SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 473 of 1998

BETWEEN:

ST. LUCIA MOTOR & GENERAL INSURANCE COMPANY LIMITED

Claimant

and

NORTHWEST LIMITED

Defendant

Appearances:

Ms. Cybelle Cenac for the Claimant.
Mr. Tyrone D. Chong for the Defendant.

2001: September 25
2002: May 06

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** The Claimant was and is a Motor Insurance Company in business in Saint Lucia. The Defendant is a reputable Company carrying on the business of a dealer in motor vehicles. On or about 2nd day of October 1997, the Claimant purchased a brand new automatic Ford Taurus GL motor vehicle [hereinafter referred to as the Ford Taurus] from the Defendant for $129,000.00. The said Ford Taurus was purchased in the Claimant's name but it was intended to be used primarily by Mrs. Gertrude Berlinda Hippolyte, wife of the Managing Director of the Claimant's Company.

[2] On or about the 1st day of December of the said year, Mrs. Hippolyte began complaining to the Defendant that the Ford Taurus was cutting off. The Defendant alleged that the vehicle came into their garage twice with the problem of cutting off. The Claimant painted a more

colourful picture alleging that the Ford Taurus went into the garage on at least eight occasions. It was however accepted that the Ford Taurus went into the garage sometime before Christmas. It remained there for approximately a month. The Defendant alleged that the problem was related to the idle speed control mechanism. As a result, the idle speed solenoid and fuel filter were replaced. The Defendant assured the Claimant that the vehicle was in perfect working condition. Acting on that assurance the Claimant took delivery of the vehicle on or about the second week of January 1998. Shortly thereafter, the Claimant continued to encounter the same problem. The vehicle went in and out of the Defendant's garage between mid-January and late March.

[3] On 30th day of March 1998, the Ford Taurus was taken again to the Defendant's garage. The same problem persisted. Mr. Curtis Mauricette, then Senior Technician with the Defendant Company spoke to Mr. Steve Dupal, the Company's Service Advisor in the Service Workshop about the car. As a result, he took the Ford Taurus for a test run and noticed that the idle speed warning light on the instrument panel would sometimes flicker while the engine was idling. He concluded that the idle speed was falling low and was therefore incorrect. Mr. Mauricette stated that based on this observation, he inspected the throttle position mechanism and adjusted throttle position cable stop to the correct idle speed position and having on the previous occasion changed the idle speed solenoid, he was absolutely convinced that the problem was completely solved with the adjustment of throttle position cable.

[4] The Defendant alleged that both Mr. Mauricette and Mr. Dupal test drove the Ford Taurus under all types of conditions and the car worked perfectly and never cut off. The Defendant next alleged that tests were done in accordance with the manufacturer's specifications and the results were all positive. Being totally satisfied, on or about 20th day of April 1998, Mr. Dupal informed Mr. Hippolyte that the Ford Taurus was in perfect working condition and was ready for delivery. Mr. Hippolyte was even invited to test drive the vehicle with Mr. Dupal. But Mr. Hippolyte was not convinced that the problem was solved. He remained adamant. He had been told so before. His response was that he needed to speak firstly to the Managing Director, Mr. Bain before he collected the car.

[5] One month passed and Mr. Hippolyte did not collect the car. The Defendant being resolute that the Ford Taurus was in perfect working condition undertook without the Claimant's knowledge and permission to deliver the car to the residence of Mr. Hippolyte at Reduit Orchard. Mr. Dupal parked the car in the parking lot and handed the keys to the maid. This was on 20th day of May 1998. Mr. and Mrs. Hippolyte were not at home at the time of the alleged delivery. They found the car in their garage when they got home. Like the Defendant, they were also resolute. They never drove or touched the car. It is still parked in their driveway. A week later, on 29th day of May 1998, the Claimant commenced the present proceedings. The Hippolytes live close to the sea. As a result of exposure to the sea air and its non-use, the pristine Ford Taurus has deteriorated so that its present value would be considerably reduced. About a year ago, they approached the High Court for an urgent hearing of the matter. This was not possible until late last year. Then there was a further obstacle. The proceedings were audio recorded and due to unexplained circumstances, the preparation of the transcript was not possible until March 2002. This resulted in a protracted delay of the judgment. This is most regrettable. In the interim, the Hippolytes continue to pay the loan instalments on the vehicle.

[6] The Claimant averred that by letter dated 14th day of May 1998, it, through its Managing Director gave due notice to the Defendant Company that the Claimant rejected the Ford Taurus and returned it to the Defendant Company and demanded a refund of the said purchase price of $129,000.00.

[7] The Claimant next alleged that the Ford Taurus was defective in that it was not suitable or fit for the purpose for which it was bought and/or was not of merchantable quality in that:

(i) The engine of the said Ford Taurus suddenly cut off on several occasions while it was being driven on public roads in Saint Lucia.

(ii) These incidents not only caused embarrassment to the Claimant but placed in danger the lives of the drivers of the said vehicle at the relevant times.

[8] Stripped to its bare essentials, the case for the Defendant was that the Ford Taurus was not defective and it was fit for its purpose and/or of merchantable quality. The Defendant admitted that the Claimant returned the Ford Taurus to the Defendant to rectify a problem of cutting off, but at no time did the Claimant require the Defendant to repossess the Ford Taurus until after delivery was made at the residence of the Claimant's Managing Director on 20th day of May 1998.

[9] The Defendant claimed that the Claimant was not entitled to reject the said Ford Taurus and demand a refund of $129,000.00 and that the Claimant was given all reasonable opportunity to inspect the Ford Taurus before its delivery on 20th day of May 1998.

[10] In the pleadings as framed, the issue between the parties was whether, by reason of the defect of cutting off, the Claimant was entitled to repudiate the contract and entitled to get its money back as being something which has failed to meet the conditions of merchantability and fitness for purpose.

[11] Section 285(2) of the Sale of Goods Act Ch. 244 of the Revised Laws of Saint Lucia 1957 implies a condition of merchantability. It provides as follows:

> "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."

[12] I do not find that on the evidence that the defect of cutting off could have been discovered upon examination of the Ford Taurus on the date of its purchase.

[13] The next issue for consideration is the meaning of the phrase "merchantable quality." In *Grant v Australian Knitting Mills Ltd (1933) 50 CLR 387 at 418, Dixon J.* at first instance commented as follows:

> "The goods should be in such a state that the buyer, fully acquainted with the facts, and therefore knowing what hidden defects exists and not being limited to

their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and without special terms."

[14] The Sale of Goods Act 1979 [UK] (not enacted in Saint Lucia) gave a definition which seems to be broadly similar to the definition quoted above. Section 14(6) identical with Section 7(2) of the Supply of Goods (Implied Terms) Act 1973 (also not enacted in Saint Lucia) provides:

> "Goods of any kind are of merchantable quality within the meaning of subsection (2) if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances."

[15] It seems obvious therefore that any attempt to forge some exhaustive, positive and specific definition of the term would be an exercise in futility. As Lord Reid remarked at *page 825 in B.S. Brown & Son, Ltd v Craiks, Ltd (1970) 823*

> "It is not possible to frame, except in the vaguest terms, a definition of 'merchantable quality' which can apply to every kind of case."

[16] It is however well settled that "merchantable can only mean commercially saleable" and subsequent cases have adhered to that construction.

[17] Though it may not be possible to define in positive terms what makes a merchantable motor car, it must be simpler to attempt some sort of analysis of factors which may make a new car unmerchantable or for that matter unfit for the purpose for which it was intended. But before I do so, I must make some primary findings of fact. On a balance of probabilities, I was more inclined to accept the evidence of the witnesses for the Claimant. I believed the witnesses that the Ford Taurus went into the Defendant's garage on more than two occasions with the same problem of cutting off. They may have exaggerated the number of times but I believe it was certainly more than two. On two occasions, the Ford Taurus remained for exceptionally long periods. I believe them when they testified that the Ford Taurus had cut off on numerous occasions when both witnesses were driving so as

to instill fear in Mrs. Hippolyte in particular. She related an incident in April 1998 when the Ford Taurus cut off while she was descending a hill in Soufriere. Although there were one or two lapses in Mrs. Hippolyte's evidence, I believed her and attributed those lapses as frailties of human nature especially in relation to dates.

[18] On the evidence, I found the Defendant, through its servants to be insensitive to the complaints of the Claimant. I found that the problem of which the Claimant complained warranted prompt and personalized attention. Possibly a replacement car during the period in which the Claimant was deprived the use of the Ford Taurus might have reduced the acrimony between the parties.

[19] Learned Counsel for the Defendant argued that the problem of "cutting off" was "teething problems" and that the Claimant's claim is limited to damages only as in the case of *Bernstein v Pamson Motors (Golders Green) Ltd (1987) 2 All ER 220.*

[20] The facts in the *Bernstein's case* are briefly summarized. The plaintiff took delivery of a new Nissan Laurel motorcar on 7th day of December 1984 which he purchased for just under 8,000 pounds. On 3rd day of January 1985 when the car had done about 140 miles, it broke down on a motorway. The car would not restart and had to be collected by the emergency services. The following day the plaintiff advised the defendants in writing that he regarded the car as not being of merchantable quality and that he was rejecting it. Later that month the car was repaired under the manufacturer's warranty at no cost to the plaintiff. After repair the car was as good as new, but the plaintiff refused to take it. The cause of the defect was that a piece of sealant had entered the lubrication system and cut off the oil supply to the camshaft, which then seized up. The plaintiff brought an action against the defendants contending that the car was not of merchantable quality. The defendants contended that the car was of merchantable quality and that, in any event, the plaintiff has accepted the car within s 35(1) of the 1979 Act and was therefore, by virtue of s 11(4) of that Act, limited to a claim for damages alone. The Court held that the car could not be said to have been of merchantable quality but a period of three weeks was

considered to be reasonable time to examine and try out the car and reject it. Before I go any further, I find that the facts of *Bernstein's* case are dissimilar to the instant case.

[21] On merchantable quality, the judgment of *Mustill LJ* in *Rogers and Another v Parish (Scarborough) Ltd and Another (1987) 1 QB 933 at page 944* is very instructive to the instant case:

> "Yet the fact that a defect is reparable does not prevent it from making the *res vendita* unmerchantable if it is of a sufficient degree: See *Lee v York Coach and Marine (1977) RTR 35* The fact, if it was a fact, that the defect had been repaired at the instance of the purchaser, which in the present case does not appear to be so, might well have had an important bearing on whether the purchaser had by his conduct lost his right to reject, but it cannot in my view be material to the question of merchantability which falls to be judged at the moment of delivery. Furthermore, the judge applied the test of whether the defects had destroyed the workable character of the car. No doubt this echoed an argument similar to the one developed before us that if a vehicle is capable of starting and being driven in safety from one point to the next on public roads and on whatever other surface the car is supposed to be able to negotiate, it must necessarily be merchantable. I can only say that this proposition appears to have no relation to the broad test propounded by section 14 (6) even if, in certain particular circumstances, the correct inference would be that no more could be expected of the goods sold.
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> This being so, I think it legitimate to look at the whole issue afresh with direct reference to the words of section 14(6). Starting with the purpose for which "goods of that kind" are commonly bought, one would include in respect of any passenger vehicle not merely the buyer's purpose of driving the car from one place to another but of doing so with the appropriate degree of comfort, ease of handling and reliability and, one might add, of pride in the vehicle's outward and interior appearance. What is the appropriate degree and what relative weight is to be attached to one characteristic of the car rather than another will depend on the market at which the car is aimed.
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> To identify the relevant expectation one must look at the factors listed in the subsection. The first is the description attached to the goods. In the present case the vehicle was sold as new. Deficiencies which might be acceptable in a secondhand vehicle were not to be expected in one purchased as new. Next, the description "Range Rover" would conjure up a particular set of expectations, not the same as those relating to an ordinary saloon car, as to the balance between performance, handling, comfort and resilience. The factor of price was also significant. At more than 14,000 pounds this vehicle was, if not at the top end of the scale, well above the level of the ordinary family saloon. The buyer was entitled to value for his money.

> With these factors in mind, can it be said that the Range Rover as delivered was as fit for the purpose as the buyer could reasonably expect? The point does not admit of elaborate discussion. I can only say that to my mind the defects in engine, gearbox and bodywork, the existence of which is no longer in dispute, clearly demands a negative answer."

[22] It seems to me that the brand new Ford Taurus acquired by the Claimant was in the class of vehicle envisaged by Mustill LJ. In 1997, the Ford Taurus was a rarity in Saint Lucia. It was by no stretch of the imagination an ordinary car. Not when the cost was $129,000.00. The Hippolytes must have been selfishly proud with their latest acquisition. And they were entitled to feel the pride and joy which springs from the external appearance and newness of their prized property. Undoubtedly, they expected it to perform beautifully. And above all, they intended that the Ford Taurus was capable of being driven in safety. Nowadays, a car is more a necessity than a luxury. Nothing is more frustrating and embarrassing than to find out that your brand new Ford Taurus cuts off at traffic lights, in the middle of the road and descending steep hills.

[23] This case, therefore, depends on the resolution of two related questions, did the presence of this defect, undoubtedly existing at the time of delivery of the Ford Taurus, render the vehicle unmerchantable and/or did it mean that the car was not reasonably fit for its intended purpose? First and foremost, it is perhaps self evident that the court must look not only at the nature of the defect itself, considered in isolation but the performance of the car. In *Bartlett v Sidney Marcus Ltd (1965) 2 All ER 753,* the Court of Appeal decided that the two basic requirements of any car, certainly a secondhand car was, first, that it should be capable of being driven and second, that it should be capable of being driven in safety. *Rougier J.* in the *Bernstein case* at *page 226* had this to say:

> " A car that will not move is useless; a car that will move as intended but is a death trap to its occupants is worse than useless. In my judgment it would be only in the most exceptional case (of which I cannot for the moment imagine an example) that a new car which on delivery was incapable of being driven in safety could ever be classed as being of merchantable quality."

[24] And that statement I respectfully adopt. In *Bartlett v Sidney Marcus Ltd* it was decided that the two attributes of drivability and safety were the only ones which the buyer of a secondhand motor car is entitled to expect. But, the purchaser of a new car and a brand new Ford Taurus is entitled to something more, how much more depends on the various considerations of description, price and all other relevant circumstances. First, there is the ease or otherwise with which the defect may be remedied. In the instant case, the Ford Taurus went into the Defendant's garage on more than one occasion to rectify the defect of cutting off but the fault proved particularly difficult to trace and rectify and kept manifesting itself in some way or another. In particular, the Ford Taurus spent nearly a month at the Defendant's garage during the festive season. On 30th day of March 1998, the Ford Taurus returned to the Defendant's garage with the same problem of cutting off. It spent another three weeks before Mr. Hippolyte was told that it was in perfect working condition and was ready for delivery.

[25] Similarly, the time which is taken and the expense of rectification, evidencing as it does the seriousness of the defect are relevant considerations. Learned Counsel for the Defendant argued that the problem of "cutting off" was "teething problems" In this regard, he quoted *Rougier J* in *Bernstein's case.* At *page 229,* the learned trial Judge stated*:*

> "Nowadays the only way in which cars can be made in sufficient numbers to meet the demand for them is by means of mass production; and no system of mass production can ever be perfect; ***mistakes and troubles of one sort or another; generally minor, (Emphasis mine)*** are bound to occur from time to time, being often referred to as teething problems. Nowadays the buyer, even the buyer of a new car, must put up with a certain amount of teething problems and have them rectified, albeit generally under some sort of manufacturer's warranty."

[26] Ms. Cenac for the Claimant contended that the problem of cutting off was a serious problem especially in an island of steep hills and mountains. Under cross-examination, she was able to extract from the sole witness for the Defendant, Mr. Curtis Mauricette that the problem of cutting off could be potentially dangerous especially for a female driver. She next submitted that this is a case where the Defendant Company was unable to locate and rectify a defect which constantly kept manifesting itself over and over again. The repairs

which were carried out were lengthy. In total, the car spent at the least seven weeks in the Defendant's garage. The Defendant contended that the vehicle was repaired and in perfect working condition. The Hippolytes refused to accept it. They refused to test drive it. They wanted their money back.

[27] Now, it this the sort of thing that a new car purchaser must accept as being part of the inevitable teething problems as suggested by Mr. Chong. Or is it a defect which goes beyond any such description and renders the car either not reasonably fit for its purpose or not as fit for its purpose as it is reasonable to expect in all the circumstances so as to render it unmerchantable?

[28] In my judgment, a defect so fundamental as in the instant case, even though repairable, goes far beyond that which the Claimant must accept. To quote Counsel for the Claimant: "what the Claimant in fact received was $129,000.00 worth of metal, a practically valueless vehicle."

[29] In coming to this decision, I am mindful of the considerable potential danger which have arisen especially in descending as well as ascending hills and mountainous terrains. The Ford Taurus was purchased for the purpose of being driven on motorable roads in ease and comfort and without posing a potential death trap to its driver and occupants. Then, there is the question of the embarrassment suffered by the Hippolytes instead of the pride and joy of acquiring such an impressive vehicle. In my opinion, it is unreasonable for a purchaser of a brand new Ford Taurus to expect to suffer the defect of cutting off in so short time after its purchase. Consequently, I find that at the time of delivery to the Claimant, the Ford Taurus was not of merchantable quality rendering it unfit for its purpose.

[30] Is the Claimant entitled to reject the car? The Defendant contended that in the circumstances of the case the Claimant is limited to treating any breach (merchantable quality/ fitness for the purpose which is denied) as a breach of warranty only. Consequently, the Claimant is limited to damages rather than rescission of the contract.

Section 282 (3) of the Sale of Goods Act, Ch. 244 of the Revised Laws of St. Lucia provides:

> "Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

[31] It is clear that the issue of severability of contract does not arise in this matter. The next question is whether the Claimant accepted the Ford Taurus? Section 306 of the Sale of Goods Act 1957 sets out three circumstances in which the buyer of goods is deemed to have accepted them. It provides:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, **or** when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, **or** when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

[32] Section 305(1) is also instructive and in my opinion, must be read conjunctively with the aforesaid section reads:

> "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

[33] However, this subsection provides an exception to the second set of circumstance included in Section 306 namely those wherein the buyer does not act in relation to the goods inconsistently with the continued ownership of the seller. It seems that the only situation to be considered in the instant matter is the one when, after the lapse of a reasonable time, the buyer has retained the goods without intimating to the seller that he has rejected them. So what is reasonable time in the circumstances? In *Bernstein's* case,

some three weeks was held to be reasonable time. In my view, the nature of the particular defect and the speed with which it might be discovered are irrelevant to the concept of reasonable time. What is reasonable time for rejection is a question of fact.

[34] Turning to the facts of the present case, the Claimant started experiencing problems with the car some two months after the purchase of the Ford Taurus. The problem persisted until 30th day of March 1998. I do not think that anyone would expect such defects of cutting off to manifest itself immediately or in the first few weeks in the case of a brand new car of the calibre and quality as a Ford Taurus. The Ford Taurus was taken to the Defendant's garage for repairs. On 24th day of December 1997, the Claimant asked the Defendant to repossess the car since it was still on warranty. This was the first rejection of the car. It was however repaired and accepted by the Claimant conditionally, I would say. Then on 30th day of March 1998, when the same problem recurred, the car was again taken to the Defendant's garage. When on 20th day of April 1998,the Defendant notified the Claimant that the car was in perfect working condition and ready for delivery, the Claimant was adamant to accept it. In fact, the Claimant rejected the Ford Taurus on 14th day of May 1998 and demanded a refund of the purchase price. Such rejection, in my considered opinion could not be held to be unreasonably long.

[35] In *R.A. Munro & Co. Ltd v Meyer (1930) 2 KB 312, Wright J at page 331* said:

> "Where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated."

[36] In the Canadian case of *Baynham (trading as Multilink Promotions) v North West Securities Ltd (7th December 1982) (unreported),* it was held that persistent and intractable vibration on the part of a motor car considerably diminished the use and enjoyment to be extracted by the owner. Such a defect or defects may not be particularly serious in individual manifestations, but nevertheless can, by reason of their intractability, render a car unmerchantable in appropriate cases and the fact that the purchaser does not reject the contract at the first manifestation of trouble, but perseveres in his attempts to have the

matter put right, does not debar his right to eventual rescission once he is deemed not to have accepted the car.

[37] Further, where the buyer repudiates the contract, having the right to do so, he can recover it as on a total failure of consideration. Where the goods are so rejected it is not the responsibility of the buyer to return the goods to the seller, for Section 307 states:

> "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

[38] The Defendant implored the Court to find that the Claimant accepted the Ford Taurus at the date of delivery which was 2nd day of October 1997 and that they did acts which confirmed them as the owners of that car. They insured the car, they registered it and they encumbered it. These acts, according to Mr. Chong, are tantamount to ownership and no reversionary interest rests in the Defendant. I do not agree with Mr. Chong. As Ms. Cenac rightly submitted, the fact that the buyer has a right to reject the goods makes his property conditional only and leaves the reversionary interest in the seller, and it is with that reversionary interest that the buyer must not act inconsistently. In *Kwei Tek Chao and Others v British Traders and Shippers Ltd (1954) 2 QB 459* at page *487:*

> " I think that the true view is that what the buyer obtains, when the title under the documents is given to him, is the property in the goods, subject to the condition that they revest if upon examination he finds them to be not in accordance with the contract. That means that he gets only conditional property in the goods, the condition being a condition subsequent. All his dealings with the documents are dealings only with the conditional property in the goods. It follows, therefore, that there can be no dealing which is inconsistent with the seller's ownership unless he deals with something more than the conditional property. If the property passes altogether, not being subject to any condition, there is no ownership left in the seller with which any inconsistent act under section 35 could be committed. If the property passes conditionally the only ownership left in the seller is the reversionary interest in the property in the event of the condition subsequent operating to restore it to him. It is that reversionary interest with which the buyer must not, save with the penalty of accepting the goods, commit an inconsistent act."

[39] In summary, the Ford Taurus could not be said to have been of merchantable quality when it was delivered to the Claimant and therefore not reasonably fit for its intended purpose. By virtue of Section 285 (2) of the Sale of Goods Act, there was a breach of the implied condition of merchantability. As such, I am of the firm view that the Claimant was entitled to reject the goods and claim the entire purchase price and I so hold.

[40] Accordingly, there will be judgment for the Claimant in the following terms:

(1) The return of the purchase price of $129,000.00.

(2) Interest at the rate of 6% from the date of judgment to the date of payment.

[41] I have deliberately abstained from making an award of Costs to the Claimant. The reason is simple. The Claimant defaulted in filing their witness statement within the time stipulated by the Court and as such, sanctions must flow.

Indra Hariprashad-Charles

High Court Judge