

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-03400

BETWEEN

YANIDIS DE LOS ANGELES VIALVA BETERMIT

Claimant

AND

PRAKASH BALA

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: 26th November, 2019

Appearances:

Claimant: Mr. G. Bhagwansingh

Defendant: Mr. D. Kidney

JUDGMENT

1. This is a claim for breach of a written contract. On or about January 21, 2016 the claimant entered into a written agreement with the defendant to purchase a Mitsubishi Rosa Japan Maxi Taxi, registration no. HCR 2707 ("the maxi") for the price of \$580,000.00. The terms of the agreement were that the claimant would pay the sum of \$480,000.00 as a deposit and the balance would be paid by way of monthly installments of \$5,000.00 commencing on March 5, 2016 and ending on October 20, 2017.
2. On or about January 21, 2016 the claimant paid the said deposit by way of certified cheque. Subsequently, the claimant commenced paying the monthly instalments. Whilst the maxi was in her care and control, she incurred the sum of \$28,394.82 to keep same in a roadworthy condition.
3. The claimant failed to continue making the monthly installments and as a result in or about the month of June, 2017 the defendant repossessed the maxi. The claimant avers that at the time of the repossession of the maxi, she was owing the sum of \$62,000.00 to the defendant.
4. Clause 6 of the agreement sets out the entitlement of the claimant to a refund of the deposit in the event that the maxi is repossessed. As such, the claimant has made several demands for the return of her deposit. Further, the claimant claims that pursuant to clause 12 of the agreement, she is entitled to an equitable interest in the maxi by virtue of all the payments made towards the maxi.
5. Consequently, by Claim Form filed on September 26, 2017 the claimant seeks the following relief;

- i. The sum of \$480,000.00;
 - ii. Any additional equitable interest in the maxi the court may deem just;
 - iii. Interest;
 - iv. Costs; and
 - v. Such further and/or other relief as the court may deem just.
6. The claimant failed to comply with the court's order to file written submissions by May 31, 2019. Having failed to apply for an extension, an extension was granted by the court of its own motion to September 20, 2019. Notwithstanding, the claimant failed to file any written submissions.

THE DEFENCE AND COUNTERCLAIM

7. The defendant admits that he entered into a written agreement with the claimant for the sale of the maxi. The defendant avers that at the time of entering into the agreement to sell the maxi to the claimant, the maxi was in proper working condition. As such, the defendant puts the claimant to strict proof of her expenditure to keep the maxi in a road worthy condition. In reliance on the claimant's promise to pay the monthly instalments, the defendant purchased another maxi on February 16, 2016 for the sum of \$350,000.00 (with a down payment of \$300,000.000 and a monthly installment of \$5,000.00).
8. The defendant avers that in order to pay him the outstanding sum of \$62,000.00, the claimant and/or her servants and/or her agents put the maxi up for sale in or around the end of June, 2017 for the price of

\$495,000.00 (negotiable). The claimant was unsuccessful in securing a sale for the maxi at that price.

9. The defendant admitted that due to the claimant's non-payment of the monthly instalments, he repossessed the maxi. He claims however, that the maxi was repossessed on July 3, 2017. At the time of repossession, the sum of \$47,000.00 was in arrears due to the non-payment of the monthly instalments from October, 2016 to June, 2017 (a partial payment of \$3,000.00 was made for the month of September, 2016). Those payments were not made even though the maxi was at that time in the possession of the claimant. According to the defendant, the usual income from a maxi of a similar type is \$20,000.00 to \$30,000 per month.

10. The defendant avers that should he repair the vehicle prior to selling same (to increase its saleable value), the claimant would be entitled to her deposit less 1) the sum of \$47,000.00 (the arrears due for the months of October, 2016 to June, 2017), 2) the actual cost of maintenance and renewal payments incurred by virtue of the claimant's and/or her agents' and/or her servants' misuse of the maxi and 3) any costs of advertising or costs incidental with the sale of the maxi. The defendant has attempted to sell the maxi as is and was unsuccessful in so doing.

11. The defendant further avers that clause 6 of the agreement must be read in conjunction with clauses 11, 12 and 13. According to the defendant, clause 12(a) permits him to subtract the cost of all repairs required to be made to the maxi upon its repossession. The defendant avers that when he repossessed the maxi, it was not in the same good condition it had been at the time it was sold. The estimated cost of the repairs required to be done on the maxi is \$138,125.00. To date, the defendant has spent the

sum of \$5,064.00 on the maxi for overdue maintenance works and renewals.

12. The defendant denies that the claimant is entitled to an equitable interest in the maxi. According to the defendant, the equity clause within the agreement does not contemplate that a party to the agreement ought to be rewarded with an equitable interest when said party has failed to perform but rather it contemplates that monies spent towards the interest in the maxi gives the purchaser an equitable interest so long as the purchaser performs the contract.

13. Consequently, by Counterclaim filed on October 24, 2017 the defendant seeks the following relief;

- i. An order that the defendant do refund the claimant her deposit less 1) the actual cost of repairs, 2) \$5,064.00, 3) 47,000.00 and 4) all costs incidental in putting the maxi up for sale;
- ii. In the alternative, an order that the claimant and the defendant do at the claimant's cost put the maxi up for sale for one month as is and upon the sale, the defendant do pay the claimant the proceeds of the sale less \$67,064.00 (being the balance of the monies due and owing on the purchase price of the maxi plus the \$5,064.00 that was already expended by the defendant on the maintenance and renewal payments);
- iii. In the alternative, if one month has elapsed and a sale has not been procured, an order that the claimant do repair the maxi at her sole cost and that the claimant and the defendant do put the maxi up for sale and upon the sale of the maxi, the sum of \$67,064.00 be paid to the defendant;

- iv. In the alternative, an order that the claimant do pay the defendant the sum of \$67,064.00 and upon receipt of the \$67,064.00, the defendant do return the maxi to the claimant as is;
- v. Interest;
- vi. Costs; and
- vii. Such or any further relief as the court may deem appropriate.

THE ISSUE

14. The main issue for determination in this case is whether the claimant is entitled to a refund of the entire sum of her deposit of \$480,000.00.

THE EVIDENCE FOR THE CLAIMANT

15. The claimant gave evidence for herself and called one witness, Julmary Madriz D'Souza ("Julmary").

The evidence of the claimant

16. The claimant met the defendant sometime in the middle of January 2016 through a family member. The claimant discussed the purchase of the maxi with the defendant, inspected same and found it to be in good working condition. The body also needed no work. The claimant is Venezuelan but knows some English. She however used an interpreter, Nicky Dialsingh ("Nicky") during the transaction.

17. On January 21, 2016 the defendant, his son, Nicky and the claimant executed the agreement at a lawyer's office the contents having been

explained to her by Nicky.¹ The claimant paid the deposit for the maxi in the sum of \$480,000.00 by certified cheque on the same day.²

18. The claimant then gave the maxi to her brother, Christopher Trancoso (“Christopher”) to operate and keep in a roadworthy condition. Christopher operated the maxi on the Priority Bus Route (PBR) as the claimant had purchased the maxi with the right to operate same on the bus route. The money which was earned from operating the maxi on the PBR was used to maintain and repair the maxi.³

19. Christopher was tasked with paying the monthly installments of \$5,000.00 to the defendant as per the agreement. Christopher made some of the payments but then he stopped doing so. In total, \$38,000.00 was paid. The balance that was therefore owing to the defendant was \$62,000.00.

20. In June 2016, the claimant discussed with the defendant the idea of selling the maxi as Christopher was not working the maxi as he should and so the money was not coming in. Consequently, the maxi was put up for sale on Facebook that very month but no one seemed interested in purchasing the maxi.

21. The defendant then repossessed the maxi (which was being worked on the PBR up to the day before repossession) from Christopher’s house at Savannah Drive, Trincity at a time when the claimant was outside the jurisdiction. Upon learning of the repossession, the claimant returned to

¹ A copy of the agreement was annexed to the statement of case at “YB1”.

² A copy of the cheque was annexed to the statement of case at “YB2”.

³ Invoices showing the cost of maintenance and repairs done on the maxi was annexed to the statement of case at “YB3”.

Trinidad and spoke with the defendant on several occasions about the return of her deposit, but the defendant refused to refund it.

The cross-examination of the claimant

22. The claimant accepted the following;

- i. The installment payment of \$5000.00 for the month of February, 2016 was paid in March, 2016;
- ii. The installment payment of \$5000.00 for the month of March, 2016 was paid in April, 2016;
- iii. The installment payment of \$5000.00 for the month of April, 2016 was paid in May, 2016;
- iv. The installment payment of \$5000.00 for the month of May, 2016 was paid in June 2016;
- v. The installment payment of \$5000.00 for the month of June, 2016 was paid in July, 2016;
- vi. The installment payment of \$5000.00 for the month of July, 2016 was paid in September, 2016
- vii. The installment payment of \$5000.00 for the month of August, 2016 was paid in May, 2017;
- viii. The sum of \$3000.000 for the month of September, 2016 was paid in June, 2017;
- ix. No payments were made from October, 2016.

23. The claimant initially testified that the defendant repossessed the maxi in July, 2017. She then testified that she could not recall whether it was repossessed in June or July, 2017 and that she thinks it was June. The claimant agreed that at the time the maxi was repossessed she owed the

defendant money. That she owed the defendant the sum of \$47,000.00 for September 2016 to June 2017. During September 2016 to June 2017 the maxi was in the possession of Christopher. According to the claimant, she and the defendant spoke about the outstanding installments and it was agreed that it would be sold so that she would be able to pay the sums due to him by the end of the agreement period which was October, 2017.

24. As such, she accepted that the sale of the maxi was a joint sale. She testified that she proposed the joint sale to the defendant. The claimant was referred to paragraph 9 of her Defence to Counterclaim filed on November 16, 2017 wherein she denied that she proposed a joint sale of the maxi.

25. Christopher maintained and repaired the maxi as the claimant was in Venezuela. Christopher informed the claimant of the works that were done to the maxi.

26. The claimant testified that the maxi was functioning properly on the road when it was repossessed. That when she returned from Venezuela, she visited the defendant at his home and inspected the maxi and saw that the maxi was in good condition. The maxi was painted and there was no damage to the body and seats. The claimant further testified that the maxi was not involved in any vehicular accident during the time she possessed it.

27. The claimant agreed that she is entitled to a refund of her deposit less the very little repair that would have been done on the maxi as same was in good condition.

The evidence of Julmary

28. Julmary has known the claimant for about ten years. They are close friends. Julmary also knows the defendant having met him on one occasion.

29. Sometime in June, 2016 Julmary accompanied the claimant to the home of the defendant to discuss the sale of the maxi. Julmary translated the conversation between the claimant and the defendant. On that occasion the defendant agreed that the claimant should advertise the maxi for sale on Trini Sell/Buy on Facebook. Julmary's contact information was used for the advertisement. Pictures of the maxi were supplied by the claimant. No one however, contacted Julmary to purchase the maxi. The advertisement was taken down a short while thereafter.

30. There was no cross examination of this witness.

THE CASE FOR THE DEFENDANT

31. The defendant gave evidence for himself and called four witnesses; Wayne Samuel ("Samuel"), Hosein Cassim ("Cassim"), Neil Rajaram ("Rajaram") and Christian Rampersad ("Rampersad").

The evidence of the defendant

32. The defendant is sixty-six years of age. He is a maxi driver and has so been since the age of thirty-seven. As he began driving maxis at a fairly young age and he developed a working knowledge of how to repair and maintain maxis. He also understood how maxis should run, the service requirements of same and how to carry out basic mechanical repairs. The defendant

currently operates maxi taxi HCK 4169 along the east west corridor to earn a living.

33. Apart from learning to repair and maintain maxis through experience, the defendant also studied at the University of the West Indies in 1989 where he was awarded a Certificate of Proficiency in Auto Mechanics (Transmission and diesel engine).⁴

34. In or around 2011, he purchased the maxi from Renzi Rampersad at the cost of \$550,000.00. He kept the maxi (as is the case with all of his vehicles) in excellent condition. In or around late 2015 to early 2016, the defendant put the maxi up for sale. Christopher and his wife initially showed interest in the maxi but eventually it was the claimant who purchased the maxi. As the claimant was rarely in Trinidad, the defendant would meet with Christopher to obtain the monthly installments for the maxi.

35. When the defendant sold the maxi to the claimant, it was according to him in immaculate condition except for the windshield which was cracked. The claimant and/or her agents and/or her servants repaired the windshield for the sum of \$1,995.00 (Christopher signed the receipt). The defendant however, reimbursed that money to the claimant and the claimant gave him a copy of the receipt signed by Christopher dated May, 11 2016.⁵

36. According to the defendant, the claimant took him to her attorney to have the agreement prepared and executed.⁶ He testified that he read the agreement and that it was clear that the claimant was responsible for the

⁴ A copy of the defendant's certificate was annexed to his witness statement at "P.B.1".

⁵ A copy of the receipt was annexed to the defendant's witness statement at "P.B.2".

⁶ A copy of the agreement was annexed to the defendant's witness statement at "P.B.3".

maintenance and repair of the maxi whilst it remained in her care. It was further clear that he would be entitled to sums which would be subtracted from the deposit if the maxi was repossessed and found to be in need of repairs and restoration.

37. Shortly after the purchase of the maxi, the claimant began defaulting on her payments of \$5,000.00 on the fifth working day of each month commencing on March 5, 2016. The defendant however, was continually lenient for some time although the installment payments accrued. In fact, the first instalment payment was made one day late and every single installment thereafter was also late.

38. The following is a schedule of the installment payments which were all admitted by the claimant in cross examination;

Installment due date	Date of payment	Month paid for	Amount paid	Cumulative total
March 5, 2016	March 6, 2016	February, 2016	\$5,000.00	\$5,000.00
April 5, 2016	April 6, 2016	March, 2016	\$5,000.00	\$10,000.00
May 5, 2016	May 22, 2016	April, 2016	\$5,000.00	\$15,000.00
June 5, 2016	June 8, 2016	May, 2016	\$5,000.00	\$20,000.00
July 5, 2016	July 14, 2016	June, 2016	\$5,000.00	\$25,000.00
August 5, 2016	September 26, 2016	July, 2016	\$5,000.00	\$30,000.00
September 5, 2016	May 6, 2017	August, 2016	\$5,000.00	\$35,000.00

October 5, 2016	June 4, 2017	September, 2016 (partial payment made for this month)	\$3,000.00	\$38,000.00
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39. At the time of repossession, the sum of \$47,000.00 was in arrears due to the non-payment of the monthly instalments from October, 2016 to June, 2017 (a partial payment of \$3,000.00 was made for the month of September, 2016). During that time the claimant was able to use the maxi for her benefit. According to the defendant, based on his experience working the east west corridor route, the income for a maxi like this one is about \$20,000.00 to \$30,000.00 per month or even more. The defendant would have seen the maxi operating on the route, so he knew that either the claimant and/or her agents and/or servants were using it.

40. In good faith, the defendant tried on many occasions to avoid repossessing the maxi. As such, he gave the claimant time to pay but when he realized that she was no longer making payments, he had to repossess the maxi to put it to work. At that time the maxi was in Christopher and his wife's possession.

41. When the defendant repossessed the maxi, he noticed that it was idling roughly, the inner upholstery was damaged, there were dents and scratches on the body, the front bumper was misaligned and there were other defects which the defendant confronted the claimant about. The defendant took several photographs of the maxi after he repossessed it.⁷

⁷ Copies of those photographs were annexed to the defendant's witness statement at "P.B.4".

42. The maxi was also operating sluggishly and making strange noises. It was clear to the defendant that the maxi had not been serviced for some time. As such, the defendant was not surprised when the claimant confirmed that she did not know when the maxi was last serviced. The defendant reminded the claimant that she promised that she would take care of the maxi while it was in her care and she began telling the defendant that her family spent a lot of money repairing the maxi while they used it and that she believed that it was being properly maintained.

43. In early July, 2017 the defendant took the maxi to Maxi Mum Auto for a long over-due service for which he paid the sum of \$1,464.00.⁸

44. The defendant also inspected the maxi by checking the engine and other parts. He then called auto suppliers to try to get an estimate to repair the maxi. Based on his own conservative estimate, he informed the claimant that the repairs to the maxi would cost approximately \$130,000.00 but that whatever the cost it was her responsibility to fix the maxi.

45. After further discussions with the claimant, she told the defendant that since all that was outstanding was the sum of \$62,000.00 she could sell the maxi as is to get the \$62,000.00 to pay him and keep whatever balance remained. The defendant agreed to a joint sale.

46. The defendant promised the claimant that if he sold the maxi as is, he would repay her the deposit (assuming the sale was for more than \$480,000.00) less \$62,000.00. However, if he had to do repairs to the maxi, it was only fair that he pay her the proceeds of the sale less the cost of

⁸ A copy of the invoice from Maxi Mum Auto dated July 5, 2017 was annexed to the defendant's witness statement at "P.B.5".

repairs which was approximately \$350,000.00 (the arrears being taken into consideration). The claimant told the defendant that she would think about his offer. That same day (July 9, 2017) the claimant took a prospective buyer to view the maxi. As the buyer was dissatisfied with the condition of the maxi, a purchase did not follow.

47. On July 13, 2017 the claimant took another prospective buyer to view the maxi and she showed the defendant an agreement which her attorney had prepared for the defendant to execute. The agreement provided that the defendant would pay her the sum of \$350,000.00 by August 15, 2017. The defendant testified that it would have been impossible for him to come up with \$350,000.00 by August 15, 2017 unless that maxi had been sold which by the looks of it, was unlikely. Further the agreement was based on the defendant's estimate of the repairs costing \$130,000.00 and did not take into account what the actual cost of repairs could be. Consequently, the defendant told the claimant that he could not sign the agreement and that he would have the maxi checked to get estimates.

48. Shortly thereafter, the defendant received a per-action protocol letter dated July 31, 2017 from the claimant's lawyer which formally demanded the refund.

49. After checking around for estimates, the defendant realized that the cost to repair the maxi was more than \$130,000.00. The following is a list of the repairs required to be done on the maxi;

Part required/repairs required to be done	Service/repair provider	Date of quotation	Cost of repairs	Cumulative total (\$)
Straightening and painting	Samuel's garage	16.08.17	20,000.00	20,000.00
Replacement of rear bumper			9,000.00	29,000.00
4M51 engine and gearbox and deferential (plus labour for installation of differential)	Rex Kar Limited	22.08.17	88,625.00	117,625.00
Transport and labour to replace engine	No quotation		5,500.00	123,125.00
Upholstery of seats and labour	H. Cassim Upholstery & Supplies Ltd	22.08.17	22,500.00	145,625.00
Overdue service-oil and filter, air filter, fuel filter, 2 gallon oil, 2 quarts QMI, servicing undercarriage	Maxi Mum Auto	05.07.17	1,464.00 (paid)	147,089.00
Air conditioning			3,000.00	150,289.00

Rear windshield wiper arm			200.00	150,289.00
Front suspension			2,500.00	152,789.00
Balancing front tyres			150.00	152,939.00
Broken accessories including levers and seat adjusters			1,200.00	154,139.00
Overdue replacement of brake shoes and disc pads			1,500.00	155,639.00
Renewal of bus route pass	Ministry of works and transport	Receipt dated 22.08.17	600.00 (paid_	156,239.00
Renewal of insurance	Hardath General Insurance Consultants Limited	21.08.17	3,000.00 (paid)	159,239.00

50. Of the costs quoted above, the defendant paid the sum of \$5,064.00. He did not get quotations for repair of the air conditioning, replacement of the windshield wipers, repair of the suspension, balancing the tires, repairing the accessories and the brake pads because those are expenses

normally incurred in the cost of maintaining the maxi. Those costs are also generally standard prices which are negligible. The defendant also did not get a quotation for transportation and labour associated with the installation of the engine because a relative of his told him that he would do same for the sum of \$5,000.00.

51. In or around mid-August, 2017 the defendant took the maxi to Samuel's garage to get an estimate of the costs to do the body works including the repairs to the bumper, straightening and painting. Samuel provided an estimate dated August 16, 2017 certifying that the costs of repairs would be around \$29,000.00.⁹

52. In order to get a proper idea of the value of the maxi in its condition, in Mid-August, 2017 the defendant caused the maxi to be valued by Charis Adjusting & Investigation Services who gave issued a valuation report dated August 12, 2017 in the sum of \$350,000.00.¹⁰ The defendant was very disappointed with the valuation since it meant that if the maxi was sold as is, its value would not be compensatory in relation to the deposit paid by the claimant. As such, the defendant would suffer tremendous financial loss because of the damages occasioned to the maxi by the claimant and/or her agents and/or her servants.

53. Also in or around Mid-August, 2017 the defendant took the maxi to Rex Car Limited to get an estimate of costs in relation to the engine and

⁹ A copy of Samuel's estimate and copies of the receipt for \$600.00 paid to renew the bus route pass and the invoice for the payment of the \$3,600.00 to Hardath General Insurance Consultants Limited were annexed to the defendant's witness statement at "P.B.7".

¹⁰ A copy of the valuation report was annexed to the defendant's witness statement at "P.B.8".

differential repairs or replacement if necessary. He was advised that he can get a used engine and differential for the sum of \$86,625.00.¹¹

54. In Mid-August, 2017 the defendant also took the maxi to H. Cassim Upholstering & Supplies Limited to get an estimate for the re-upholstery of the maxi. The estimate received was in the sum of \$22,500.00 and dated August 22, 2017.¹²

55. Sometime in late August, 2017 the defendant advised the claimant that he finally got someone to purchase the maxi once it was repaired and that he could refund her the sum of \$350,000.00 by September, 2017. The claimant advised the defendant that her attorney told her that she had some ownership of the maxi and that he (the defendant) could not sell same nor was she accepting that the cost of repairing the maxi was so much money.

56. As the matter was coming up in court, the defendant decided to get an independent person to check out the engine, differential, air conditioning, suspension, brakes and calipers. He visited Neilsha's Auto Parts and Mechanical Repairs sometime in late December, 2017 to early January, 2018 and received a quotation for the sum of \$115,650.00 to do all the repairs rather than the differential only.¹³

¹¹ A copy of Rex Car Limited's invoice dated August 22, 2017 annexed to the defendant's witness statement at "P.B.9".

¹² A copy of H. Cassim's estimate annexed to the defendant's witness statement at "P.B.10".

¹³ A copy of the quotation prepared by Rajaram dated January 8, 2018 was annexed to the defendant's witness statement at "P.B.11".

57. The defendant testified that based on the facts, he will have to repair the maxi to get it in proper working condition again, the cost of which is likely to be approximately \$159,239.00 (not taking into account Rajaram's estimate).

58. He further testified that he cannot nor does he want to use the maxi regularly in its current condition. That the claimant and he have been unable to secure a sale for the maxi in its condition. The defendant admitted that he owes the claimant her deposit subject to damages, arrears and monies already spent towards the maxi.

The cross-examination of the defendant

59. The defendant agreed that he has not expended any monies to repair the maxi. The defendant only decided to obtain estimates for the cost of repairing the maxi when he received the pre-action protocol letter from the claimant's lawyer. Before that time, the maxi was parked up and not in use.

The evidence of Samuel

60. Samuel is fifty-five years of age. His career as a straightener began around the age of thirteen when he worked at his uncle, Ramjattan Samuel's garage for five years. At the age of eighteen, he took over the garage and began operating it as his own business. As such, he has been straightening and painting all types of vehicles including cars, maxi taxis and buses ever since he was a young adult. His specialization therefore comes by way of experience over the course of thirty-six years.

61. On August 16, 2017 the defendant took the maxi into Samuel's garage for assessment. Samuel viewed, inspected and prepared an estimate for the defendant. In preparing the estimate, Samuel took into consideration the type of damage he observed. The rear bumper was damaged and the front bumper was also damaged (it was not aligned properly with the front left and right fenders). It was clear that the front bumper was repainted about four to five months prior to Samuel's inspection because the paint on it was newer although there were scratches on the paint consistent with wear and tear on the maxi. The paint also did not match the paint on the body of the maxi.

62. Samuel also noticed that there were some serious dents and scratches along the body of the maxi but he could not say how old those dents and scratches were. Based on his observations, he gave an estimate of the fees he would normally charge to straighten and paint a maxi in similar condition and based on the materials and labour required. The estimate was in the sum of approximately \$29,000.00.

63. Samuel did not take any notes when he was inspecting the maxi as same is not a customary practice in his field. Also, an estimate is prepared immediately after the inspection of the vehicle while the information is still fresh in Samuel's head. The estimate serves as an indicator of works required to be done.

64. Samuel also prepared an expert report dated June 7, 2018 which listed out the damages he saw on the maxi on the date he inspected same amongst other things.¹⁴

¹⁴ A copy of Samuel's expert report was annexed to his witness statement at "W.S.4"

The cross-examination of Samuel

65. Samuel has known the defendant for approximately twenty years.

66. Samuel was not aware of the condition the maxi was in when it was repossessed as he only viewed same on August 16, 2017. Samuel never did any work on the maxi. The estimated sum of \$29,000.00 for the straightening and repainting of the maxi is not a standard price. The price could be more or less than \$29,000.00 and could go up as high as \$40,000.00.

The evidence of Cassim

67. Cassim is a director of H. Cassim's Upholstering & Supplies Limited.¹⁵ He is fifty-six years of age. His career as an upholsterer began in August, 1986.

68. On August 22, 2017 he inspected the maxi and found that the seats were torn (but not badly), there were burn marks on the upholstery, deep stains were on the seats, seams of fabric were ripped (the seats were fabric and vinyl) and some of the accessories including seat levers and seatbelt covers were damaged.

69. Based on his findings, Cassim prepared an estimate in the sum of \$22,500.00 which included materials and labour.

¹⁵ A copy of the Annual Return for H. Cassim's Upholstering & Supplies Limited dated October 3, 2017 was annexed to Cassim's witness statement at "H.C.1".

70. Cassim testified that it is not his custom to take notes during examination of vehicles as the shop fixes badly performing parts as the mechanics see them.

71. Cassim prepared an expert report dated June 25, 2018 which included the damages he observed on the upholstery of the maxi amongst other things.¹⁶

The cross-examination of Cassim

72. Cassim knows the defendant as he has been doing work for him for the past twenty years.

73. Cassim did not do any upholstery work on the maxi. He testified that the sum of \$22,500.00 is his standard price for upholstering maxis. He has worked on approximately twenty to thirty maxis.

74. According to Cassim, the damages that he observed to the upholstery of the maxi was normal for a working maxi.

75. Cassim testified that he did not know what condition the maxi was in when the defendant repossessed it. That the only time he saw and inspected the maxi was on August 22, 2017. He further testified that he prepared his expert report based on what he remembered from viewing the maxi on August 22, 2017.

¹⁶ A copy of this report was annexed to Cassim's witness statement at "H.C.5".

The evidence of Rajaram

76. Rajaram is forty-six years of age. His career as a mechanic began in 1986. In 1992, he began operating Neilsha's Auto Parts and Mechanical Repairs. He specializes in the mechanical repair of cars, trucks, buses and maxi taxis. He considers himself an expert in the field of auto repairs and mechanics as he has been working in the field for more than thirty-two years.
77. On January 6, 2018 he inspected the maxi and found the engine and differential were damaged. The damage was noticeable upon starting the maxi because there was a rough idle coming from the engine. Upon inspecting the engine, Rajaram found that the engine and differential were damaged beyond what is normal for regular wear and tear and advised the defendant to replace the parts immediately to avoid further or complete damage of the engine, differential, transmission and other mechanical parts of the maxi as further deterioration would have no doubt rendered the maxi unusable at some point in the future. The suspension was also damaged but not badly.
78. Rajaram prepared an estimate in the sum of \$115, 650.00 which includes the estimated cost to repair or replace the engine, differential, front suspension and other mechanical parts. The estimate for repairing the engine and differential alone is approximately \$105,500.00. Rajaram testified that it is not a custom of his to take notes during the examination of vehicles as the shop fixes badly performing parts as the mechanics see them. He prepared an expert report dated June 7, 2018 in which he detailed repairs required to be done to the maxi amongst other things.¹⁷

¹⁷ A copy of this expert report was annexed to Rajaram's witness statement at "N.R.4".

The cross-examination of Rajaram

79. Rajaram has known the defendant for approximately five years. According to Rajaram, based on the damages he observed on the maxi, same was only safe to be driven without load. He testified that he could not say when the damages had occurred. Rajaram worked on the maxi prior to January 6, 2018. That was sometime in the year 2016 or 2017.

The evidence of Rampersad

80. Rampersad is sixty-one years of age. He is a Motor Loss Adjuster. His career as an Adjuster began in 1983. In 1998, he obtained his diploma in Motor Loss Adjusting from the Academy of Insurance.

81. In 2012, Rampersad registered his own adjusting business, Charis Adjusting and Investigation Services (“Charis”) in accordance with the Insurance Act of 1980. Charis carries out valuations and claims adjusting for a number of insurance companies, banks and members of the public in relation to motor vehicle claims, accident investigations and general valuations of vehicles to determine realistic market value based on age, condition, mileage and history of accidents.

82. As an adjuster, Rampersad’s role is consistent with the works carried out by Charis which includes valuation and performing claims adjusting to vehicles. Rampersad has over the course of his career, surveyed more than two thousand motor vehicles, a number of which were maxi taxis.

83. When surveying motor vehicles attention is paid to the working condition of the vehicles particularly for properly working engines, oil leaks, strange

noises and clean exhaust emissions. The worse those conditions are, the lower the market value of the motor vehicle.

84. On or around August 12, 2017 Rampersad surveyed the maxi. He made notes of the quality of the vehicle which he noticed to be idling roughly while the engine was on. He also noticed that the maxi was in otherwise good condition save some evidence of repair work on the front bumper as it was not aligned properly. Further the electricals were in good working condition and the maxi was properly outfitted with seats in good condition albeit some evidence of wear and tear.

85. Rampersad prepared a valuation report dated August 12, 2017 setting out his findings based on the inspection of the maxi. Based on his findings having regard to the age, model and make of the maxi, the suspected engine damage, the condition of the seats taking into account wear and tear, the properly working accessories, fair body condition including paint job and high mileage on the odometer, Rampersad estimated the maxi's value as \$350,000.00 including Vat.

The cross-examination of Rampersad

86. Rampersad was referred to his valuation report. In the report the following was stated;

"The undermentioned market value has not taken into consideration the value of the Maxi Taxi Rights."

87. Rampersad explained that a person selling a maxi taxi usually attaches a value to the right given to operate as a maxi taxi. That some persons may

attach a value of \$100,000.00 more or less to that right. The estimated value of the maxi in this case did not take into consideration the value of that right. Rampersad agreed that the right is a valuable commodity.

Whether the claimant is entitled to a refund of the entire sum of her deposit of \$480,000.00

88. The agreement between the parties dated January 21, 2016 provided as follows;

“...

3. *The Vendor agrees to sell and the Purchaser agrees to buy the said Vehicle under the following terms and conditions:- The sale price of the said Vehicle shall be: FIVE HUNDRED AND EIGHTY THOUSAND DOLLARS (\$580,000.00)*

4. *On the execution of this Agreement, the Purchaser shall make a deposit of \$480,000.00 towards the sale price.*

5. *The remainder of the sale consideration shall be as follows*

1. *Monthly installments of the sum of \$5000.00 on the 5th working day of each month commencing the 5th day of March, 2016 for a period of 20 months (completion date shall be the 20th day of October, 2017).*

6. *Failing which would result in the Vendor rescinding the agreement and refunding the deposit and retaking possession of the said vehicle at the cost of the Purchaser.*

7. *The Vendor shall renew the Priority Bus Route pass 6 months or up until he reaches 65 years of age.*

8. ...

9. ...

10. *On payment of the remainder of the consideration, the Vendor will cause to be transferred, the said Vehicle, to the Purchaser...*

11. *The purchaser hereby specifically undertakes to exonerate the Vendor from all claims, court actions or liabilities whatsoever which flows and touches and concern the said Vehicle.*
12. *All payments made towards the said vehicle gives the Purchaser an equitable interest in the said vehicle.*
- a) *Provided it become necessary that the Vendor has to repossess the said vehicle after same is viewed and found to be in need of repairs and restoration then all monies spent by the Vendor shall be deducted from the deposit without prejudice..."*

89. It is pellucid from the terms of the agreement that the claimant is entitled to a refund of her deposit upon repossession of the maxi subject to monies spent by the defendant in repairing and restoring the maxi. Clause six of the contract is clear and unambiguous in its ordinary meaning.

The arrears

90. According to the evidence of the defendant, he repossessed the maxi in July, 2017. The claimant claims that he repossessed the maxi in June, 2017. Be that as it may, during cross-examination, the claimant accepted that at the time the maxi was repossessed, the sum of \$47,000.00 was in arrears due to the non-payment of the monthly instalments from October, 2016 to June, 2017 (a partial payment of \$3,000.00 was made for the month of September, 2016). During October, 2016 to June, 2017 Christopher had possession of the maxi.

91. Firstly, the defendant submitted that the claimant is estopped by virtue of the doctrine of promissory estoppel from denying him the promised payment of the arrears in the sum of \$47,000.00. That it was

uncontroverted that she sought several extensions of time from him to pay off the arrears on the maxi to avoid repossession and promised to pay him and that he relying on that promise to pay the arrears did not repossess the maxi until July 3, 2017. Further, that he lost the benefit of \$20,000.000 to \$30,000.00 per month for nine months because of his reliance on the claimant's promise to pay.

92. Secondly, the defendant submitted that the payment of the arrears is an implied term of the contract. That his conduct of waiting for a period of time between September, 2016 to July, 2017 to repossess the maxi and the claimant's part payment of arrears up to September, 2016 is evidence of an implied term that the arrears would be paid for the contractual period.

Law & findings

93. Rajkumar J in ***Fulchan v Fulchan***¹⁸ at paragraph 11 defined promissory estoppel as follows:

"11. Promissory Estoppel

Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be

¹⁸ CV 2010-03575

permitted to act inconsistently with it emphasis mine ” Snell’s Equity 31st ed. 2005 Para 10-08”

94. Contracts may be expressed or implied, or partly expressed and partly implied. Contracts are expressed to the extent that their terms are set out either by word of mouth or in writing. They are implied to the extent their terms are a necessary inference from the words or conduct of the parties.¹⁹

95. In **Attorney General of Belize and others v Belize Telecom Ltd and another**,²⁰ Lord Hoffman, delivering the judgment of the Privy Council, stated the following in relation to the process of implication of terms:

“[16]...The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute... It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument...

[21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a

¹⁹ Halsbury’s Laws of England, Volume 22 (2012), paragraph 218.

²⁰ [2009] UKPC 10 at paragraphs 16 & 21

provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must “go without saying”, it must be “necessary to give business efficacy to the contract” and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument read as a whole against the relevant background, would reasonably be understood to mean?”

96. The court finds that based on the evidence in this case it is clear that the defendant exercised great leniency in activating clause 6 of the agreement. That in exercising such leniency, the defendant at no time acquitted the claimant of her obligation to pay the monthly installments of \$5,000.00 per month. It is further clear on the evidence that there were many discussions between the claimant and the defendant concerning the monies due and owing and that the claimant promised to pay those monies to the defendant. In an attempt to so do, the claimant would have attempted to sell the maxi to pay the defendant his monies.

97. As such, the court finds that it is clear on the evidence that the claimant promised to pay the defendant the arrears and that based on that promise to pay, the defendant would have altered his position by not repossessing the maxi when the first non-payment of the installment occurred. The defendant would have therefore been acting to his detriment in reliance on the promise as he would have lost the benefit of the use of the maxi. Consequently, the court finds that it would be inequitable to permit the claimant to withdraw the promise. The court therefore agrees with the

defendant that the claimant is estopped based on the principle of promissory estoppel from denying him the promised payment of arrears in the sum of \$47,000.00.

98. The court further finds that the payment of the arrears is an implied term of the contract. That same goes without saying and is necessary to give business efficacy to the agreement between the parties. As such, the court finds that the arrears in the sum of \$47,000.00 will be deducted from the deposit payable by the defendant to the claimant.

The repairs and restoration

99. According to the agreement, the claimant is entitled to a refund of her deposit subject to the monies spent by the defendant in repairing and restoring the maxi. It is clear on the evidence that the defendant did not spend any money in repairing and restoring the maxi. He however spent the sum of \$5,064.00 as follows; service of the maxi (\$1,464.00), renewal of the bus route pass (\$600.00) and renewal of the insurance of the maxi (\$3,000.00).

100. It was the evidence of the defendant that upon repossession of the maxi, same was in need of repairs. He confronted the claimant about the damages to the maxi which included damages to the inner upholstery, dents and scratches on the body, the front bumper being misaligned amongst other things. The maxi was also idling roughly. The defendant informed the claimant that based on his own conservative estimate, the repairs to the maxi would cost approximately \$130,000.00 but that whatever the cost was she was responsible for same. Further, upon repossessing the maxi, the defendant found same to operating sluggishly

and making strange noises. He therefore took the maxi to be serviced on July 5, 2017. According to the defendant, the maxi was then parked up and not used.

101. The claimant on the other hand testified that the maxi was in good working condition at the time of repossession. That she inspected the maxi upon her return to Trinidad and saw that the maxi was in good condition. The maxi was painted and there were no damages to its body and to the seats.

102. Upon receiving the claimant's pre-action protocol letter dated July 31, 2017 the defendant began obtaining estimates to repair the alleged damages to the maxi. On August 16, 2017 he obtained a quote from Samuel's garage in the sum of \$29,000.00 to straighten and paint the maxi and to replace the rear bumper of the maxi. On August 22, 2017 he received a quote from 1) Rex Kar in the sum of \$88,625.00 to replace the engine, gearbox and differential of the maxi and 2) H. Cassim Upholstering & Suppliers Ltd. in the sum of \$22,500.00 to upholster the seats of the maxi (inclusive of labour costs). He did not receive a quotation for doing the air-conditioning, replacing the windshield wiper, repairing the suspension, balancing the tires, repairing accessories, and the replacing of the brake pads but quoted prices for same.

103. The defendant also obtained a valuation for the maxi on August 12, 2017 which valued the maxi at \$350,000.00. However, the valuation of the maxi did not take into consideration the value of the maxi taxi rights which according to Rampersad is a valuable commodity. Further, the defendant obtained a quote from Nielsha's Auto Parts on January 8, 2018 in the sum of \$115,650.00 for the repair of the engine, differential, air conditioning, suspension, brakes and calipers.

104. During cross-examination of the defendant, Counsel for the claimant made heavy weather of the fact that the agreement between the defendant and the claimant referred to “*monies spent*” and the defendant did not in fact spend any monies towards the repair and restoration of the maxi but only obtained estimates for same. Additionally, the fact that all estimates and/inspections of the maxi were done a month or more after the maxi was repossessed was an important factor according to the defendant.

105. In that regard it is the finding of the court that clause 12(a) of the agreement is clear and unambiguous when the ordinary mean of the words used are applied. It was the duty of the defendant upon repossession of the maxi to inspect same and if found to be in need of repairs to undertake those repairs and then deduct those monies spent on the repairs from the deposit which was owed to the claimant. As such, the court finds the defendant cannot claim sums for the repairs of the maxi since he has not in fact spent any monies on same. There is no requirement for the court to apply any secondary meaning to the clear terms of the contract as the literal interpretation does not lead to an absurd result. The clause required the repairs to have been done before the claimant is reimbursed and the cost deducted therefrom. To this date he has failed so to do.

106. Further, the court finds that the sum of \$5,064.00 was not spent in repairing or restoring of the maxi as these are sums spent on matters of maintenance and so the defendant is not entitled to deduct same from the money he owes to the claimant.

General Finding

107. It is obvious to this court by way of inference that in their effort to circumvent the lawful process of transfer of the right to use the PBR (which must be approved by the Commissioner of Transport), the parties used the sum of \$480,000.00 as a deposit when it fact it would have been the full purchase price of the maxi. Clause 7 of the agreement mandates that to vendor to renew the PBR pass until he turns 65 years old. This obligation under the contract speaks to the fact that the right to use the pass cannot be transferred or sold. It is a licence granted by the Commissioner and any clause which purports to transfer or sell it is void in law. It follows that the clear inference is that the sum of \$100,000.00 was the value ascribed to the use of the right granted to the vendor. Were it otherwise, a usual deposit would have been paid, being a minority percentage of the purchase price.

108. So that essentially, the defendant would have agreed to refund the entire cost of the maxi (which has been returned to his possession in any event). That is the obligation he undertook although couched in terms of a deposit. It is an obligation he undertook with full knowledge and collateral to the intention to circumvent the law as relates to the provision of PBR passes. He must therefore fulfil his part of the bargain.

DISPOSITION

109. The court will therefore make the following order;

- i. The defendant shall pay to the claimant the sum of \$433,000.00.
- ii. The counterclaim is dismissed.
- iii. The defendant shall pay to the claimant the prescribed costs of the claim.
- iv. The defendant shall pay to the claimant the prescribed costs of the counterclaim.

Ricky Rahim

Judge