

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2022/0118 formerly GDAHCV 2014/0515

BETWEEN:

GARVEY LOUISON

Claimant

and

**VALDA SAMUEL MAITLAND
(Personal Representative of The Estate of Kenwyn Maitland)**

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Ian Sandy for the Claimant

Mrs. Sabrita Khan-Ramdhani for the Defendant

2023: November 7, 14

RULING

[1] **ACTIE, J.:** In a claim filed on 12th November 2014, the claimant, Garvey Louison, seeks damages for breach of contract against the defendant, Kenwin Maitland, for defective service rendered in the servicing of his motor vehicle. The defendant died in 2019 and his wife as administratrix was substituted as a defendant. It is not in dispute that the deceased caused damage to the claimant's vehicle. Accordingly, judgment is entered in favor of the claimant for breach of contract with the only remaining issue being the quantum of damages to be awarded to the claimant.

The claimant's case

- [2] The claimant in his pleaded case claims special damages representing the value of the vehicle in the sum of \$150,000.00; loss of use of the vehicle at the rate of \$300.00 daily from 1st April 2014 until judgment, damages, costs and interest.
- [3] The claimant's vehicle is a 2004 Mercedes Benz E Class Elegant Motorcar Registration No. P 136, which he claims he bought from Sterling Motors Port of Spain, Trinidad and Tobago for the sum of \$300,000.00. He did not provide any evidence to substantiate the purchase price. In January 2014 he delivered the motor vehicle to the defendant's garage for the purpose of an engine oil change and replacement of a small seal. On 15th March 2014, the defendant while conducting the servicing of the vehicle poured oil into the engine instead of the transmission causing damage to the engine.
- [4] The claimant contends that he informed the claimant that he should refrain from effecting any further service on the engine unless assessed and diagnosed by Mr. Keston Padia, a certified Mercedes Benz Specialist from Trinidad & Tobago. Notwithstanding, the defendant proceeded to start the engine causing it to blow up. A point not denied by the defendant.
- [5] On 27th May 2014, Mr. Padia assessed the vehicle and concluded that too many parts had been removed from the engine thereby preventing him from making any proper assessment of the condition of the vehicle.
- [6] The defendant informed that claimant that he would procure and did in fact procure a used replacement engine from the United Kingdom to replace the damaged engine. Again, the claimant pleaded that he informed the defendant to refrain from doing further work without the express advice and supervision of Mr. Padia. Notwithstanding, the defendant installed the second hand engine.

- [7] Mr. Padia returned to Grenada on 21st July 2014 after the installation of the engine and conducted a road test of the vehicle. In his witness statement he stated that it was impossible to certify the second hand engine as a proper replacement engine as the mileage was unknown and there was no information whether the replacement engine was specifically designed for the type of motor vehicle No. P 136. He stated that he discovered further problems which were not seen prior to the vehicle being delivered to the defendant's garage. The court notes however that Mr. Padia stated that he last inspected and serviced the vehicle sometime in March or July 2013 and therefore could not have known of the condition of the vehicle at the time it was presented to the garage.
- [8] On the 14th day of June 2018, almost four years post the installation of the replacement engine, Mr. Darryl Norris, a Mercedes Benz Diagnostic Technician of Jamaica was appointed as an expert witness for the purpose of these proceedings. Mr. Norris, in his report dated 10th October 2018 and addressed to Mr. Ian Sandy, Legal Practitioner for the claimant, stated that the work done on the vehicle was done at a professional level: the actual valves of the engine running condition were all good; the engine ran perfectly fine with no indications of any misfires or faults; the vehicle performed normally; the engine was running at the correct engine temperature and performed well. There was a slight delay in heating the catalytic converter (part of the exhaust) but after running the vehicle for a few minutes the valves were corrected and in correct specifications. Additional work was carried out in the vehicle transmission and filter was replaced together with electrical plates in the transmission.
- [9] Mr. Norris conducted a test drive of the vehicle and stated that the vehicle was very sluggish during the first mile which he attributed to the brakes slightly binding due to the vehicle standing for a long period of time. He stated that after driving for over a mile the brakes freed up and the vehicle performed normally at the correct engine temperature and performed well with transmission changing gears as normal. Mr. Norris overall view was that the second-hand engine performed well but unforeseen

failures could arise due to the true mileage of the vehicle being unknown plus the second-hand engine held no warranty which leaves the owner with no peace of mind and assurance. The expert surmised that the lack of warranty was a concern for both parties.

[10] The totality of evidence leads to the ineluctable conclusion that the replacement engine worked exceptionally well with the only concern being the unknown mileage on the used engine. The expert in his report stated that the replacement engine had a production date of 22nd April 2004, with a first registration date of 1st June 2004 from a Mercedes Benz Dubai. The last recorded mileage was on 16th October 2006 with 42,797 km with no further recorded mileage until the installation on the claimant's vehicle. That he said gave him some level of concern as there was no guarantee or ability to give any definite lifespan on the engine's duration when compared to the lifetime guarantee of the engine in P136.

[11] The witness and brother of the deceased, Mr. Richard Maitland, in response to the lack of further recorded mileage in the replacement engine since 16th October 2006, said that the low mileage could only suggest that the second-hand engine had not been in use since the last recording in 2006 as was the case of the claimant's vehicle which has been parked in the defendant's garage without any significant movements since 2014 to reflect any change in the last recorded mileage for the past nine years. I am of the view that Mr. Maitland's assessment is a plausible analogy with respect to the unrecorded mileage in the replacement engine. The only concern is the lack of lifetime warranty in the second-hand engine when compared with the original engine.

Analysis – Measure of damages

[12] The measure of damages to which the claimant is entitled is based on what is reasonable in the circumstances to put the claimant in the position he would have been in had the contract been effectively executed by the defendant.

- [13] **McGregor on Damages** provides that where there is a breach of contract in the rendering of defective services, the claimant may claim basic loss of the diminution in the property's value only by the diminution in market price or may, alternatively, claim the costs of putting the property into proper condition. It is a question to which no clear-cut answer is possible. Each case must be looked at separately to see what is reasonable¹.
- [14] The claimant seeks the sum of \$150,000.00 as the replacement cost of the vehicle based on a valuation made by Mr. Keston Padia in 2013. It is to be noted that Mr Padia expressly stated in his report that he was not a certified valuator.
- [15] Counsel for the claimant in support of sum claimed relies on the authority in **Liesbosch Dredger V. S. S. Edison**² where the plaintiff's dredger was negligently sunk and destroyed by the defendant. The court held that damages should be calculated by the market value of a replacement dredger as at the time of the loss. Lord Wright at page 463 opined:
- “that the dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule. It follows that where movable property has been damaged through the negligence of the Defendant the Claimant is entitled to damages which, so far as money can compensate, will give him reparation for the wrongful act and all the natural and direct consequences of the act”.
- [16] The **Liesbosch Dredger** case is easily distinguishable from the case at bar in that the dredger was totally destroyed unlike the claimant's vehicle engine which from all accounts has been restored and is working efficiently since the installation of the replacement engine.
- [17] The **Liesbosch Dredger** case held that there are two well established rules namely:
- (i) if an article which has been damaged can be repaired the measure of damage is the costs of repairs and the costs of hiring a substitute during the period of the

¹ 19th Ed. Para 4-013.

² 1933 AC 449.

repair: (ii) if it could not, then the measure of damages is the market value of the article at the time of damage plus the cost of hiring of a substitute until a new one can be obtained.

[18] The claimant also referred to the case of **Gibbons v Trapp Motors Ltd**³ where defects in a relatively new motor vehicle appeared over a period of ten months with “monotonous regularity. The purchaser returned the car to the dealers. The court held that “whether there has been a breach of a fundamental condition of the agreement is a question of degree depending on the facts.” The court looked at the accumulation of defects, taken en masse, constituted a breach going to the root of the contract.

[19] Mrs. Sabrita Khan-Ramdhani, counsel for the defendant, contends that the claimant’s vehicle has at no point been deemed unroadworthy, dangerous or incapable of performing its requisite functions by any of the professionals, namely: George Rapier, Robert Miller, Keston Padia and Darryl Norris the court appointed expert.

[20] I am in total agreement with counsel for the defendant as there is no evidence that the claimant’s vehicle was a constructive total loss or that it would have been more economical to pay for the market value of the vehicle in 2013 than the costs of the replacement engine. It is the evidence that the claimant has refused to collect the vehicle from the defendant’s garage despite all the reports indicating that the vehicle is in excellent working condition.

[21] The quantum of damage is a question of fact based on the totality of the evidence. In **British Westinghouse Electric and Manufacturing Co v Underground Electric Railways Co (London) Limited**⁴ it was held that:

“The fundamental basis of damages is compensation for the pecuniary loss to a party naturally flowing from the breach. This is qualified by the duty of

³ (1970), 9 D.L.R. (3d) 742.

⁴ HL 1912

a plaintiff to take all reasonable steps to mitigate the loss consequent on the breach.

[22] The claimant posits that the replacement engine should have been either a new Mercedes Benz Engine specifically manufactured for P136 with a lifetime warranty or a reconditioned engine certified by Mercedes Benz with a lifetime warranty and installed by a certified Mercedes Benz technician. However, the claimant failed to provide the court with evidence of any of the efforts that he made in sourcing what he purports to have been the ideal replacement engine to minimise his loss.

[23] In **Payzu Ltd. v Saunders**⁵ per Scrutton LJ states:

"Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take 'all reasonable steps to mitigate the loss consequent on the breach,' and this principle 'debars him from claiming any part of the damage which is due to his neglect to take such steps.'"

[24] The court in **Payzu** followed and applied the court of appeal decision in **Brace v. Calder**⁶ where it was held that the question of what steps a plaintiff in an action for breach of contract should take towards mitigating the damage is a question of fact and not of law. Therein the following was stated by Justice McCardie:

"What is the rule of law as to the duty to mitigate damages? I will first refer to the judgment of Cockburn C. J. in *Frost v. Knight*, (1) where he said: "In assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished."

[25] The court accepts that the defendant damaged the vehicle's engine which is an essential component. The defendant having damaged the engine was under an obligation to put the claimant back into the position he would have been had there not been such a breach. The defendant within a short time sought to remedy the

⁵ [1919] 2 KB 581 at p.589.

⁶ [1895] 2 Q. B. 253

breach by sourcing a replacement engine. The defendant procured and installed a replacement engine imported from England and also procured engine mountings from New York as the original ones on the car had gone and were causing a vibration which Mr. Padia alluded to in his witness statement. It is the defendant's evidence that the installation of the replacement engine was done in consultation with a Mercedes Benz expert in New York. The claimant was informed that the vehicle was available for collection. The vehicle was certified to be in good working condition by Mr. George Rapier, Glean's Auto Garage on 25th July 2014 and further certified in 2018 by the court appointed expert. It is the evidence that the claimant has refused to take delivery of the said vehicle, which to date remains at the defendant's garage.

[26] Our Court of Appeal in **Danny Ambo v Michael Laudat et al**⁷ per Edwards J.A said:

“Where damages for any pleaded causes of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim”.

[27] **McGregor on Damages** states that:

“a plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could have avoided but has failed, through unreasonable action or inaction. Put shortly, the plaintiff cannot recover for avoidable loss. The plaintiff can recover for loss incurred in reasonable attempts to avoid loss”.

[28] The court applying the law to the facts is of the view that the claimant acted unreasonably in refusing to retrieve his vehicle from the defendant's garage. The claimant in refusing to accept the second-hand replacement engine was under a duty to obtain a suitable replacement engine for his vehicle and then seek compensation from the defendant for the cost of the replacement engine. He did not make any attempt to mitigate his loss. Accordingly, the claimant has failed to satisfy the court that there was a fundamental breach of the contract or any basis in making an award in the sum of \$150,000.00 for the replacement of the vehicle.

⁷ HCVAP 2010/016.

Travel Expenses

- [29] Mr. Ian Sandy, counsel for the claimant in submissions claims the sum of USD \$1,500.00 representing the costs of travel for Mr. Keston Padia from Trinidad & Tobago. A simple response is that this is an amount which should have been pleaded as special damages. It is a trite principle of law that special damages must be pleaded, particularised and proved. The failure to follow this basic principle is fatal to the claimant and a claim under this head is accordingly refused.

Loss of Use

- [30] The claimant pleaded loss of use from 1st April 2004 until judgment at a daily rate of \$300.00. However, in closing submissions, counsel for the claimant instead seeks loss of use up to 21st August 2014. The defendant contends that the claimant is not entitled to loss of use since he had access to other vehicles and had not provided any evidence to prove rental of a substitute vehicle.
- [31] The authorities are clear that the claimant is entitled to loss of use for the deprivation of his own vehicle. The amount would be the sum it would have cost the claimant to hire a comparable vehicle. The fact that the claimant had not hired or paid the cost of hire does not prevent him from recovering damages for the loss of use of his own car. Damages are measured by the reasonable cost of hiring a substitute vehicle.
- [32] Counsel for the claimant relies on the case of **James Bristol v Andre Bernard**⁸ from this jurisdiction where the claimant in 2009 was awarded loss of use for 87 days at \$200.00 for a high-end vehicle.
- [33] The claimant's vehicle is a Mercedes Benz E Class elegant motorcar and would be considered a luxury vehicle which would attract a higher rental rate for a comparable vehicle. The court takes into consideration that the daily awarded in the in **Bristol's** case was made in 2009 and would accordingly award a reasonable daily rate of

⁸ [2011] ECSCJ No. 157.

\$250.00 from 1st April 2014 to 21st August 2014 when the vehicle was first certified to be in perfect working condition by Mr Rapier, Glean Auto Garage. This equates to the sum of \$35,500.00, (that is, 142 x 250.00).

General Damages – Diminution in value

- [34] The claimant claims general damages being the diminution in value of the vehicle. A claim for diminution in value is measured by the reasonable cost of repairs in order to restore the condition to its original state prior to the damage. That diminution in value figure is usually calculated by the reasonable cost of repairs (to the claimant) in a case where the vehicle is capable of economic repair.
- [35] The claimant contends that the vehicle's engine when brought to the garage was the original engine, which was regularly serviced and in respect of which the claimant had a lifetime warranty from Mercedes Benz. The claimant argues that to be restored in the position he would have been in before his vehicle engine was completely destroyed, the replacement installed by the defendant should have been either a new Mercedes Benz Engine specifically manufactured for the claimant's vehicle with a lifetime warranty or a reconditioned engine certified by Mercedes Benz with a lifetime warranty and installed by a certified Mercedes Benz technician. The defendant on the other end contends that the vehicle was restored to the condition at the time of delivery by the claimant or even better.
- [36] In **Coles v Hetherington**⁹ it was held that: "(i) Where a vehicle was damaged as a result of negligence and was reasonably repaired (rather than written off) the measure of the claimant's loss that resulted from the damage inflicted by the tortfeasor was the diminution in value of the vehicle; the reasonable cost of repair could generally be taken as representing that diminution in value. The court held that the practical way that the diminution in value was generally calculated was to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged; that was a convenient practice which

⁹ [2014] 3 All ER.

the courts should continue to follow. Only if the sum claimed appeared to be clearly excessive would the court be justified in investigating whether that sum exceeded the cost that a claimant would have incurred in having the repairs carried out by a reputable repairer”.

[37] In the case at bar, neither the claimant nor the defendant presented the costs of the replacement parts vis a vis the costs of a new engine and customised replacement engine for the said vehicle. As indicated previously, there is no evidence that the vehicle was totally destroyed or could not have been economically restored.

[38] The main concern of the expert was that the second-hand engine did not have the lifetime warranty as the original engine for the claimant’s vehicle. The expert surmised that it would not give the claimant or defendant any peace of mind. The expert’s opinion was not a definitive assessment of any factual circumstances as to reliability of the second-hand engine over time. The practical way that the courts have calculated diminution in value is to ask how much the reasonable cost of repair would be so as to put the item back in the state it was in before it was damaged. Documents such as invoices for the cost of the repairs undertaken and the costs of a proper substitution would have assisted in the determination of the diminution in value.

[39] In this instant case the court would only be able assess the diminution in the value of the engine by reference to the difference between the market value of the perfect replacement engine vis a vis the second hand replacement engine installed by the defendant. The claimant did not produce a scintilla of evidence to guide the court. The court cannot speculate to make a reasonable estimation without evidence. However, the court takes into consideration the opinion of the expert and would accordingly award a nominal sum of \$1,000.00 in keeping with the Privy Council decision of **Carlton Greer v Alstons Engineering Sales and Services Limited**¹⁰

¹⁰ [2003] UKPC 46.

where it was held that although the loss was unquantified, it is the duty of the court to recognise it by an award that is not out of scale.

ORDER

[40] In summary and for the foregoing reasons it is ordered as follows:

- (i) Judgment for breach of contract is entered in favour of the claimant.
- (ii) The defendant shall pay the claimant, Special Damages for loss of use of the vehicle in the sum of \$35,500.00 with interest at the rate of 3% per annum from the date of filing the claim until judgment and at the rate of 6% per annum from the date of judgment until payment in full.
- (iii) General Damages in the sum of \$1,000.00 with interest at the rate of 6% from the date of judgment until payment in full.
- (iv) By consent, prescribed costs in the sum of \$7,500.00.

Agnes Actie
High Court Judge

By the Court

Registrar