

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO CV2016-02430

BETWEEN

DENZIL JEMMOTT

Claimant

AND

ROGER BOCUS

TRADING AS EAST COAST AUTO AND EQUIPMENT SERVICES

Defendant

Before: Master Alexander

Delivery date: January 20, 2021

Appearances:

For the Claimant: Ms Suzette Bullen

For the Defendant: Ms Khadeen Bocus

DECISION

BACKGROUND

1. This matter involves the assessment of damages for breach of contract, interest and costs to the claimant. By order dated 17 May 2018, the trial judge directed the defendant to pay \$80,000.00 to the claimant as well as the quantum assessed by this court as damages for breach of contract. The facts giving rise to the breach commenced on 24 November 2015 when the claimant employed the defendant as his agent to purchase and import, from Japan, a Toyota Voxy into this country ('the Voxy'). The Voxy was to be used as a taxi

along the Mayaro/Sangre Grande route. This agency agreement was partly in writing and oral. Material aspects of the written agency agreement included an approximate delivery date of eight weeks from the date of purchase. It also vested the claimant with full responsibility for all costs and fees incurred in the transaction, from purchase to licensing, and stated that he would collect the Voxy within five working days after licensing. Additionally and allegedly, parties had agreed, orally, that the Voxy would be a 2013 model and that a down payment towards purchase would be paid on the date of the agreement and the balance upon the arrival of the Voxy. The fee for the defendant's services was agreed, orally also, to be in the sum of \$7,000.00. Pursuant to the agreement, the claimant paid the sum of \$80,000.00 as a down payment to the defendant, as evinced by receipt dated 24 November 2015.

THE EVIDENCE

2. The claimant gave evidence by filing a witness statement, and issued witness summonses to two other witnesses to give evidence on his behalf: (i) Mr Roger Phillip, past President of the Mayaro/Sangre Grande Taxi Association and (ii) Ms Maltee Bedassie, Acting Deputy Trade Officer. The claimant averred that at the time of entering the agreement in November 2015, he had notified the defendant, orally, that the Voxy was for commercial purposes and, specifically, would be used as a taxi along the Mayaro/Sangre Grande route. Subsequently, on 8 January 2016, he secured his taxi badge, which was valid for three years. The claimant attested that based on the terms of the written agreement, he ought to have received the Voxy on 19 January 2016. The Voxy actually arrived into the country on 19 February 2016, approximately one month after the contractually agreed time, and was licensed as HDM 791. Further, its release

was delayed owing to a change in government policy¹ on importation of vehicles, sometime in January 2016, among other factors. These changes included a reduction in the age limit of vehicles that could be imported from six years to four years. Given the importation date, it meant that the defendant had to secure an import licence for the Voxy. He affirmed that he was aware that the defendant had applied for an import licence for the Voxy and obtained approval on 10 March 2016. Sometime in May 2016, the claimant was informed that the registered Voxy was ready to be delivered to him and that his outstanding balance was \$63,667.00.

3. He sought in evidence to ascribe the responsibility for the fallout and ensuing losses, from the change in government policy, to the defendant, who sourced, purchased and brought in a 2011 Voxy, rather than a 2013 Voxy as had been agreed. It led to the Ministry of Trade and Industry launching an investigation into the importation of the 2011 Voxy. He alleged that this investigation caused further delay in Customs, and unnecessary expenses and consequential losses. It was his evidence further that he only discovered that the defendant had imported a 2011 Voxy, and not a 2013 Voxy, when he was given a certified copy of ownership for the vehicle from the defendant. As a result, he refused to pay the balance of the purchase price or to accept delivery of the Voxy. In further evidence, he stated that the Voxy could carry seven passengers and that he could make at least five round trips daily, which after deduction of all reasonable expenses, would earn him approximately \$500.00 per day. The above evidence provided the context for the claimant's claim for loss of earnings.

¹ New policy changes included measures reducing the age limit of foreign used vehicles to be imported from six years to four years.

4. Mr Roger Phillip gave evidence in corroboration of the claimant's evidence that a taxi driver working along the Mayaro/Sangre Grande route could earn an approximate income of \$500.00 per day, after expenses. He testified that he had served as the President of the Mayaro/Sangre Grande Taxi Association for the period ending November 2015. He also attested that he was a taxi driver who had worked along that route for about twenty years. It was his evidence also that the fares increased along that route with effect from 2 November 2015 and were \$14.00 for adults, \$13.00 for children in uniform, \$5.00 for all short drops and \$5.00 for all off route drops. He testified further that there was another fare increase with effect from November 2018, whereby the fares for adults increased to \$16.00. He tendered into evidence a flyer reflecting the increased fares with effect from 2 November 2015.

5. Ms. Maltee Bedassie testified that she was an Acting Deputy Trade Officer with the Ministry of Trade and Industry and that she was familiar with and vested with the authority to provide evidence of the policy guidelines governing the importation of foreign used vehicles into Trinidad and Tobago. She provided oral and documentary evidence as to the then existing government policies on the importation and ownership of foreign used vehicles. The policies related to the period prior to January 2016 and the new policy that was put into effect from 15 January 2016. She stated that prior to January 2016, an individual was allowed to import only one vehicle within a three-year period and the ownership was not transferable during that period. Under the new policy, which commenced from 15 January 2016, an individual was allowed to import only one vehicle during a four-year period and that vehicle was required to be no more than four years from the date of manufacture². She indicated also

² She tendered into evidence ministry guidelines issued on 15 January 2016 on importation of vehicles that were not more than four years old from the date of manufacture

that there was a period of moratorium, which permitted vehicles already *en route* to Trinidad and Tobago at the time of the policy change, to be processed. The Voxy had arrived in Trinidad and Tobago on 19 February 2016, shortly after the change in policy, so would have been covered by the moratorium. However, by letter dated 16 March 2016, the Chief Trade Officer wrote to the General Manager of the Port Authority of Trinidad and Tobago setting out that an application had been made for an import licence for the Voxy. This letter specifically referenced the date of manufacture as 2010, which was clearly not the date indicated by the defendant. The claimant's case for damages, therefore, was hinged on the failure of the defendant to source and purchase a 2013 Voxy, which led to the delay at Customs and consequential losses.

6. The defendant's evidence was contained in his witness statement filed on 12 November 2018, wherein he denied that the claimant had requested and/or that there was an agreement to source and purchase a 2013 Voxy. He stated that the claimant had opted to have imported a 2011 Voxy, as the 2013 Voxy was outside his budget. As the evidence unfolded under cross-examination, the defendant admitted that the Voxy was not, in fact, a 2011 or 2013 model but a 2010 model, as shown on the CARICOM invoice issued by SBT Co Ltd. The said invoice was at variance with the defendant's invoice (RB4) attached to his witness statement, which contained no reference to the year of manufacture. The defendant further sought to build his case on an allegation that the claimant had not informed him that he had obtained his taxi badge until sometime in February 2016 and it was at that point, that the claimant told him that the Voxy was to be licensed as a taxi. This evidence proved untruthful when during cross-examination, the defendant conceded that the claimant had informed him that the Voxy was to be used as a taxi, shortly after entering the written agreement. The court also noted the defendant's

evidence that he had provided an estimate of the vehicle to be imported without specifying or discussing the manufacture date. The defendant's evidence was incredulous and viewed with suspicion especially given his initial untruth about when it came to his knowledge that the Voxy was to be used as a taxi.

7. Another witness was Ms Sophia Pascall whom the defendant summoned to give evidence on his behalf. Ms Pascall testified that she was an employee of Direct Freight and Courier Services Limited where she functioned as a broker and had made the application for the import licence for the Voxy. She tendered into evidence a copy of the SBT Commercial Invoice dated 12 January 2016. Notably, this invoice conflicted with the invoice dated 24 December 2015 and the defendant's document RB13, as attached to his witness statement. There was a failure to explain the differences in these invoices, which all purported to represent evidence of the application for the import licence but made on conflicting dates. It was unclear as to why there was more than one document reflecting this transaction and/or which was the correct document. Ms Pascall admitted also that copies of documents, including the authorization letter and C75, were not kept in her possession. In the view of this court, the evidence of Ms Pascall confirmed simply that the transaction involving the Voxy was fraught with missteps, inaccuracies, poor record keeping and lack of clarity on the part of the defendant. The evidence of the defendant and his witness also served to bolster the case of the claimant that the responsibility for the flawed purchase, miscommunication and ultimately the delay and consequential expenses, flowed from the poor system operated by the defendant. It was accepted further that while the defendant would not have known about or been able to circumvent changes in government policy,

the circumstance that delayed the smooth processing by customs of the Voxy was contributed to by the actions of the defendant.

DAMAGES

8. The assessment aimed to determine the claim for special damages, the award of \$80,000.00 already having been made by order of the liability judge. The court does not intend to rehash the learning on special damages, save to state that pleading, proof, entitlement to and justification for such damages remain sacrosanct.

Loss of Earnings

- (i) The claimant sought \$500.00 per day as loss of earnings from 19 January 2016 and continuing. In his counsel's submissions, this claim for continuing loss of earnings was adjusted to cover the fixed period of 19 January 2016 to December 2019 viz. for a period of two years and 347 days. Counsel asked the court, in making its award, to take into account the existing government policies on importation and ownership of foreign used vehicles as these would have impacted the claimant's ability to acquire a replacement motor vehicle. These policies were set out in the claimant's witness statement and were as confirmed by the evidence discussed above.
- (ii) The court had a few concerns with this claim as tabled and/or attempted to be substantiated. First, the period from which the claim for loss of earnings was pleaded as having commenced was 19 January 2016. It was assumed that this selected date was meant to coincide with the date when the Voxy was expected to be imported into this country. He has provided no direct documentary evidence to support this claim that the loss actually started on that date, such as bills or receipts, and the defendant sought to use this to

discredit the claim. On the other hand, counsel for the claimant dismissed the argument of the defendant's counsel with the submission that lack of documentary evidence was not a bar for recovery of loss of earnings, as the degree of strictness in such circumstances will depend on what was reasonable in the context: see **Anil Reds v Nyan Rattan**³. Counsel confirmed further that in any event the claimant was employed elsewhere at the time the Voxy was purchased so he had no documents in his possession to produce in substantiation of his claim. The reliance on the contractually appointed date of arrival of the Voxy, rather than the actual date of importation and/or taking of possession, as the commencement date for computation of loss of earnings was not realistic or reasonable. Indeed, the court noted that the claimant was issued with his taxi badge, entitling him to drive a taxi for revenue earning purposes on 8 January 2016 but, from the evidence, he was yet to secure a loan to complete the transaction. Further, on that date he was employed otherwise and he provided no evidence as to how he intended to put the taxi to use to earn income. Thus, there was no evidence that the claimant intended to hire another taxi driver in the interim and/or of the terms and conditions of such a person should he have been in possession of the imported Voxy on 19 January 2016.

(iii) In the view of the court, actual loss of earnings would only commence upon the claimant being in possession of a registered and insured Voxy. It could not have commenced from the date of online purchase of the Voxy or during its transition to this jurisdiction or even when it actually arrived and/or before it was released into the possession of the claimant and lawfully put to use for income earning purposes. It was borne in mind that government policies

³ *Anil Reds v Nyan Rattan* CV2007-00903

would have impacted the processing and releasing of the Voxy. However, had all the challenges in getting the Voxy released not occurred, shortly after customs had cleared and released it to the claimant, he could have started earning income once insured. It noted that there was a grace period provided for the new policies to kick. It meant that the claimant would not have been negatively impacted or prevented from taking possession of the Voxy, save for the other issues with the date of the Voxy. Also, the evidence of Ms Bedassie was considered to wit that with the change in policy, there was a natural delay created in processing imports.

- (iv) The next issue was that of a replacement vehicle and at what point would the claimant have been able to acquire this, which would impact the claim for loss of earnings. This was considered in the context of the period for which the claimant sought loss of earnings viz. from 19 January 2016 to December 2019. Counsel for the claimant submitted that December 2019 was the earliest date when the claimant was able to obtain a motor vehicle for use. In its deliberations on this issue, counsel asked that the court consider the existing government policies on importation and ownership of foreign used vehicles, which would have affected his ability to acquire a replacement vehicle.
- (v) The next issue was the evidence called by the claimant in support of his claim for loss of earnings. The claimant's primary evidence for calculating this loss came through his witness, Mr Phillip, who worked the route and was at some point the President of the Mayaro Taxi Association. He was unable to recall exactly which year he served as President and whether it was in 2016 or not. He produced a document that he called a "Tariff" or "State of Fares", which he was not the maker of but which he used as a taxi driver to charge fares along that route. The document set out the different fares for transportation along

that route. The defendant asked the court to view Mr Phillip's evidence as unreliable because he was not the maker of the document nor was he its custodian as he had indicated in evidence initially. Counsel for the defendant also submitted that Mr Phillip's evidence was untrustworthy, as he could not provide the scientific or technical factors for the rates' increases. This argument was rejected outright as the court found Mr Phillip to be a forthright and candid witness who explained, in his simplistic and rustic way, that increases in fares were based on an *ad hoc* system generally linked to gas prices. Mr Phillip was clear that taxi fares usually would increase when drivers felt it was necessary, which usually would be tied to increases in fuel prices. Once there was a hike in gas prices, drivers would be propelled at that point to convene a meeting to elevate fares to meet or offset the increases in gas prices. In his plainspoken way, he explained to the court that the Mayaro Taxi Association was neither a formal body nor properly constituted. The court was told that a president appeared to emerge only when drivers wanted to consider increasing the fares. In the view of this court, this answer smacked of honesty and it could find in it no attempt at exaggerating or clouding the truth. His evidence was accepted as truthful, reliable and trustworthy.

(vi) The court accepted further that the document called a "Tariff" provided a guide to taxi drivers of which Mr Phillip was one and that he in fact utilized it to charge fares to his passengers along the route. He also provided evidence as to how these fares were determined based on his knowledge as President of the Mayaro Taxi Association during a period when fares were increased. The court accepted that he was not the maker of the document and that his evidence was given in the context of being a taxi driver who used the route and charged fares guided and authorized by the "Tariff". In this context, Mr Phillip testified that as a taxi driver, he made four trips per day, earning

\$128.00 per trip, and would work up to 1:30pm. He owned and drove a sedan, which carried four passengers. The court accepted this evidence together with the documentary evidence tendered showing the fares for different categories of persons travelling along that Mayaro/Sangre Grande route. It was considered that the claimant's evidence of likely earnings of \$500.00 per day was plausible and believable, especially as the Voxy had the capacity to carry seven passengers. In the circumstances, the court rejected counsel for the defendant's argument that in lieu of documentary evidence, the claimant should have called a taxi driver who owned a similar type vehicle and worked the same route. In the view of the court, there was no need for exactitude in terms of type of vehicle and number of passengers capable of being carried in order to prove this claim. The claimant called Mr Phillip whose taxi seated two passengers fewer than the Voxy and pinned his loss of income against this. This court was at a loss as to why counsel for the defendant sought to discredit this evidence but felt that a driver, whose vehicle seated more passengers and likely was earning more income was the only proper witness. Further, the submissions of the defendant's counsel on the failure of the claimant to source a local vehicle and/or make representations to the Ministry of Trade and Industry and so mitigate his losses were noted. The defendant's argument also that the sum of \$80,000.00 awarded by the trial judge was sufficient and constituted a full refund was not accepted. In that same liability order, the matter was sent to this court to assess damages for breach of contract.

- (vii) In the view of the court, the claimant would have suffered a loss of income when the Voxy was not delivered to him as soon as practicable in the circumstances of government's policy change. The loss could only have commenced when he was in a position to either drive the taxi or put it to such use by employing a driver with a valid taxi badge. He has provided no evidence

as to any such intention to hire a driver so no consideration was given to this aspect. The Voxy was only capable of being delivered to him when it was registered and released from customs and insurance coverage authorized it to operate on the roadways of Trinidad and Tobago. Further, based on the documentary evidence, he obtained a loan facility to complete the transaction, which by letter dated 29 March 2016 gave him access to a down payment in the sum of \$16,000.00 towards the purchase of the vehicle by 4 April 2016. The balance of the payment was conditional on the provision of documentary evidence, so clearly he would not have been in the position to complete the transaction before obtaining the loan facility. Further, the insurance coverage commenced on 4 May 2016, authorizing him to drive the taxi for income, so would be the appropriate date for assessing any loss of earnings. However, the court was unable to accept that the claimant was entitled to recoup loss of earnings for the enlarged period sought. Indeed, the claimant's evidence as to his inability to source another vehicle of comparable standard locally, so as to mitigate his losses, was found not credible nor was it accepted by the court. He brought no evidence to support this allegation and the court was of the opinion that, while he could not immediately import another vehicle based on government policy, he had refused to locate a vehicle on the local market. He was not entitled to recover loss of earnings for such an extended period as claimed when, by choice, he had refused to take steps to purchase a foreign used vehicle already imported, from another provider. It was considered that he would have needed some time to secure a replacement vehicle on the local market and could reasonably have done so within, at least, an eight-month period and, at most, by twelve months, after he had determined that he no longer wanted to take delivery of the Voxy. In the circumstances, and in a bid to do justice in this matter, the court will award loss of earnings for twelve months at the daily rate of \$500.00, for a five day

week. The global award of \$120,000.00 subject to a 25% contingency fee to cover taxes, illnesses or holidays.

Insurance Expenses

- (i) The claimant sought reimbursement of insurance cost for the Voxy. His evidence was that his transaction was conducted through a broker and the certified copy was not required for this purpose. His counsel submitted that given this fact, the claimant could not be fixed with knowledge of any discrepancy before the expense was incurred and should be awarded the full sum to insure the subject vehicle. The defendant submitted that this evidence was wholly untrue as a registration number of the Voxy was required before purchase of insurance and, in any event, the claimant had refused the defendant's offer to reimburse him all monies but opted to file suit.
- (ii) When assessing damages for breach of contract, the rule as to the measure of damages to be applied was to return him to the same position as he would have been in if he had not sustained the wrong for which he was now getting his compensation: ***Livingstone v Rawyards Coal***⁴. It meant, any award of special damages must put the claimant back into his pre-contract position and in cases of breach of contract, "*expenses in preparation or in part performance will be properly recoverable.*"⁵
- (iii) In support of his case for insurance compensation, the claimant averred that during the period when the transaction was delayed further, he took steps to secure a loan for the balance of the price for the Voxy and to secure insurance

⁴ *Livingstone v Rawyards Coal* (1880) 5 App Cas 25

⁵ McGregor on Damages 20th Edition, paragraph 4-025 page 41

coverage. He provided a letter dated 29 March 2016 addressed to the defendant from the claimant's loan service provider, which indicated that the sum of \$16,000.00 as a down payment towards the purchase of the vehicle would be available by 4 April 2016 and the remaining balance would be remitted upon the provision of all other outstanding documents. Further documentary evidence namely the "Member Loan Disclosure Statement and Loan Agreement" was provided. This loan agreement was signed by the claimant on 1 April 2016. He then proceeded to insure the vehicle on 4 May 2016 so provided a receipt from the insurance brokers and the Taxi Certificate of Insurance of the same date. He avowed in evidence that while he was informed of his outstanding balance for the Voxy, the defendant never provided him with documents such as bills and receipts for the expenses incurred in the transaction. Thereafter, from 6 May 2016 to 19 July 2016, when he filed his claim, he sought to get the requisite documents from the defendant. He averred further that he never had use of the Voxy, which remained in the custody of the defendant throughout the proceedings. He asserted that the change in government policy meant that he was unable to import another vehicle while the matter was pending or to source another at a comparable rate. The claimant's evidence as to inability to source another vehicle at a comparable rate was non-existent and so not accepted.

(iv) From the evidence, it was unclear as to why the claimant would insure a vehicle for such a large sum if it were not in his possession or he was unwilling to complete the transaction with the defendant. By May 2016, he averred that he was informed that the Voxy was ready for delivery and he paid for insurance. He requested original documents as to expenses incurred in order to complete the transaction, which were not provided until a claim was filed. It meant that he could not complete the loan transaction, as payment of

outstanding monies towards the purchase of the Voxy was hinged on the provision of all requisite documents relating to the purchase and import of the Voxy. In the view of the court, the defendant was required to provide the necessary documents to the claimant to enable him to secure the full financing. The claimant incurred insurance cost to enable him to take delivery of the vehicle, which he never got possession of as the defendant instead kept the Voxy. The fact that he had applied for the loan and insurance indicate to the court that the claimant was taking steps to complete the transaction and take delivery of the Voxy. He needed all the requisite documents from the defendant to complete the transaction. It was only after filing the claim that he received the documents. In any event, the benefit of the insurance coverage remained with the defendant who kept possession of the Voxy throughout the proceedings. The court would award the sum of \$9,468.98 expended under this head of damages.

INTEREST AND COSTS

9. The claimant sought interest on special damages of 12% per annum from 19 July 2016, the date of filing the claim, to 22 September 2016 and thereafter statutory interest of 5% per annum pursuant to the Remedies of Creditors (Amendment) Act 2016. Generally, interest on special damages would arise from the date of loss to the date of decision. In the circumstances, any award of interest would be aligned to that date of loss, which would be 4 May 2016 when he obtained insurance coverage and could have started earning income. Further, the court was at a loss as to the inflated interest rate that was sought for special damages, which it deemed unrealistic. The Court of Appeal in ***Fitzroy Brown v AG*** stated that short-term investment rates should be applied to awards for personal injuries and a higher interest rate to commercial losses. Moreover, the award of interest would rest with the discretion of the court.

This court, therefore, would award an interest rate of 3% from the date of loss to its decision. Costs would be on a prescribed basis and its calculation would include the sum awarded in interest as indicated by the Privy Council in *Leriche v Maurice*⁶.

ORDER

10. It is ordered that the defendant do pay to the claimant as follows:

- i. Damages in the sum of \$99,468.98 with interest at the rate of 3% per annum from 4 May, 2016 to 20 January, 2021;
- ii. Costs on the prescribed basis in the sum of \$19,524.07.
- iii. Stay of execution 28 days.

Martha Alexander

Master



MARTHA ALEXANDER
MASTER OF THE SUPREME COURT OF
TRINIDAD AND TOBAGO

⁶ *Leriche v Maurice* [2008] UKPC 8