BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2002

BETWEEN:

INTERNATIONAL MOTORS LIMITED

Appellant

and

RONNIE THOMAS

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal [Ag.]
The Hon. Mr. Adrian D. Saunders — Justice of Appeal
The Hon. Mr. Brian G. K. Alleyne, SC — Justice of Appeal

Appearances:

Ms. Tana 'ania Small-Davis for the Appellant
Ms. Margaret Price-Findlay for the Respondent

2004: January 13;
March 1.

JUDGMENT

[1] SAUNDERS, J.A.: The Appellants, International Motors Limited ("IM"), are the authorised dealers in Suzuki motor vehicles in the British Virgin Islands. In November, 1996, they sold a brand new 1996 Vitara 4 door vehicle to Mr. Ronnie Thomas for the sum of $21,150.00. The 4-wheel drive, manual, 5-speed transmission model carried a V-6 engine. It had a 12 months or 12,000 miles warranty. In April, 1997, after experiencing problems with the vehicle, Thomas repudiated the contract of sale and commenced these proceedings for breach of contract.

[2] Mr. Thomas's claim was based on section 16(a) of the Sale of Goods Act. As the learned Judge noted, in order to take advantage of that section, Thomas was required to satisfy the Court on a number of matters. He had to show firstly, that in purchasing the vehicle he, expressly or by implication, made known to IM the particular purpose for which the vehicle was required. Secondly, that he relied on IM's judgment. And thirdly, that it was in the course of IM's business to supply such motor vehicles. If Thomas could satisfy the Court on these matters then the law implied into his contract of sale a condition that the car was reasonably fit for the purpose indicated.

[3] On the issue of liability, Thomas's case was that he satisfied the above requirements and that IM was in breach of the implied condition thereby giving him the right to repudiate the contract. IM 's case was that, if at all Thomas had communicated the purpose for which he required the vehicle, the jeep delivered was indeed reasonably fit for the intended purpose. Further, IM claimed that negligent or incompetent driving had caused the problems experienced.

[4] The suit was tried before Matthew, J. The learned Judge found that Mr. Thomas had indeed proved his case. He ordered IM to return to Mr. Thomas, with interest, the vehicle's purchase price. He also awarded Thomas a small sum for using alternative transportation up to the date of the repudiation. IM is dissatisfied with this judgment. They have appealed to this Court.

[5] On the issue of their liability to Mr. Thomas, this was always going to be a difficult appeal for IM. The case is to a significant degree based on findings of fact and practically all the findings of fact made by the Judge were in favour of Mr. Thomas. The Judge found Thomas to be a truthful and reliable witness and accepted his version of events over that of IM's witnesses. The Judge also preferred, over the IM's expert, the evidence of the mechanic who testified on behalf of Thomas.

[6] The Judge accepted that when Thomas set out to acquire a new vehicle, he went in to IM specifically looking for a jeep with plenty power that could ascend hills. He wasn't particularly concerned with the brand name. He resided in a very hilly area and he simply needed a jeep with power to take the hills. His mechanic had advised him to purchase a 4 cylinder vehicle but when he indicated to the IM salesman that he wanted a powerful vehicle for the hills, the salesman convinced him to take the V-6 Vitara, saying to him that the Vitara was just the thing he needed. Thomas purchased the vehicle without even carrying it for a test drive.

[7] Almost immediately after he began driving the jeep Thomas realized that there seemed to be a problem with the power. Three to five days after taking delivery he complained to IM about the problem. He was advised that the jeep had not yet been broken in. About three weeks after the jeep was purchased, it broke down. It turned out that the reverse gear was broken. This was no ordinary problem. The IM representative testified that the jeep exhibited a defect that was wholly out of keeping with what one would expect in a new vehicle. The representative said that it was the first time he had seen any defect like that. IM kept the vehicle for some two weeks while it was repaired. Thomas was minded there and then to reject the vehicle and he intimated this to IM's personnel but he was persuaded by IM to keep it and continue to try it.

[8] IM promised to repair the vehicle and make it as good as new. They suspected that inept driving may have caused the problem and so, their representative tested Thomas's driving skills without Thomas being aware at the time that his motoring expertise was on trial. It turned out that Thomas was a perfect driver and the representative actually complimented him on his driving.

[9] The reverse gear was repaired but Thomas was still dissatisfied about the fact that the vehicle did not have the power he expected it to have. Moreover, other problems developed with the vehicle. For example, an unusual hard, knocking sound was occasionally heard when one shifted from first to second gear and

Thomas also claimed that the rear wheels would sometimes spread out when the vehicle was being reversed.

[10] That Thomas faced many difficulties with his jeep was conceded by IM at the trial. Their representative confirmed that Thomas had "a lot of problems with the vehicle since the purchase" and that these problems were reported to the service manager. Further, the rep admitted to Thomas that, with respect to the lack of power, there were vehicles exhibiting similar problems in Barbados. Thomas and IM had some discussions about exchanging the vehicle for a 4 cylinder but these talks broke down when IM insisted on making a deduction for the time Thomas had the vehicle.

[11] The final straw for Mr. Thomas occurred on 16th April, 1997. This was some five months after the purchase of the vehicle. The jeep stalled on Joe's Hill and would not move. Neither forward nor backward. Again it had to be taken back to IM for repairs. It turned out that there was damage to the crown wheel and pinion. Thomas had had enough. He decided there and then that he did not want this jeep. He was informed by IM on 11th May, 1997 that the vehicle had been repaired but he refused to collect it. A month later he filed this suit.

[12] The trial Judge had before him and rejected the notion that the vehicle experienced no serious problems with power and the ability satisfactorily to ascend hills. The Judge also ruled out the view that the problems encountered resulted from driver error. This was a case where credibility, the Judge's assessment of the testimony of the respective witnesses, must have played a crucial role in the adjudicative process. The trial Judge's findings as to a) whether or not Thomas had revealed to IM the purpose for which he needed the jeep and b) whether driver error had caused the undoubted problems experienced with the vehicle, were based, not so much on inferences drawn from accepted facts but rather, on an assessment of the primary evidence of the witnesses. An appellate

Court will not lightly disturb such findings[1]. By overwhelmingly accepting the evidence of Mr. Thomas and his witnesses, the Judge clearly found that Thomas had communicated to IM the particular purpose for which he required the vehicle. Thomas needed a vehicle with power, one that could cope properly with hills. He complained that this vehicle was deficient in the former and it was accepted that the agreed and serious problems exhibited by the vehicle were associated with the climbing of hills. Putting aside for the moment Mr. Thomas's complaints about the lack of power, no purchaser of a brand new motor vehicle would be content with one that exhibits a completely defective reverse gear within a month of purchase and very serious damage to the crown wheel and pinion within five months. It took IM about two weeks to fix the former problem and almost one month to address the problems associated with the defective crown wheel and pinion. In my view this Court ought not to disturb the Judge's conclusion that Thomas had made out a breach of the condition as to fitness for purpose.

[13] There then arises the issue as to whether the right to repudiate was lost by reason of the length of time Thomas kept the vehicle before rejecting it. The law is that any rejection of the goods must take place promptly, within a reasonable time. Counsel for IM cited the case of W J Abbott & Son Limited v. Duncan[2] and Bernstein v. Pamson Motors[3]. In the former case, a purchaser was held to have lost the right to reject a vehicle that was not of merchantable quality after he had retained the same for some two months after purchase. In Bernstein, it was held that a new vehicle that exhibited a single albeit serious problem after three weeks of purchase was neither of merchantable quality nor fit for its purpose but that the buyer had lost the right to reject the car.

[14] On the other hand, Counsel for Mr. Thomas cited the Canadian case of Lightburn v. Belmont Sales Limited[4]. That case is taken up with a lengthy discussion of

[1] *See Grenlec vs. Peters Grenada Civil Appeal No. 10 of 2002*
[2] *OECS Law Reports Vol. 1, 694*
[3] *(1987) 2 A.E.R. 220*
[4] *6 DLR (3d) 692*

exemption clauses but suffice it to say that, in that case, the buyer of a new car that gave persistent problems was held entitled to reject the car after a period of eight months.

[15] By section 36 of the Sale of Goods Act, a buyer is deemed to have accepted goods when, after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that he has rejected them. Each case must turn on its own peculiar facts. In this case the trial Judge was rightly impressed by the fact that Mr. Thomas had made it clear at the outset that he was not satisfied with the jeep and it was IM that kept asking him to keep it and to continue trying it. In these circumstances, I agree with the learned Judge that the conduct of Mr. Thomas was not unreasonable and that he had not lost the right to reject the goods.

[16] Finally there is the question of the mitigation of damages. The law is that a person bringing a claim for damages should act reasonably in seeking to mitigate the damages. Even though you have a good, solid claim against a defendant, the law expects you to behave in a reasonable and responsible manner to ensure that the damages suffered or incurred are not greater than they reasonably ought to be. The law will not allow you to recover loss that could and should have been avoided.

[17] Mr. Thomas repudiated the contract and refused to take back the jeep from IM. The latter had repaired it and asked Thomas to collect it on 11th May, 1997. The Judge found, rightly in my view, that Thomas was entitled to reject the jeep. In my judgment, the Judge erred however in not considering whether Thomas had acted reasonably in mitigating his loss. The Judge also failed to consider IM's counterclaim for damages for storage of the jeep.

[18] IM's representative deposed in his witness statement that in May, 1998 a prospective buyer offered them $15,572.00 for the vehicle. Mr. Thomas acknowledges that IM contacted him seeking his consent to sell the vehicle for

some price that he could not precisely recall. He conceded that the price was somewhere between $14,000 and $18,000. Mr. Thomas refused to agree to the sale of the vehicle. IM has therefore remained stuck with the jeep. They can't sell it because it is still registered in the name of Mr. Thomas.

[19] This refusal by Mr. Thomas was irresponsible. He had already rejected the jeep. This suit had already been filed. There is no good reason why he should have refused to permit the vehicle to be sold. The sale proceeds could have been placed in escrow pending the results of the suit. Thomas must now abide the consequences of this failure to mitigate.

[20] The trial Judge also ignored the counterclaim but, in my judgment, IM should be entitled to damages for storage fees. The unchallenged evidence is that in May, 1998 they could have disposed of the vehicle but for the unreasonable conduct of Mr. Thomas. Since that time the vehicle has been sitting in their compound taking up space that could be used by the company for another of their vehicles. The IM's representative assessed the storage rate to be $100.00 per month. That evidence was also not challenged. I would therefore find that IM is entitled to judgment on the counterclaim for damages at the rate of $100.00 per month from May, 1998.

[21] The trial Judge had awarded Thomas the sum of $21,150.00 plus interest at 11.5% from April 30th 1997 plus damages of $390.00 plus costs of $4,000.00. The net sums due to Mr. Thomas must however be adjusted in order to take into account the failure of Mr. Thomas to mitigate. In the absence of any current value of the jeep, I would order that it be sold forthwith at the best price possible. The sale proceeds must then be set off against the sum of $15,572.00, the amount IM would have obtained for the car if Thomas had acted reasonably. The difference thus arrived at should further be set off against the sum of $21,150.00 due to Mr. Thomas. I would also quantify the damages due to IM for storage to be $6,800.00, a total of 68 months between May, 1998 to January 2004. That sum of $6,800 is therefore to be further set off against the sums due to Mr. Thomas. The trial Judge

made a generous award of interest, 11.5%, to Mr. Thomas. In the foregoing calculations, no provision is made for interest on the sums awarded to IM up to the date of this judgment. I think the most convenient way to address that issue is by allowing Mr. Thomas interest on $21,150.00 at 11.5% from April, 1997 to May, 1998. Then, in lieu of awarding interest on the sums ordered payable to IM, I would reduce the Judge's award of interest to Mr. Thomas from 11.5% to 8% from May, 1998 to the date of payment. As to the costs of this appeal, each side won a little, each side lost a little. I think they fairly cancel out each other and in the circumstances I would make no order as to costs in this appeal. Mr. Thomas will be entitled to the costs awarded him by the trial Judge.

Adrian Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal [Ag.]

[22] ALLEYNE, J.A.: The Island of Tortola in the British Virgin Islands is a small but very mountainous island, with a generally very steep road network. On or about November 11, 1996, the Respondent Ronnie Thomas purchased a new Suzuki Vitara 4 door V6 vehicle from the Appellants International Motors Ltd. for $21,150.00. Prior to purchasing the vehicle, Mr. Thomas had informed the sales representative of the Appellant where he lived, that he had a lot of hills to climb, and that he wanted a vehicle with power. The representative told him that he had just the thing for him. On that basis, Mr. Thomas agreed to purchase the V6 Vitara, arranged his financing through a bank loan and concluded the transaction. Within 3 to 5 days, he complained that the vehicle lacked power to get over the hills, but the Appellant's representatives informed him that the vehicle was not yet broken in, and he should give the vehicle time. He was also given advice on

acceleration. It appears that whereas Mr. Thomas expected that the vehicle would be able to climb Joe's Hill in second gear, it could only do so in first gear.

[23] About two weeks after taking delivery of the vehicle, a serious problem developed with the reverse gear of the vehicle while it was reversing up a steep hill. This problem was attended to and repaired under the warranty on the vehicle within two weeks. About two weeks later there was a complaint about the rear wheels spreading out when the vehicle was reversing. A number of other complaints were made, in response to which the Appellant's representatives test drove the vehicle and claimed to have found nothing wrong. The learned trial Judge found this hard to believe, and rejected the Appellant's evidence.

[24] In March or April 1997, some 5 to 6 months after taking delivery of the vehicle, the vehicle again broke down, this time apparently with a damaged differential as a result of which the vehicle would not move. The Appellant took the vehicle for repairs, but on 2nd May Mr. Thomas' solicitor wrote the Appellant informing that Mr. Thomas did not want the vehicle and asked for a replacement or a return of his money. The vehicle was repaired by 12th May, but Mr. Thomas refused to accept it, and to this day it remains in the possession of the Appellant. In March and April 1999, the vehicle was inspected by three separate reputable car dealers, who, in the words of the trial Judge, "all expressed confidence in the performance of the vehicle, (but) at a time when the claimant had already rightfully rejected the goods."

[25] Mr. Thomas claimed against the Appellant for breach of an implied condition of the contract of sale and of a warranty that the vehicle would be reasonably fit for the purpose for which it was sold. In his statement of claim he alleged that he relied on the Appellant's skill and judgment in making his purchase, and that in breach of the said contract and of the conditions and warranties, the vehicle was not reasonably or at all fit for the said purpose, i.e. for private use and for ascending hills. He pleaded in his particulars that the first and reverse gears refused to

function adequately or at all, that the differential pinion gear also did not function, a complaint which I understand from the evidence to be not an additional complaint, but coincident with the complaint concerning the first gear earlier referred to, and that the vehicle had little or no power when required to progress up any hill or incline. Other particulars related to the complaints concerning the first and reverse gears. On the evidence it appears, in effect, that the complaints of Mr. Thomas were that the reverse gear was defective and suffered serious damage after about two weeks, that after about 5 months of his taking delivery the differential was damaged at the crown wheel and pinion, and that the vehicle lacked the power which he expected of it, so that hills which he expected it to climb in second gear could only be negotiated in first gear. The Appellant's case was that the defective parts were replaced and the vehicle repaired under the warranty, and that Mr. Thomas had no reasonable ground on which to reject the goods.

[26] The case was contested and decided on the basis of the Sale of Goods Act Chapter 298 of the Revised Laws of the Virgin Islands. This contract was for the sale of specific goods within the definition in section 2 of the Act. The same section defines "warranty" as an agreement collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

Fit for the purpose

[27] The learned trial Judge, rightly in my view, declined to deal with the case on the basis of the issue of merchantable quality under section 16(b) but dealt with it on the basis of fitness for purpose under section 16(a) of the Sale of Goods Act. That section reads as follows:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods 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 the 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."

[28] Anthea Worsdall FIMI, Solicitor, in the fourth edition of her work Consumer Law for the Motor Trade, says at page 110:

> "The provisions relating to fitness for purpose overlap with satisfactory quality (*the successor concept to merchantable quality under the modern English Act*) but may also in practice impose a higher standard. Goods may be satisfactory but not fit for the particular purpose for which they were sold."

[29] The learned trial Judge found, on the evidence, that Mr. Thomas in buying the car relied on the skill and judgment of the Appellant as to the fitness of the particular vehicle for the purpose of which he had informed the Appellant through its agent, that is, for the purpose of negotiating hills. The learned Judge held that this created and led to a contractual implied condition of fitness for the purpose; Baldry v Marshall[5]. It seems to me to be necessary, however, to examine the pleadings and the evidence to determine the precise scope of the condition to which the Appellant is subjected.

[30] At paragraph 3 of his amended statement of claim Mr. Thomas asserted that he made known to the Appellant that the vehicle would be required for use as a private motor vehicle for himself and his family, and for going up hills. This was reasserted at paragraphs 5 and 9 of the amended statement of claim.

[31] In his witness statement Mr. Thomas complained that the vehicle 'was going up the hill in first gear alone, when I tried to go up in second gear the vehicle would not go and I would have to go back to first gear.' He related further an incident after the first repairs to the vehicle when the Appellant's head mechanic in test driving the vehicle at the request of Mr. Thomas, was unable to get it up Joe's Hill with Mr. Thomas and his wife as passengers, in second gear but had to go into first gear. The witness Gwendolee Thomas, Mr. Thomas' wife, reiterated the

[5] [1925] 1 K.B. 260 per Bankes LJ at 266, Atkin LJ at 267.

same complaint in her witness statement. However, nowhere either in their witness statements nor in further examination or cross-examination did either of them say that they had specified that the vehicle should be able to negotiate any particular hill, or all hills, in second gear. Different cars have different performance standards, and while no doubt there are vehicles that can negotiate Joe's Hill in second gear, there was no evidence suggesting that the ability to do so is a reasonable performance standard to apply to a vehicle, or to a Vitara V6.

[32] Mr. Thomas' evidence is that he expected the vehicle to be able to go up Joe's Hill in second gear. He described Joe's Hill as the highest (steepest) of a number of steep hills in the area where he lives. He was evidently disappointed that the vehicle could not negotiate that steep hill in second gear, and expressed his disappointment to the Appellant's representative. In my view that is not sufficient to establish a contractual condition, express or implied, within the terms of section 16(a) of the Act.

[33] Mr. Thomas said in cross examination; 'This 6 cylinder, I know it doesn't have the power that it should, the performance.' His expectations of the vehicle were not fulfilled. Is this sufficient to bring the provisions of section 16(a) into play? I think not.

[34] There were other serious problems with the vehicle, but these were repaired under the warranty prior to Mr. Thomas' purported repudiation of the contract. These defects having been repaired, they cannot in themselves now be ground for repudiation; it is apparent that the repairs have restored the vehicle to 'as good as new' condition, and there is no evidence that suggests, as in the case of Bernstein v Pamson Motors Ltd.[6], that there is a risk that no amount of repair, however well performed, will ever bring the car properly to its pristine state. As in Bernstein, '[T]his is not a case where repairers are unable to locate and rectify a defect which constantly keeps manifesting itself over and over again and no

[6] [1987] 2 All ER 220 at 227.

question of intractability arises.'[7] There were two mechanical problems of which Mr. Thomas complained, the reverse gear, and damage to the differential. They do not appear to be connected, nor can they be described as intractable and have not, on the evidence, manifested themselves repeatedly, and they appear to have been satisfactorily repaired under the manufacturer's warranty, at no cost to Mr. Thomas and reasonably expeditiously. On that ground and on the basis of my view that the lack of power, while a cause for dissatisfaction on the part of Mr. Thomas, was not an express or implied condition or warranty under the contract of purchase and sale, I cannot agree with the learned trial Judge's inference drawn from the facts proved that the vehicle was unfit for its purpose.[8]

Right to Repudiate

[35] Section 13(2) distinguishes between a condition and a warranty, and is in the following terms:

> "Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

[36] Section 13(3) provides in part that in the case of the sale of specific goods the property in which has passed to the buyer, as in the instant case, the breach of any condition to be fulfilled by the seller can only be treated as a ground for rejecting the goods and repudiating the contract if there be a term of the contract, express or implied, to that effect. I quote the subsection in full.

> "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."

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[7] *Ibid.* page 228 d.
[8] Watts v Thomas [1949] AC 484;
Grenada Electricity Services Ltd. v Isaac Peters, Grenada Civil Appeal No. 10 of 2002.

[37] Mr. Thomas has neither pleaded nor sought to prove an express or implied term of the contract entitling him to reject the goods and repudiate the contract upon breach of a condition, an issue, in my view, separate and distinct from the issue of whether there was an express or implied condition of fitness of the vehicle for its purpose. Unfortunately, the learned trial Judge does not appear to have addressed his mind to that issue. At paragraph 76 of his judgment he adverted to three factors, which are relevant in the application of the implied condition that the goods are reasonably fit for the purpose. However, he did not, in that paragraph or elsewhere, consider whether Mr. Thomas had met, or even attempted to meet, the requirement to prove an implied term in the contract that a breach of a condition would entitle him to reject the goods and treat the contract as repudiated. It is my view that the subsection requires that that be specifically pleaded and proved.

[38] In paragraphs 81 to 87, the learned trial Judge adverted to the particular subsection, but did not address his mind to that aspect of it. His focus was entirely on the question of whether Mr. Thomas' alleged delay in seeking to enforce his supposed right to repudiate the contract relegated him to his right in damages.

[39] However, it is a precondition to the operation of the section that the buyer has accepted the goods. Section 36 provides that the buyer is deemed to have accepted the goods, amongst other things, when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them[9]. On the evidence in this case it is fair to say that Mr. Thomas within a reasonable time did intimate to the seller that he was rejecting the vehicle, thus the section does not assist the Appellant.

[40] On the sole ground, therefore, that, as I have intimated above, I am of the view that the dissatisfaction of Mr. Thomas regarding the lack of power in the vehicle

[9] Leaf v International Galleries [1950] 2 K.B. 86 at 90.
Chalmers Sale of Goods 15th edition page 51.

does not amount to a breach of a condition, express or implied, and that the admitted defects have been repaired so as to render the vehicle 'good as new', I would allow the appeal, vary the order and order that damages be assessed against the Appellant, with costs below in favour of the Respondent, and costs of the appeal in favour of the Appellant.

Brian G. K. Alleyne, SC
Justice of Appeal