

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.28 OF 2005

BETWEEN:

PATRICK MORILLE

Appellant

and

JOSEPH MARIUS

Respondent

Before:

The Hon. Mr. Michael Gordon, QC

Justice of Appeal

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

The Hon. Mr. Kenneth Benjamin

Justice of Appeal [Ag.]

Appearances:

Mr. Gerard Williams for the Appellant

Mrs. Kimberly Roheman for the Respondent

2006: June 21;
June 22.

JUDGMENT

[1] **BENJAMIN, J.A. [AG.]:** This is an appeal against the judgment of Mde. Justice Edwards given on June 14, 2005. The subject - matter of the claim is a used Nissan Caravan Diesel Engine bus. The appellant is a dealer in foreign used vehicles. The respondent is a taxi-operator. It was the finding of trial judge that the bus was sold by the appellant to the Respondent on March 5, 1998, and that the bus was not of merchantable quality nor was it fit for taxi purposes as engaged in by the respondent when sold. Damages and costs were awarded in favour of the respondent.

[2] The dissatisfaction of the appellant with the decision was confined to three grounds of appeal set out in the Amended Notice of Appeal, as follows:

1. The Learned Trial Judge erred when she found as fact that the changing of the fan from direct to indirect by the Defendant contributed to the overheating problem of the bus.

That there was no evidence before the court that the fan was changed from direct to indirect nor was there any evidence as to the presence of any such alteration.

2. That the Learned Trial Judge erred when she wrongly concluded that the kinked hoses of the cooling system did not cause or contribute to the overheating problem notwithstanding that the court appointed expert along with the Defendant's expert witness so concluded and that this evidence was uncontroverted.
3. That the Learned Judge erred when she took into consideration irrelevance as to the lack of servicing of the bus which was never an issue before the Court. Further, the Claimant's case was specific as it referred only to overheating and never was it contended by either party that there was an overall malfunctioning of the bus.

Ground One

[3] The appellant challenged the finding of the trial judge that she accepted the testimony of the Court-appointed expert, Mr. Owen King, and that the changing of the fan from direct to indirect by the Appellant contributed to the overheating problem of the bus.

[4] The main thrust of the argument was that reliance was placed on a report by a Senior Price Control Officer. The report formed part of the trial bundle and was stated by the trial judge as having not being challenged by the appellant.

- [5] Having regard to rule 39.1 (1) (2) & (3), the report having been included in the trial bundle without being therein identified as being not agreed upon for use and there having no subsequent objection before the court, it was within the province of the trial judge to rely on that document.
- [6] Learned Counsel for the appellant alluded to the answers of his client denying the allegation in the Report. Clearly the trial judge having seen and heard the testimony did not accept it. In any event, as learned counsel for the respondent submitted, this matter was not raised in the Court below as a matter of law. This ground of appeal must therefore fail.

Ground Two

- [7] The appellant argued that the trial judge was in error when she concluded that the kinked hoses of the cooling system did not cause or contribute to the overheating problem. This finding was said to fly in the teeth of the uncontroverted evidence contained in the report of the court-appointed expert and the expert witness of the appellant, Mr. LaBorde. Mr. King commented that any kinked hose can cause overheating problems. Mr. LaBorde stated that the kinked aluminum hoses of the cooling system, which he observed appeared to be minor but would result in a reduced cooling ability of the system.
- [8] In her reply, learned counsel for the respondent usefully pointed out that no definite evidence was led as to when the hoses became kinked and as to who caused the same. Thus, the trial judge was entitled to find as she did.
- [9] We accept the respondent's observation and on that basis, this ground of appeal is rejected.

Ground Three

- [10] In paragraph 75(7) of the judgment, the following sentence appears: “I therefore find on the balance of probability that the lack of adequate servicing may have been a contributing factor to the overall malfunctioning of the bus.” Learned counsel for the appellant contended that, the problem of overheating apart, there was no evidence of any malfunctioning. It needs to be at once clarified that, although it was not addressed by any of the experts, both parties in their respective testimonies speak of a complaint that the bus had no power. Having said that, it must be noted that the finding was expressed in the subjunctive – in a manner that negated its effect. The net effect is that it did not affect the plain finding, for other reasons supported by the evidence, as to the unmerchantability and unfitness for purpose of the bus. There can be no merit in this ground of appeal.
- [11] It needs to be said that even if the appellant had been correct in the prosecution of his grounds of appeal, there having been no impact on the unmerchantability and unfitness for purpose, the remainder of the judgment remained unimpugned.
- [12] In the premises, the appeal shall stand dismissed. Costs of the appeal shall be the respondent’s fixed at two-thirds of the prescribed costs awarded in the court below.

Kenneth Benjamin
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal