortly after the conversation and paid a huge bill on credit for body work repairs a few weeks after the alleged conversation.
47. The wording of the alleged conversation was not particularised but instead the Claimant relied on the alleged belief of Mr. N. Koomalsingh as to what was meant by same in order to prove waiver of the voiding of the warranty. Mr. N. Koomalsingh admitted that he was aware of the clause in the Warranty Agreement that made it mandatory for such a waiver to be in writing yet he made no attempt to request a written waiver. The Claimant's evidence was not sufficient to establish on a balance of probabilities that

the Defendant waived the provision of the Warranty Agreement that rendered it void for failure to service the motor vehicle on schedule.

On that basis was the Defendant liable to correct the defect in the vehicle?

48. There being insufficient evidence on a balance of probabilities of a continuing warranty at the time the alleged defect was reported in September 2014, the Defendant could not have been liable to correct it based on the warranty. Further, there being no prima facie evidence of a manufacturer's defect that existed from the time of sale such that the vehicle would have been sold in breach of the implied condition of merchantable quality, there could be no liability on the part of the Defendant in that respect as well.

If there was such a defect in the transmission did the Claimant establish that to correct the alleged defect the motor vehicle what was required was "a complete replacement of the said vehicle transmission"?

49. On this issue my finding accords with the submission of Counsel for the Defendant that "*taken at its highest, the Claimant's evidence **can only** suggest that further examination of the transmission needs to be undertaken, based on the report from MAC Corporation. …… Notwithstanding the above, the evidence of the Claimant's expert is that it **may** be that the valve body of the transmission is defective. In the words of the witness himself, this part can be repaired or replaced at a fraction of the cost of replacing the entire transmission. The Claimant has placed no evidence before the Court with respect to these costs..... The approach of the Claimant in insisting on the cost of a replacement of the vehicle's transmission in the manifest absence of any evidence to support same, reeks of haughtiness, and in its apparent haste to institute these proceedings, the Claimant has deprived itself of the opportunity to determine the root cause of its complaints with respect to the said vehicle and to be compensated for same if same fell within the remit of the Defendant*."
50. On a balance of probabilities the Claimant had not established at the close of its case that a complete replacement of the motor vehicle transmission is required.

Did the Claimant establish that there was need for the Claimant to rent a vehicle from the related company from November 6, 2014 and continuing to the present time at a cost of Nine Thousand Dollars ($9,000.00) per month and that it did in fact rent the replacement vehicle?

51. Although somewhat surprising that the Claimant company would make cash payments with no receipts to rent a vehicle from a company owned by the son of its owner and the brother of the vehicle's driver Nicholas Koomalsingh which once operated from the same premises as the Claimant, a prima facie case was established as to the rental. What was not established on a balance of probabilities or even prima facie was that it was necessary at all to rent a replacement vehicle and if so that same had to be rented up to the present time at a cost of more than Two Hundred Thousand Dollars ($200,000.00) when the alleged cost to replace the transmission was around One Hundred Thousand Dollars ($100,000.00). The amount allegedly spent on rental amounts to more than half the price that would be required to pay for a new equivalent vehicle.
52. The Claimant's witnesses admitted that correction of the alleged transmission problem whether by full replacement or less costly repair was not attempted at all. Instead the vehicle was kept in the garage of Mr. N. Koomalsingh where the engine was *"idled"* every day awaiting the court's determination. In all the circumstances not even a prima facie case of the need to rent the replacement motor vehicle from December, 2014 to the present time was made out.

Decision:

53. Having considered the evidence presented by the Claimant and the submissions on both sides it is my determination that:
    - **a.** The Claimant's claim against the Defendant is dismissed.
    - **b.** The Claimant do pay to the Defendant prescribed costs of $42,879.84 calculated on the amount claimed of Two Hundred and Twenty-Five Thousand, Eight Hundred and Sixty-Five Thousand Dollars and Sixty-Fie Cents ($225,865.65).
    - **c.** Stay of Execution 28 days.

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Eleanor Joye Donaldson-Honeywell

Judge