ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 107 OF 1998

BETWEEN:

JOACHIM ENGINEERING LIMITED

Plaintiff

and

ARGYLE CONSTRUCTION LIMITED

Defendant

Appearances:

Mr S Commissiong for the Plaintiff
Ms Z Horne for the Defendant

2000: February 21, 22, 24

JUDGMENT

[1] MITCHELL, J: This is a Sale of Goods Act case. The Plaintiff company is one of the leading building contractors in St Vincent. It employs about 400 people. It has its main concrete plant at Calliaqua, some 4 miles out of Kingstown. The Defendant is an importer of used trucks and construction equipment for sale. In the year 1996, the Plaintiff won the tender to build the new General Market in Kingstown for the government of St Vincent. This is a huge project. The building is three stories high, and is constructed almost entirely out of reinforced concrete. It covers a block of the city. About 6,000 cubic meters of concrete was to be involved in the construction. The contract was worth some $14,500,000.00. The government made available to the Plaintiff near to the proposed construction site a spot of reclaimed land for storage of materials, and for the Plaintiff to set up the concrete batching plant that would be used to make the concrete for the project.

This spot was 200 yards from the construction site. The Plaintiff's main concrete batching site at Calliaqua was separated from the construction site by some 4 miles of road including steep hills. It would not be economic for the Plaintiff to produce concrete at Calliaqua and to truck it to the construction site. Producing high quality concrete near to the site would reduce the turnaround time, and make the concrete cheaper by $15.00 to $17.00 per cubic meter. The Plaintiff's managing director decided to purchase a second-hand concrete batching plant for the project, and to locate it on the spot that government had made available. He learned that the Defendant had just imported a second-hand batching plant and a truck to use with it. On about 10 June 1996, he agreed with Alonso Deane, the manager of the Defendant company, that the Plaintiff would pay the Defendant $120,000.00 for the batching plant and $90,000.00 for the used truck. A new plant would have cost about $300,000.00. Payment depended on whether the equipment was operational. The Plaintiff was, as usual with second-hand equipment, to send persons to examine the plant to ensure it was satisfactory.

[2] At this point the two stories of the parties diverge. The facts as I find them are that the Defendant deals in second-hand equipment. It does not normally give purchasers any warranty when it sells a piece of second-hand equipment. The purchaser is expected to inspect the equipment and satisfy himself that it meets his requirements and that the price is satisfactory for the state of the equipment. The Plaintiff's witnesses claimed in evidence that Alonso Dean had stated to them that the equipment had been "reconditioned." But, Alonso Dean denied that, and the Plaintiff produced no evidence of any kind other than a recollection. I was not satisfied that Alonso Deane gave an assurance that the second-hand plant had been "reconditioned."

[3] Gregory Joachim and Brian Browne were charged by the Plaintiff company with examining the equipment to ensure it was working and able to do the job for which it was intended before it would be paid for. Gregory Joachim gave evidence. Brian Browne no longer worked for the Plaintiff, and did not live in St Vincent any

longer, so that his evidence was not available. The Plaintiff got the bill for the concrete batching plant in June 1996. It was around this time that Gregory Joachim and Brian Browne went to examine the batching plant. They found that while the engine started nicely, and the conveyor belt was working, the display for the scale did not work. This was very serious. Concrete for such a large building as the one for which it was intended must be mixed to meet the strength specified in the engineering plans for the building. This requires that the correct weights of aggregate, sand, cement, and water must be put together in the hopper. There is a scale that is electronically operated that tells the person using the plant how much of each is put into the hopper. When the plant was inspected on this first occasion, as the light did not go on on the display for the scale, it was completely useless as far as the Plaintiff was concerned. When this defect was pointed out to him, the Defendant's manager Alonso Deane promised to have the plant checked out. It took several weeks to get the display board to work. Alonso Deane stated in evidence that he got a technician named Dawnley John to make it work. But, as Dawnley John was not called as a witness, we do not know what exactly he found wrong, or what he did to make the display board work. Alonso Deane said in evidence that nothing had been wrong with the display board. The UK shippers had merely disconnected the wiring to the display board. No other wiring on the plant was apparently disconnected, only the wiring to do with the scale. The engine started fine, and the conveyor belt worked when the machine was turned on. I find that there was some more serious problem than a mere disconnection for shipping. It took two months, between the date of the agreement to purchase the equipment, as seen on the invoice from the Defendant dated 10 June, and the payment of the cheque on 7 August 1996, as seen on the receipt put in evidence, to get the display board to work.

[4] The electronic scale attached to the bin or hopper worked by having the bin rest on cells or electronic sensors. Anything put in the bin caused the bin to press down on the cells, and the resistance in the circuitry in the cells altered. There was then a read-out on the display board of the weight that had been put into the

bin. Mr Deane may well not have known at the time that the Plaintiff's employees examined the plant that in addition to the display board not lighting up, the sensors were not working, but I am satisfied that they were not working.

[5] When Dawnley John got the display board to light up, Alonso Deane informed the Plaintiff company that the defect had been repaired. Gregory Joachim and Brian Browne returned to inspect the plant. They now found the light on on the display board. They were not experts in electronics, and could not be expected to know if the scale was working properly. Alonso Deane stated in evidence that he had given the Plaintiff no assurance that the scale was now working. He claimed that it was required to inspect the plant and to satisfy itself. According to Alonso Deane, when the mechanics from the Plaintiff company returned to the site after the display board had been made to light up, they tested the display board by placing the scoop of a front-end loader on the top of the hopper, and pressing the scoop down, to make sure that the scale was working. But, no such story had been put to any of the witnesses for the Plaintiff. It was not a story that had been tested by cross-examination of the Plaintiff's witnesses. The story sounded too pat when Alonso Deane came up with it in giving his evidence, after the case for the Plaintiff had been closed. I am satisfied that Alonso Deane got an electrician to get the display board to light up, but that the scale was not functioning properly even after the light lit up. Alonso Deane assured Brian Browne and Gregory Joachim that it was now working properly. Seeing the display light up, they believed him and reported back that the plant was satisfactory. They would not have recommended the Plaintiff purchasing the plant unless Alonso Deane had assured them that the defect they had discovered had been corrected.

[6] The Plaintiff company, relying on the report from its office manager and mechanic that the display board was now lit up and working, paid the Defendant for the plant and the truck. The Plaintiff removed the plant and the truck to the site at Kingstown. Alonso Deane complained in evidence that the Plaintiff had altered the plant and that its workmen had probably, in the process, damaged the sensors on

the scale. He gave evidence that the hopper had had pieces of steel welded to it to increase its capacity from 3 cubic meters, which was the maximum capacity stenciled onto the outside of the plant. Richard Joachim, the managing director of the company had said that the plant produced up to 6 cubic meters of concrete. Richard Joachim did not operate the plant. He sat in the head office of the company and did what managing directors do. His son Gregory Joachim was the office manager who examined the equipment and gave evidence. He gave evidence that a sidepiece of steel had at some point after they had taken possession been welded onto the side that the load was put into the hopper. This was done to stop the materials being loaded into the hopper from falling out of the hopper. It was not suggested to him that this welding had been done to increase the capacity of the hopper above the manufacturer's recommended limit. He denied that they had altered the machine in any way, except to put this safeguard onto it. Alfred Joachim the brother of Richard and uncle of Gregory was the manager of the concrete mixing plant at the time in question, and up to the present time, and gave evidence. It was not suggested to him that the hopper had been altered to increase the capacity to an unacceptable level or at all. He also denied that the plant had been altered in any way. I do not accept that the hopper had been altered to increase its capacity. In any event, this is a red herring. The problem that arose with the sensors had nothing to do with the use of the plant to make concrete either in batches of 3 cubic meters or 6 cubic meters, or in any other quantity. It was not suggested in evidence that the sensors stopped working after the Plaintiff had commenced mixing cement as a result of abuse of the capacity of the plant. The evidence is that the sensors were not working from the moment the first ingredients for mixing the first batch of concrete were put in to the hopper. The problem was that before any concrete could be mixed, the sensors that weighed the ingredients were not working.

[7] There was another reason why Alonso Deane came to the opinion after a while that his company was not liable to the Plaintiff for the loss and damage they had suffered from purchasing the plant, and why he should disclaim any further

responsibility for the repairs. When the plant had been at Argyle in the possession of the Defendant it had been on wheels. When the Plaintiff purchased it and moved it to Kingstown, its employees took it off its wheels and jacked it up as it was supposed to be erected to begin producing concrete. Alonso Deane had not seen it up on its jacks before. He incorrectly concluded when he saw it on its jacks at Kingstown that the Plaintiff had done a lot of unauthorized welding to the feet of the plant to stabilize it. But, I find that this was just the usual and expected procedure of taking it off its rubber wheels and putting it on its jacks to allow it to take the weight of the concrete that it was supposed to mix. It could not operate on rubber wheels. Cameron Cadogan was an electrical engineer who gave evidence for the Plaintiff. He does work for both the Plaintiff and the Defendant. He gave his evidence professionally and objectively, and I accept his evidence. He says that he also saw other welding that had been done in the area of the display board. It had been welded onto another surface from the one that it was originally placed on by the manufacturer. There is no evidence that this alteration was done by the Plaintiff. The original owner might well have done it when it was in the UK. Cameron Cadogan explained that the alteration of the display panel was to make it more convenient for the operators to use. He did not consider that any improper or unusual welding had been done to the plant, and I accept his evidence. One suggestion of the Defendant was that the Plaintiff might have done welding work on the plant without disconnecting the batteries, causing a short to have occurred in the electronic circuitry. There was no evidence that anything of the sort had happened.

[8] Gregory Joachim said in evidence that when he was called back to examine the plant at Argyle, he saw the light on the display board light up. At this time, the Plaintiff paid for the plant, and transported it to the reclaimed land site at Kingstown. They built a concrete platform for it to rest on, and removed the wheels and put it up on the jacks provided for it to operate. They welded on a piece of steel on the top of the hopper to stop material from falling out. The first load of stone was put into the plant. No figures showed on the display board to

the scale. The manager of the plant contacted Alonso Deane and told him that something was wrong with the scale. Alonso Deane said he would send Cameron Cadogan to look at it. Cameron Cadogan, as previously mentioned, was well known to the Plaintiff and the Defendant. He did work for both of them. He was an electrical engineer, a graduate of CAST in Jamaica, and with over 20 years experience with equipment carrying electronic parts.

[9] It was Gregory Joachim who actually contacted Cameron Cadogan before Alonso Deane did. This fact appeared to have caused Alonso Deane to conclude that the Defendant could repudiate responsibility for the costs incurred after sale. Cameron Cadogan was a very busy technician, and I am satisfied that it was the Plaintiff that managed to find him before the Defendant did, to instruct him to inspect the defective plant. Cameron Cadogan testified that he went to the site at the request of Alonso Deane. It was Alonso Deane he looked to for meeting his expenses in trying to get the plant to work. He never charged the Defendant a fee, because it is not his policy to charge when he is unable to make a piece of equipment work. He considered the Defendant his employer when he went to examine the plant at the site at Kingstown. Cameron Cadogan came eventually to look at the plant. There was no manual that had come with this second-hand piece of equipment. He had never examined or serviced this plant before. He found the scale was not working. The display board lit up, but the reading was not accurate. He examined the 3 load cells or sensors. He examined each one with his testing equipment. He found that each one gave a different reading. They should all have been within accepted tolerances, but they were not. One of them may have been accurate, but as all 3 were giving such different readings he could not tell which one, if any, was correct. He assumed they had failed from ordinary use. On further examination, he discovered that one of them, one that was not working at all, had a broken cable. Cameron Cadogan did not suggest that this was something that the Plaintiff's employees were responsible for. It took him some time to locate this broken cable. It was not something that was obvious. On reconnecting the cable, a reading came up on the display board. It was still not

giving a correct reading. Mr Deane came around on a number of occasions to see how his work was proceeding.

[10] Cameron Cadogan worked unsuccessfully on the plant at the site at Kingstown for a long time. He came for an hour or so, after 4pm, perhaps once a week, when he could find the time. No one paid him, so it is perhaps not surprising that he did not put much effort into it. After 5 or 6 months of this testing he still had not found out what was wrong with the plant. The cells were still not giving a uniform reading, as they should. He requested information from the manufacturers, but it took a long time for the information to arrive. The Defendant paid for the cost of the over-seas calls made by Cameron Cadogan to the manufacturer. Cameron Cadogan finally advised Alonso Deane that he would have to get new cells. The Plaintiff's managing director was calling repeatedly to Alonso Deane complaining that the plant was lying down unusable for too long a time. Alonso Deane now arranged for his brother, the buying arm of the Defendant company in England, to acquire new cells and a new display board. When they arrived in St Vincent, Cameron Cadogan installed them in the plant with the help of the schematic drawings that arrived with the new parts.

[11] The Defendant company paid the cost of the new sensors and the new display board that it imported in an attempt to make the plant work. According to Alonso Deane, the bill came to some $13,000.00 and he had faxed a copy of the bill to the Plaintiff. The suggestion was that he expected the Plaintiff company to pay the bill for the replacement parts. But, after cross-examination, it was apparent that this was a fabrication. No effort had been made by the Defendant to keep a copy of the bill; there was no evidence they ever sent a copy to the Plaintiff; they never wrote a letter to the Plaintiff demanding payment; they never made any effort to collect on the bill; they no longer had any record of the bill; they had not counterclaimed for the amount of the costs they had incurred in attempting to repair the plant. I am satisfied that the Defendant company intended to cover the cost of the replacement parts. It considered that it was responsible to the Plaintiff

to make the plant operable. It never considered at the time that the Plaintiff was responsible for causing the plant to break down. That claim only arose at a later date when the writ was issued. In the correspondence before action, the Defendant's solicitors wrote on the instructions of the Defendant to the effect that the Defendant had been told by the Plaintiff that while the Plaintiff's mechanics had been reassembling the plant they had broken another censor. Alonso Deane gave no evidence of such a conversation or of any "breaking" at the trial. I find that the allegation that the Plaintiff had been the cause of the sensors not working is not true.

[12] After the installation of the new cells and display board by Cameron Cadogan, the scale still did not read properly. Despite all of his tests he could not understand what was still wrong with the scale. Cameron Cadogan advised the Plaintiff and the Defendant that they should get someone else to examine the plant. Sometime later, after discussion with the Defendant, the Plaintiff called in the Trinidadian firm of Unique Scale Service Ltd. They examined the scale in the presence of Cameron Cadogan who explained to them what problems he had encountered and what steps he had already taken. On 14 October 1997 they recommended that the 'quarter bridge resistance load-cell' presently installed be replaced with a 'non-micro processor base indicator.' The system installed was a very difficult system to calibrate; the manufacturer in England no longer provided service for the system; the private individual recommended for servicing by the manufacturer had not been able to be contacted. The Plaintiff decided to purchase the new parts. Months had passed since the purchase of the plant and the commencement of he project. The concrete had to be trucked at great cost and delay from the plant at Calliaqua to the construction site in town. The Plaintiff paid the cost of the replacement equipment, the airfare and hotel costs for the Trinidadian technicians, and the labour costs to install the new parts. It came to a total of $22,749.69. Some 14 months after the plant had been acquired by the Plaintiff from the Defendant, and halfway through the project, the replacement

parts recommended by the Trinidadian firm were installed, and the plant finally began to produce the concrete needed for the General Market project.

[13] The uncontraverted evidence of the Plaintiff was that the cost of bringing concrete from the plant at Calliaqua to the site of the General Market under construction in Kingstown was an additional $15.00 to $17.00 per cubic metre. The Plaintiff had demanded that the Defendant pay a part of this extra cost. They claimed $10.00 per cubic meter for 2,940 cubic metres to a total of $29,400.00. The Defendant's manager denied that the Plaintiff's managing director had informed him at the time of their negotiations of the importance of the plant for the General Market project. I am satisfied that the Defendant's manager had been informed by the Plaintiff's managing director that the plant was required for the Kingstown project. The Defendant had for years done business with the Plaintiff. The Defendant would have been well aware of the Plaintiff's main plant at Calliaqua and the extra cost of transporting concrete from the main concrete batching plant at Calliaqua to Kingstown, the reason for the purchase of the equipment to be installed at Kingstown. He was aware of the immensity of the General Market project, and the usefulness of having a plant close to the constructions site to improve efficiency and reduce cost.

[14] Section 53 of the Sale of Goods Act, Cap 115 of the 1991 Edition of the Laws of St Vincent and the Grenadines, deals with the remedies available to a buyer when there is a breach by a seller of a warranty. It provides:

> (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not, by reason of such breach of warranty, entitled to reject the goods, but he may:

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

[15] By section 16 of the Sale of Goods Act in certain limited circumstances there are implied conditions in a contract for the sale of goods as to the quality or fitness of the goods sold. The section reads:

16. Subject to the provisions of this Act and of any written law in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows –

(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the gods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that that goods shall be reasonably fit for such purpose:

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality;

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usages of trade;

(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[16] The questions that the court has to ask itself in applying the above law are;

(1) Did the Defendant expressly warrant to the Plaintiff after the attempt to repair the scale at Argyle that the scale was now working properly? If the answer to that is yes, then there is strictly no need to apply section 16. The Defendant will be liable to the Plaintiff under section 53(1) for breach of an express warranty.

(2) For the purpose of applying section 16(a) if necessary, did the Plaintiff make known to the Defendant the purpose for which the plant was required?

(3) Did the Plaintiff rely on the Defendant's judgment as to the working condition of the plant?

(4) If the plant was delivered to the Plaintiff in a defective condition, was it (a) fit for the purpose for which it was bought; and (b) of merchantable quality?

(5) If the Defendant is liable to the Plaintiff under either section 53(1) or section 16, what are the damages to which the Plaintiff is entitled?

I am satisfied from the evidence that the scale on the plant did not work when it was in the Defendant's possession at Argyle. I do not accept the claim of the Defendant that the Plaintiff tested the scale and found it satisfactory. The display board may have lit up, but the evidence is that it still did not work. The Defendant did not have the scale properly repaired before he sold the plant. I am satisfied that the Defendant warranted the repairs of the plant at Argyle. The Plaintiff having found the plant defective would have wanted the Defendant to confirm that he had had it repaired. I do not believe that the Plaintiff would have bought the plant at that stage if the Defendant had said, "I am sorry, you will have to test it again and satisfy yourself." There is no credible evidence that the Plaintiff did anything to the plant to cause the failure in the scale. I do not accept the story of the Defendant's pleadings that the Plaintiff's mechanics removed the wrong bolt and broke one of the units. Nor do I believe the Defendant's suggestion in evidence that welding by the Plaintiff's employees may have caused the failure. Nor do I believe the Defendant's suggestion that the damage may have been caused by the Plaintiff having increased the hopper's capacity. I accept the evidence of Cameron Cadogan that to this day it is not known why the censors did not work. Neither the Plaintiff nor the Defendant, their servants or agents, had the requisite skills to put the plant in this case into a functional state. The Plaintiff's staff could not know whether the scale was working without technical equipment of the sort Cameron Cadogan had. They relied on the assurance of Alonso Deane that the scale was working now that the light had come on. It was only when they first tried putting stones into the mixer when it had arrived in Kingstown that they realized that the scale was defective, despite it being lit up.

[17] The Plaintiff relied on the cases of:

Council of the Shire of Ashford v. Dependable Motors Pty Ltd (1961) 1 All ER 96

Priest v. Last (1903) LRCA 148

Henry Kendall & Sons v. William Lillico (1968) 2 All ER 444

Mason v. Birmingham (1949) 2 All ER 134

The Plaintiff distinguished the case of:

Bartlett v Sidney Marcus Ltd [1965] 2 All ER

From the facts found above, the application of the provisions of the Sale of Goods Act presents no difficulty. The plant was sold in a defective condition. It was not fit for the purpose for which it had been bought. It was not of merchantable quality. This was contrary to the assurance of the Defendant to the Plaintiff that the plant was in good working condition after the repairs. The Defendant is liable for the loss directly and naturally resulting.

[18] There will be damages for the Plaintiff for the amount of the special damages claimed and proved of $52,149.69. No argument was presented on an appropriate amount of general damages. In the circumstances, there will be general damages in the nominal amount of $5,000.00. The Plaintiff is also entitled to have its costs to be taxed if not agreed

I D MITCHELL, QC
High Court Judge