

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(*Civil*)

SAINT LUCIA

Claim No. SLUHCV 1998/0967

BETWEEN:

JOSEPH MARIUS

Claimant

vs

PATRICK MORILLE

Defendant

Appearances: Mrs. K. Roheman for Claimants
Mr. G. Williams for Defendants

2004: January 16,
February 23,
May 27,
June 4
2005: June 14

JUDGMENT

Background Facts

[1] EDWARDS J: Mr. Joseph Marius is a taxi driver and mini-bus owner. He provides transportation for tourists to and from Vieux-Fort.

- [2] On the 9th March 1998 he completed purchasing a used 1992 14 Seater Nissan Caravan 2700 c.c. Diesel Engine bus for \$50,000.00 from the Defendant Mr. Patrick Morille.
- [3] Mr. Morille then, had been operating a business registered as Hardest Novelty since September 1997. He sold foreign used vehicles from Japan.
- [4] There is disputed evidence as to whether Mr. Marius had expressed interest in purchasing this bus for his taxi operations, sometime in February 1998, and had taken possession of this bus on the 3rd March 1998 to have it sprayed.
- [5] There is disputed testimony as to what date Mr. Marius paid a deposit of \$10,000.00 on the bus. The parties agree that on the 9th March 1998 Mr. Marius paid the balance of \$40,000.00 on the bus.
- [6] Mr. Marius has not denied that prior to finalizing the purchase, Mr. Morille on 2 occasions told him that the bus had not yet been serviced, or that on each occasion Mr. Marius had told Mr. Morille it was okay, and assumed the responsibility to have it serviced.
- [7] Mr. Morille by Cabinet Decision dated 2nd October 1996, was mandated to offer Mr. Marius a warranty on this used bus for 3 months or 3000 miles whichever was sooner. This Warranty was limited to the engine and transmission. It is disputed whether the recorded mileage on the odometer at the time the balance of the purchase price was paid was 63,296 Km or 39,332 miles.
- [8] Between the 9th March, and the 14th March 1998, the rear heater of the bus which was connected under the seat, was disconnected, unscrewed and removed by Mr. Michael Albert a driver and employee of Mr. Marius.
- [9] On Mr. Albert's first trip to Vieux-Fort, with the bus it overheated . Mr. Albert took the bus back to Mr. Morille who changed the thermostat, spray washed the radiator, drained and replaced the coolant in the engine.
- [10] A few days later, the bus was again returned to Mr. Morille for the same overheating problem. Mr. Morille sought the assistance of a mechanic Mr. Donovan Lord, changed the cylinder head gasket, ordered new parts and then replaced the water pump and clutch fan of the bus.
- [11] Subsequent to this, the bus continued overheating and was returned to Mr. Morille more than once. Upon the flushing of the radiator at Denbow Radiator Repair, and further work done by Mr. Morille, the bus continued to malfunction, working with a big rev, while having no power.

- [12] The situation came to a head around the 30th May 1998 when Mr. Marius returned the bus to Mr. Morille and subsequently refused to accept it, ordering Mr. Morille to sell it and return the purchase price to him.
- [13] There was an impasse between the parties which, resulted in Mr. Morille on the 1st June 1998 parking the bus in front of Mr. Marius' driveway, leaving the keys in the bus.
- [14] By letter dated 3rd June 1998, Mr. Marius' lawyers communicated with Mr. Morille. He was informed that legal action would be taken if he failed to remedy the problems with the bus or replace it with one of a similar specification by the 15th June 1998.
- [15] By letter dated 9th June 1998, Mr. Morille's lawyers replied, explaining Mr. Morille's version of the events, and stating that the problem with the vehicle had been sorted out, and the vehicle was in perfect working condition.
- [16] Having obtained 2 independent assessments of the said bus subsequent to this letter, Mr. Marius concluded that the engine of the bus was defective. Since Mr. Morille had refused to collect this bus, and Mr. Marius had previously said he had rejected it, Mr. Marius stored the defective bus, and bought a new bus on the 26th August 1998.
- [17] Mr. Marius subsequently, brought this action on the 2nd October 1998 for breach of the Oral Agreement made on the 9th March 1998.
- [18] Mr. Marius seeks to recover a refund of the purchase price, special damages for loss of earnings amounting to \$68,400.00, general damages, interest, costs and further or other relief.
- [19] By the Defence filed on the 28th October 1998, Mr. Morille has denied breaching the contract.
- [20] Mr. Morille pleaded among other things, that Mr. Marius' driver on collecting the bus from him removed the rear heater and left the disconnected hoses hanging and opened. That this contributed to the problem with the vehicle which Mr. Marius resolved. Further, that Mr. Marius had exhausted the 3,000 miles warranty at the time he complained, having had possession of the vehicle one week before full and complete payment had been made.
- [21] Mr. Marius' Reply included a denial that the 3000 miles warranty had been exhausted on the 14th March 1998, when the bus was returned to Mr. Morille because of the overheating problem detected on the 13th March 1998.

The Issues

[22] The issues raised by the pleadings evidence, law and submissions of Counsel are:

- 1) On what date did Mr. Morille transfer to Mr. Marius the general property in the bus? (*See paragraphs 23 to 32 of Judgment*)
- 2) Was the 3000 miles warranty exhausted on the date the complaint was first made to Mr. Morille about the overheating problem? (*See Paragraphs 33 to 42 of Judgment*)
- 3) Did the removal of the rear heater contribute to or cause the engine of the bus to overheat? (*See Paragraphs 43 to 75 of Judgment*)
- 4) Whether or not there was an implied condition that the bus should be of merchantable quality. (*See Paragraphs 76 to 80*)
- 5) Whether or not there was a defect in the bus covered by Statutory Warranty, or the Warranty under the Contract, or a Merchantable quality "implied condition"? (*See Paragraphs 82 to 101*)
- 6) What remedies or damages if any, are available to Mr. Marius? (*See Paragraphs 103 to 135*).

Property Passing

[23] Mr. Marius testified that he received (*Exhibit "JM 4"*) a receipt No. 0132, dated 9th March 1998 from Mr. Morille after he had paid Mr. Morille the balance of \$40,000.00 for the bus. His testimony that prior to the 9th March 1998, he had no discussion with Mr. Morille about purchasing the bus, conflicts with his evidence concerning the date he would have paid the deposit of \$10,000.00 to Mr. Morille.

[24] It appears from his testimony that after paying a deposit of \$10,000.00, he used Mr. Morille's demonstration plate and drove the bus to a mechanic for body work to be done to the damaged portions of the bus. Mr. Marius testified that the bus spent 4 days for body work and then he returned the bus to Mr. Morille, and paid him the balance of \$40,000.00.

[25] In light of the inconsistencies in Mr. Marcus' testimony, I accept the evidence of Mr. Morille, and find the following facts –

- (1) At least 4 days prior to the 9th March 1998 Mr. Marius had deposited \$10,000.00 on the purchase price of the bus.
- (2) Prior to the 9th March 1998, Mr. Morille permitted Mr. Marius, at his request to take the bus to have it sprayed.
- (3) Prior to the 9th March 1998, on 2 occasion Mr. Morille informed Mr. Marius that the bus needed servicing.
- (4) Mr. Marius assumed the responsibility to have the bus serviced prior to and on the 9th March 1998.

(5) Mr. Marius had made up his mind to buy the bus regardless of its condition, before he finalized the purchase on the 9th March 1998.

[26] Article 305 (1) of the Commercial Code, Chapter 244 states that "*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.*"

[27] Article 305 (2) states that "*Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.*"

[28] Article 306 of the Commercial Code 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. . ." (My emphasis)

[29] Applying this law to the evidence and facts found, I deem Mr. Marius to have accepted the bus on the day that the bus was delivered to him for spraying. By spraying the bus before paying the full purchase price, he did an act in relation to the bus which was inconsistent with the ownership of Mr. Morille. I find also that Mr. Marius had a reasonable opportunity to examine the bus and ascertain whether it was in conformity with the contract.

[30] I am dealing here with a used bus which was identified and agreed upon at the time the deposit of \$10,000.00 was paid on the purchase price. Article 288 of the Commercial Code Chapter 244 states -

"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case".

[31] To discover what Mr. Marius and Mr. Morille intended I am guided further by Article 289 of the Commercial Code which provides -

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:-

RULE 1 – Where there is an un conditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both be postponed.

RULE 2 – where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

[31] Applying this law to the facts as found, I conclude that the parties intended the property in the bus to be transferred to Mr. Marius on or about the 5th March 1998 although the time of paying the full purchase price and the subsequent formal delivery of the bus took place on the 9th March 1998.

[32] The property in the bus therefore passed to Mr. Marcus on or about the 5th March 1998.

The 3000 Miles Warranty

[33] On the 9th March 1998 when Mr. Morille recorded the mileage on the vehicle in his Sale Book Record (*Exhibit "PM 2"*), he recorded the mileage to be "0632962".

[34] Regardless of the mileage that the bus may have covered between the 5th and the 9th March 1998 when it was in Mr. Marius' possession, Mr. Morille obviously intended the Warranty period and mileage to run from the 9th March 1998.

[35] I have difficulty accepting Mr. Morille's testimony that on the first occasion that Mr. Albert returned the bus with the overheating problem, he had taken record of the mileage, subtracted it from the previous mileage, realized the warranty had expired, said nothing about this to Mr. Marius, and decided to work on the bus based on what the complaint was. He testified further that it was only on the 3rd occasion when Mr. Marius and or Mr. Albert complained about the performance of the bus that he told them that he was not supposed to be working on the bus as it had passed the warranty period.

[36] Mr. Marius tendered the documentation of a complaint that he had made to the Ministry of Commerce, Industry and Consumer Affairs dated 2nd June 1998, concerning the malfunctioning bus (*Exhibit "PM 6"*). The dates in the complaint concerning the occasions when the bus was returned to Mr. Morille conflict with the testimony of Mr. Marius and Mr. Morille.

[37] Since this complaint was made sufficiently proximate to the occurrence, I have accepted the dates mentioned in this document (*Exhibit "PM 6"*). I find therefore that the bus was first returned to Mr. Morille on the 17th March 1998, and that the 2nd time it was returned was on or about the 3rd April 1998, I find also that

following a third complaint by Mr. Marius about the performance of the bus, Mr. Morille directed that he take the bus to Denbow for flushing. Further, that the bus was returned to Mr. Morille on the 3rd May, 1998 which would have been the 3rd occasion.

[38] The documentary exhibits (*Exhibit "JM 6", "JM 8", "JM 11"*) speak to the date when the bus was insured and registered. This date was the 13th March 1998.

[39] I find it highly improbable that between the 13th and 17th March 1998 the bus would have been driven a distance of more than 3000 miles in St. Lucia, particularly bearing in mind the nature of the problem the bus was having.

[40] I reject Mr. Morille's testimony in the absence of any written record he may have made concerning the mileage on the bus at the time it was first returned, up to 1st June 1998, which was the last occasion when Mr. Morille parked the bus at Mr. Marcus' gate.

[41] I conclude therefore that the warranty period and 3000 mileage distance had not yet expired on the 1st June 1998.

[42] I now move on to consider the third issue relating to the rear heater.

The Reason for the Over Heating

[43] The parties have relied on Expert Witnesses who have contradicted each other as to the role the removal of the rear heater may have played in the engine over heating. Mr. Marius testified that he had previously disconnected the heater from 2 Toyota Crown cars he had bought, which were imported from England, in the past, and had plugged the holes back without there being any problem. He said he had sought advice before doing this for the 2 cars. However, he did not obtain advice before disconnecting the rear heater on the bus. He testified that he had told Mr. Albert to disconnect the rear heater because the bus was suffering from a problem. Although he was not present when it was disconnected, he disagreed with Mr. Albert's testimony that it was disconnected before the first trip to Vieux-Fort.

[44] Mr. Albert testified that on the 6 to 7 trips in all that he made to Vieux-Fort the engine would overheat while ascending steep hills or slopes. On descending the temperature in the engine remained high and would eventually cool down on the flat. On such occasions he would stop to let the bus cool down he testified.

[45] Mr. Morille's evidence was that he did not accept that the bus had an overheating problem because when motor vehicles overheat the temperature does not go back down. In his opinion, the problem was due to abuse. He testified that for heating abnormality you change the clutch fan, the water pump, and the thermostat if it is not good. Sometimes the problem may be the Radiator, so you flush the Radiator. If there is a burnt cylinder head gasket or a crack cylinder head you change it.

[46] Mr. Marius' first Expert was Mr. Denis Primus, a Master Technician, Garage Supervisor and Service Manager at J. Q Charles Motor Garage. Mr. Primus has been an auto mechanic for 35 years with a diploma in Automobile Auto Mechanics since 1980. He inspected the bus on the 15th June 1998, recorded the mileage as 75683, and found that it had a missing thermostat and a jammed clutch fan. He therefore recommended a complete compression test, the replacement of the thermostat and clutch fan. In his opinion an overheating problem may be due to several reasons including a faulty radiator or radiator cap, a faulty cylinder cap, a faulty water pump, a tied valve, a bad injection timing or low compression. The cylinder head of the bus was not warped, the radiator cap, radiator, the tied valve, injectors, air filter, fuel filter, valve timing and the restricted exhaust system were all in good condition on the bus. He did not check the cylinder cap or the injection timing. On the test drive up to Union Hill, Grand Riviere, Corinth and down to Gros Islet main road the temperature rose up to 200 ° Fahrenheit – boiling point - while ascending Union Hill which is a very challenging hill. They had to slow down, stop, allow it to settle down and then continue.

[47] In his opinion the removal of the rear heater should not affect the performance of the bus for the following reasons –

- (a) *The rear heater is not a heating element.*
- (b) *The rear heater gets its water supply from the Radiator Coolant that is supplying the Engine Cooling System. It is a bypass. So even where you disconnect or condemn the heater system away from the cooling system, there would be no overheating problem.*
- (c) *When you put the heater off you either shut off the water supply from the engine to the heater, or you put off the fan that is blowing hot air into the compartment.*
- (d) *The bus rear heater has the fan system so if the heater is off the heated water still passes through the heater and back into the engine.*
- (e) *There is then no heated air blowing over the fins of the fan.*
- (f) *The fins trap any heat and if the heater is turned off the trapped hot air remains trapped and goes nowhere.*
- (g) *The heater does not act as a Radiator.*

[48] Mr. Marius also called Mr. J.G Long, garage proprietor for Circle-Line Transport Co. Ltd Automobile and Marine Garage of Corinth. As a motor mechanic with over 25 years experience and working in the U.K. from 1959 to 1970 as a trained mechanic, he was also workshop Manager for Nissan Dealers Peter and Company Limited between 1992 to 1994.

- [49] He examined the bus on the 12th June 1998 and recorded the mileage as 75654 Km. He is specifically trained in diesel engines and testified that he had a complete understanding on the cooling systems of diesel engine. Prior to test driving the bus he noticed that the working temperature was above the normal 176 ° Fahrenheit and found the fan to be faulty. He concluded he said, then that the faulty fan itself could not be the cause of excessive overheating. On test driving the bus for approximately ½ mile, the temperature rose to over 212 ° Fahrenheit. He concluded that the engine was defective due to constant overheating, and the Radiator Fan Assembly, and he recommended a complete overhaul of the engine.
- [50] He subsequently examined the bus again in the presence of Mr. Victorinus Laborde on the 8th December 2003. The bus then could not be road tested. He observed then that the interior heating system was disconnected. He concluded that this would cause no danger to the engine cooling system or to the performance of the vehicle. In his report he also answered specific written questions put to him by Counsel for Mr. Marius.
- [51] Of significance was the fact that on this occasion, nearly 5 years later, the engine was started and allowed to run for a period of 3 minutes, despite his previous assessment that it was defective and needed overhauling. However, he concluded that 3 minutes were not long enough to determine any overheating or any irregular noises coming from the engine that would affect the performance of the bus. Mr. Long's testimony under cross examination and the existence of an undated report from **EUFA Garage** with conclusions identical to Mr. Long's (*Exhibit "PM 8"*) leads me to question the basis on which Mr. Long arrived at his conclusions.
- [52] I accept learned Counsel Mr. Williams' submissions regarding the credibility of Mr. Long. In my view the Eufa Report (*EX "PM 8"*) does impact negatively on Mr. Long's testimony and diagnosis of the problem with the bus. There is also other Expert testimony which has served to reduce the weight that I attach to some of Mr. Long's testimony.
- [53] The Defendant's Expert Mr. Victorinus Laborde disagreed with the opinions of Mr. Primus and Mr. Long. Mr. Laborde has been a Motor Mechanic/Garage Supervisor since 1972. He has had an array of Certificates since 2000 as a Nissan Service Advisor, Programme Instructor, Technician in Advance Computer Circuits System, and a Diploma from Nissan Motor as Consultant Diagnostic Technician on all Nissan Vehicles (*Petrol and diesel*). He also has a Certificate in Air Conditioning Repairs from Nissan Motors since November 2000.
- [54] Mr. Laborde inspected the bus only on the 8th or 9th December 2003 in the presence of the parties and Mr. Long. He found the bus to be rat infested in the engine compartment, and in a dilapidated condition. Of significance are his

findings that the Heater Unit was disconnected in the rear of the bus, and the heater pipe was kinked and hoses condemned. He found no thermostat fitted.

[55] Despite the excessive corrosion on the undercarriage, the oil leak in the Transfer box for 4 wheel drive, the engine top pan and air conditioner lines rusted, and fluid leak on the brake master cylinder servo, the engine started at the first turn of the ignition key when Mr. Marius' car battery was removed and fitted in the bus engine.

[56] Although the amount of corrosion on the injectors and lines made it impossible to conduct a compression test of the engine's cylinders, he concluded that it would be necessary to overhaul a diesel engine only if there is a loss of compression. In his opinion the fact that the engine turned over so impressively reflected that the engine was not suffering from a loss of compression.

[57] A summary of the evidence of Mr. Laborde concerning the reason for the overheating is as follows –

- (a) The bus has a diesel engine which was not fitted with a Turbo Charger to enhance the pulling power of the engine, especially a 2700 cc Diesel as the said Nissan Caravan bus. This makes the engine a slower engine.*
- (b) The results of overworking the engine beyond its rated capabilities is that in ascending any steep hill the engine's temperature would increase, thus showing a high reading on gauge and a decrease when descending. This may account for a variation in the vehicle's operation temperature.*
- (c) The diesel engine of the Nissan Caravan is designed with its own cooling system i.e. the clutch fan, the radiator, the thermostat, the aluminum hoses and the heater.*
- (d) The heater has 2 functions. It provides heat for the interior compartment if desired and it forms an important part of the cooling system.*
- (e) The heater's unit's cooling ability is achieved by means of fins which are built into it. Any heated water passing through it is quickly cooled as these fins effectively dissipate the heat.*
- (f) It is through the functioning of the heater that the interior heating system is founded. When the heater on-button is selected on the dashboard of the bus, a fan which is mounted near the heater unit blows the dissipated hot air from the fins into the air ducts of the vehicle. This results in the interior of the vehicle being heated.*
- (g) When the heater is in the off position the heater unit allows the fins to dissipate the heated air outside of the vehicle.*

- (h) *The effect of disconnecting the aluminum hoses and by passing the heater is very significant in that an effective cooling component of the cooling system has been ignored.*
- (i) *This results in the heated water which would have otherwise been cooled being continuously injected into the system. In such circumstances, the vehicle operates at higher temperatures as complained.*
- (j) *The kinked aluminum hoses of the cooling system though appearing minor would result in a reduced cooling ability of the system. The restricted flow of water through these hoses would reduce the amount of water flow and the consequent heat dissipation, causing the vehicle to operate at a higher temperature.*
- (k) *The thermostat is a device fitted on all engines primarily to regulate the flow of water through the cooling system. It allows water to heat up to a specific temperature within a short period, and thereafter to allow a greater volume of water to flow through the system in order to provide a regulated operating temperature.*
- (l) *The absence of the thermostat means that the cooling system would be erratic, not being able to maintain a constant temperature.*

[58] One of Mr. Marius' exhibits was the unsigned Report of Senior Price Control Inspector Francis Raphael dated 1st September 1998 (*Exhibit "PM 7"*). This Report contains allegations that Mr. Morille told the investigator that he had changed the fan from direct to indirect in an attempt to address the overheating problem. Mr. Morille did not challenge this evidence.

[60] Mr. Laborde testified that the function of the fan direct or indirect has the same function, and it pulls off hot air from the radiator. He said that changing the fan from direct to indirect will not weaken the power of the engine. He also testified that if the fan was connected to the engine there would be very little significance as it would still turn to extract hot air. Neither would it damage the engine if it was connected to the engine.

[61] Having regard to Mr. Laborde's testimony that Peter and Company Limited were the Nissan Dealers in St. Lucia, I appointed Mr. Carol King, Manager of the Motor Vehicle Division at Peter and Company Limited since 1998 to be an Assessor pursuant to PART 32.17 of the Civil Procedure Rules 2000. I requested that he answer specific questions concerning the significance, purpose, and function of the Heater in the Cooling System for the Nissan caravan, having regard to the evidence of the other Experts and the documentary Exhibits previously mentioned.

[62] Mr. King who was an Auto Technician in 1969 pursued a 2 year course in Motor Vehicle Mechanics and graduated from the Morne Technical College Castries in

1972. He later graduated from a 2 year course in Automotive Power Technician's Programme at St. Clair's College of Applied Arts and Technology in Windsor Ontario Canada in June 1976. In September 1992, he attended a Service "Training/Incident" Problem Course organized by the Nissan Motor Company of Japan in Miami.

[63]

The questions in substance and the answers Mr. King gave were as follows –

- (a) Whether or not the removal of a rear heater from a type of motor vehicle as the Nissan Caravan 1992 Mini Bus in question can in any way affect or cause or contribute to overheating?

Ans: *The removal of the rear heater from this type of vehicle will not affect or cause or contribute to overheating.*

- (b) Whether this type of vehicle without a Turbo should adequately negotiate all hills in St. Lucia from Hewanorra International Airport to Gros Islet along the known routes to and from the airport where the vehicle is in normal condition?

Ans.: *This type of vehicle without a turbo should adequately negotiate any/all hills in St. Lucia from Hewanorra International Airport to Gros Islet along the known routes to and from the airport in its normal condition providing the vehicle is equipped with the right rear axle ratio.*

- (c) Whether by turning on the engine of this type of vehicle for a period of 3 minutes can this determine whether or not the motor vehicle has a compression problem?

Ans.: *By turning on the engine of this type of vehicle for a period of 3 minutes you cannot determine whether or not the vehicle has a compression problem.*

- (d) How does one detect a loss of compression in this type of vehicle?

Ans.: *One detects a loss of compression in this type of vehicle by carrying out a compression test.*

- (e) Do you have the necessary expertise to comment on the Cooling System for this particular type of vehicle?

Ans.: *Yes -
Mr. King subsequently testified that his training dealt with Cooling Systems on all*

Auto Vehicles including Nissan vehicles apart from his practical experience; the course in Canada covered Cooling Systems, Engines, everything.

(f) What is the effect of changing the fan from direct to indirect in this type of vehicle?

Ans.: *The effect of changing the fan from direct to indirect would result in overheating problems. "I would like to point out that this type of vehicle is equipped with a variable speed engine fan that will not exceed a predetermined speed or that will rotate only as fast as required to keep the engine from overheating.*

(g) Does the rear heater form part of the Cooling System?

Ans.: *The rear heater in this type of engine does not form part of the cooling system.*

(h) Does the heater in this type of vehicle function as a Radiator?

Ans.: *The heater does not function as a radiator.*

(i) What is the effect of removing the Radiator from the Cooling System?

Ans.: *It would result in engine seizure.*

(j) How does the Rear Heater in this type of motor vehicle function?

Ans.: *By an electric motor which drives a fan that forces hot air through the Radiator Section of the heater.*

(k) What happens to the heated air when the heater is not in operation?

Ans.: *The heat vanishes.*

[64] Mr. King testified further concerning a diagram which he had taken from a book and had incorporated it as part of his Report. He explained that this Diagram did not represent the exact diagram of a Nissan Vehicle but was a cooling system which basically has the same principle as the Nissan Cooling System.

[65] This Diagram includes the following components –

1. Lower Radiator tank,,
2. Lower hose,
3. Water pump,

4. Cylinder-block water jackets,
5. Cylinder-head water jacket,
6. Thermostat,
7. Upper hose,
8. Radiator,
9. Hose to heater,
10. Shut off valve,
11. Heater,
12. Return hose from heater

[66] Mr. King explained that the Heater in question is a device or component which transfers heat from the Cooling System to the passenger compartment inside the vehicle, that is all it does. Whereas you can switch off the heater from inside the car, and the Cooling System will still function, if you switch off or disconnect the Cooling System, both the heater and the Cooling System will not function. He explained that the heater system is a completely different system from the Cooling System, all it does is transfer heat from the Cooling System to the passenger's compartment. He said further, that the Cooling System removes 30% to 35% of heat generated by the engine, but the heater does not do that.

[67] When asked to explain the perceived contradiction in his answers at (h) and (j) he testified that there is no conflict in his answers. The heater, he said, looks like a small Radiator, it is shaped the same way. In his answer at paragraph (j) he has referred to the Radiator Section of the heater. There, he was not referring to the Radiator of the Cooling System.

[68] Mr. King was also required to comment on the opinions of the Mr. Primus, Mr. Long and Mr. Laborde.

[69] He agreed with Mr. Laborde that a Kinked hose can cause overheating problems, and that the heater is cooled by the circulation of air through fins. He also stated that the heater functions by hot water from the engine which is circulated through the heater and a small electric motor which drives the fan, and which forces air through the ducts, and which is directed into the vehicle or against the windshield.

[70] He disagreed with Mr. Laborde's testimony that the absence of the thermostat in the Cooling System would cause the engine to take long to reach its operating temperature. He also agreed with the 7 factors mentioned by Mr. Primus that can cause overheating.

[71] All of the experts agreed that the mileage of the vehicle will not contribute to overheating.

[72] Learned Counsel Mr. Williams commended Mr. Laborde's testimony. He emphasized Mr. Laborde's observation concerning the Kinked hoses which would affect the flow of water through the Cooling System and impact on the cooling ability of the system. He urged the Court to disregard Mr. Kings evidence since he

did not inspect the mini-bus in question or determine the exact configuration of the heater with the Cooling System before submitting his Report.

[73] Counsel argued further that Mr. King's Diagram conflicted with his opinion since the Diagram clearly lists the Heater as a part of the Cooling System, while Mr. King has asserted that the heater is not a part of the Cooling System. All the other experts have accepted that the heater is a part of the Cooling System, Counsel argued.

[74] Learned Counsel Ms. Roheman urged the Court to accept the opinion of Mr. Primus, Mr. Long and the assessor Mr. King, that the removal of the rear heater had nothing to do with the overheating problem.

[75] Having considered all of the evidence and submissions of Counsel, I make the following findings on a balance of probabilities –

- (1) The inclusion of the heater in the diagram illustrating the Cooling System which was relied on by Mr. King does not without more reflect that the heater is a cooling component of the Cooling System. The Diagram demonstrates the principle of the Nissan Cooling System and how the heater depends on this Cooling System.
- (2) Although Mr. King did not inspect the mini-bus or the disconnected rear heater, he is qualified, skilled and competent to testify as an Expert concerning how the Cooling System in the said Nissan Caravan operates.
- (3) Mr. Primus, Mr. King, and Mr. Long's testimony accord concerning the function of the rear heater in the said bus. I accept their testimony and find that the rear heater had only one function, which was to transfer heat from the Cooling System to the passenger's compartment when the heater is turned on.
- (4) The disconnection of the rear heater and the Kinked hose that Mr. Laborde saw did not cause or contribute to the overheating problem.
- (5) I accept Mr. King's testimony and I find it more probable that Mr. Morille's changing of the fan from direct to indirect contributed to the overheating problem with the bus.
- (6) Since no compression test was carried out by any of the Experts or Mr. Morille, it has not been proved on a balance of probability that this mini-bus had a compression problem.
- (7) There is no evidence adduced by the parties that the mini-bus was serviced prior to taking it on its first trip to Vieux-Fort before the 17th March 1998. I therefore find on a balance of probability that the lack of adequate servicing may have been a contributing factor to the overall malfunctioning of the bus. I also find that the rear heater was disconnected prior to the first trip to Vieux-Fort.

I shall now deal with the fourth issue concerning implied conditions and warranty.

Implied Conditions and Warranty

[76] The evidence discloses that prior to the transaction, Mr. Morille knew that Mr. Marius was purchasing the bus to operate it as a taxi.

[77] Article 285 of the Commercial Code states that "***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 -***

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purposes 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 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. . .

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacture 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.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Title [Sale of Goods Provisions] unless inconsistent therewith".

[78] Though Mr. Marius may have mentioned that he was purchasing the bus for his taxi operations the evidence discloses that he was not relying on Mr. Morille's skill or judgment. Consequently, Article 28 (1) does not apply. However, the mere disclosure that the bus would be used for taxi operations invokes Article 285 (3) in my view.

[79] Applying Article 285 (3) I find that there was an implied warranty or condition that the bus should be reasonably fit to be used as a taxi.

[80] In the absence of any evidence that Mr. Marius had examined the bus prior to the 9th March 1998, applying Article 285 (2), I find that there was an implied condition that the bus should be of merchantable quality.

[81] I shall now consider whether the defects in the bus are covered by Statutory Warranty, or the Warranty under the Contract, or the Merchantable Quality "***implied condition***".

The Defects

- [82] Articles 1432 o 1438 of the Civil Code of St. Lucia Cap. 242 deal with Warranty Against Latent Defects.
- [83] Article 1432 states that *"The seller is bound to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended , or so diminish its usefulness that the buyer would not have bought it or would not have given so large a price, if he had known them"*.
- [84] Article 1433 exonerates the seller from apparent defects *"with which the buyer might have made himself acquainted"*. (My emphasis)
- [85] Article 1434 states that the seller is liable for latent defects not known to him unless the agreement otherwise stipulated.
- [86] Article 1416 recognizes that *".. . the parties may, by special agreement, add to the obligations of legal warranty, or diminish or exclude"*. The question to be answered therefore is whether Mr. Marius' acceptance of the responsibility to service the bus served to diminish or exclude the legal warranty implied by Article 1432. I also have to consider whether Article 1433 applies to the circumstances in the case.
- [87] The answer to these 2 questions depends on the characterization of the defects. Are they latent defects or apparent defects?
- [88] In my opinion they are latent defects. I have arrived at this conclusion because of the evidence from the Expert Witness and Mr. Morille. The evidence has revealed that despite the repairs done by Mr. Morille to correct the problem, the overheating problem persisted. From the evidence of the experts it is more probable that the reason for the overheating would not have been discovered by merely servicing the bus before its first trip to Vieux-Fort.
- [89] There is no statutory definition of *"Latent defect"* in the Civil Code or Commercial Code so I look to the definition in Blacks Law Dictionary 8th Edition. There *"Latent Defect"* is explained as a *"hidden defect"* which means – *"a product imperfection that is not discoverable by reasonable inspection. . ."*.
- [90] Although Mr. Marius had control of the bus before the 9th March 1998 which gave him ample opportunity to have the bus examined by a competent mechanic, it is more probable that the overheating problem would not have been discovered by such examination in light of the evidence of the Expert Witness and Mr. Morille. In such circumstances therefore Article 1433 of the Civil Code does not apply.
- [91] I therefore conclude that Mr. Marius' assumption of the responsibility to service the bus did not relieve Mr. Morille from his obligations under his warranty or his obligations under the statutory implied terms that I have found to exist.

- [92] Learned Counsel Mr. Williams submitted in substance that since Mr. Marius and his witnesses could not specifically identify a particular defect in the bus, or the nature of the defect, the Claimant had failed to prove that the bus had a defect. Mr. Williams submitted further that the issue of breach of contract does not arise as the term of merchantability implied into this contract cannot be invoked unless Mr. Marius established a defect caused by Mr. Morille or existing prior to having acquired the vehicle.
- [93] Learned Counsel Ms. Roheman countered, submitting that the fact that the bus never ran smoothly, was continuously returned for repairs, and that the attempts made to rectify the problem failed, this she argued was evidence that it was not fit for taxi purposes, roadworthy, or of merchantable quality. In such circumstances, Counsel argued, Mr. Marius was entitled as he did to reject the bus since Mr. Morille failed to remedy the overheating problem.
- [94] Ms. Roheman relied on the following cases in advancing her submissions:
1. Crowther –vs- Shannon Motor Company ALL England Law Reports 1936 [1975] 1 ALL E.R. 139;
 2. Rogers and Another –vs- Parish (Scarborough) Limited and other [1987] 2 ALL E.R. 232;
 3. International Motors Limited –vs- Ronnie Thomas Civil Appeal No. 7 of 2002, Saunders J.A. (Unreported Judgment).
- [95] The second case underscores the point that the Warranty guaranteeing the engine and transmission for 3 months or 3000 miles, is not in conflict with the implied conditions that I have found to exist i.e. that the bus should be reasonably fit for taxi purposes, and also should be of merchantable quality. The Rogers Case is the authority for saying that Mr. Morille's warranty is an addition to Mr. Marius' Statutory Rights and not a subtraction of them.
- [96] There is no statutory definition of the meaning of "*Merchantable quality*". In the circumstances I look to the current law of England as Article 917 A of the Civil Code requires me to do.
- [97] The definition of "*Merchantable quality*" under Section 14 (6) of the Sales of Goods Act 1979 U.K. was considered in Business Application Specialist Limited –vs- Nationwide Credit Corporation Limited: (Court of Appeal (Civil Division)), [1988] RTR 332' [1988] BTLC 461; [1988] CCLR 135, 18th April 1988).
- [98] Section 14 (6) of the U.K. Act provides that "*Goods of any kind are or merchantable quality within the meaning of subsection (2) above* [which is comparable to Article 285 (2) of the Commercial Code of St. Lucia] *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*".

[99] Applying the U.K. definition of "**Merchantable quality**" to the description of and problems with the Nissan Caravan bus, its performance, its inability to ascend the steep hills of St. Lucia without overheating, its inability to transport tourists to and from Vieux-Fort comfortably and without problems,, its malfunctioning with a big rev while having no power, I agree with Learned Counsel Ms. Roheman's submissions.

[100] I find that the bus was not of merchantable quality and was not fit for taxi purposes to transport tourists to and from Vieux-Fort when Mr. Morille sold it to Mr. Marius.

[101] I also find it more probable that the overheating problem which first existed was due to latent defects which diminished the usefulness of the bus and which were made worst when Mr. Morille changed the fan from direct to indirect. I am of the view that Mr. Marius would not have bought that bus or paid \$50,000.00 if he had known of these latent defects. In these circumstances, applying Article 1432 of the Civil Code, Mr. Morille is liable for such latent defects.

[102] I will now consider the available remedies.

Remedy and Damages

[103] Learned Counsel Ms. Roheman contends that Mr. Marius is entitled to \$50, 000.00 being the return of the purchase price and damages for breach of contract amounting to \$54,392.00 along with interest and prescribed costs. Her contention is based on her statement of the law that the buyer can claim damages in addition to any right to reject the goods or to recover the purchase price.

[104] The submissions of Learned Counsel Mr. Williams have not addressed this issue. So I look to the evidence, the local statutory provisions, the current law of England relating to Remedies for Breach of Contract, to the extent that the U.K law does not conflict with the local statutory provisions (*Article 917 A of The Civil Code*).

[105] It appears to me that based on the definition of "**Merchantable quality**" (*See paragraph 98 above*), the breach of the implied condition as to merchantable quality and the breach of the implied condition or warranty as to fitness pursuant to Article 285 of the Commercial Code have merged into the breach of the Warranty against Latent Defects, as a result of Article 1416 and 1432 of the Civil Code Chapter 242 (*see paragraphs 83 and 86 above*).

[106] I am therefore considering the Remedy for Breach of Warranty "***against such latent defects in . . .[the bus] sold to Mr. Marius as render it unfit for the use for which it was intended. . .***".

[107] Mr. Marius had the option of returning the bus and recovering the price because of the overheating problem, or he could have kept the bus and recover a part of the price according to the estimate of its value (*Article 1436 of the Civil Code*).

[108] In the absence of any knowledge of the latent defect at the time of the sale, Mr. Morille would have been obligated to restore the price to Mr. Marius and reimburse him the expenses caused by the sale (*Article 1438 of the Code*).

[109] If Mr. Marius knew of the defect, he would be obliged not only to restore the price of the bus, but to pay all damages suffered by the buyer (*Article 1437 of the Civil Code*).

[110] Article 323 of the Commercial Code Chapter 244 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 only 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 and 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.

(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty”.

[111] Now the question I have to answer is whether or not Mr. Marius elected to reject the bus, having regard to the subsequent letter of his lawyer dated 3rd June 1998.

[112] Mr. Marius testified at paragraph 20 of his witness statement: *“On the 31st May 1998 the Defendant was verbally informed that given his refusal on 30th May 1998 to repair the problem with the vehicle that the vehicle should be collected and the purchase price returned”.*

[113] However, his lawyer’s letter to Mr. Morille stated – *“. . .The purpose of this letter therefore is to advise you that unless the problems with this vehicle are finally sorted out or the vehicle replaced with one of similar specification by the 15th June, 1998 legal action will be commenced against you for the losses incurred by our client as a result of having been sold a defective vehicle by you”.*

[114] In light of this letter, I conclude that Mr. Marius though at first communicated to Mr. Morille that he was rejecting the bus, subsequently changed his mind, accepted the bus and decided to sue for damages. In such circumstances therefore he

would not be entitled to recover the price of the bus since in my view he elected to maintain an action against Mr. Morille for damages for breach of warranty.

[115] I do not regard Article 282 (2) of the Commercial Code, which Counsel Ms. Roheman focused on, as relevant, in light of Article 282 (3). It states that where the property has passed to the buyer or where the buyer has accepted the goods the breach of any condition to be fulfilled by the seller can also 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 expressed or implied to that effect.

[116] I shall therefore consider Mr. Marius' estimated loss directly and naturally resulting in the ordinary course of events from the breach (Article 323 (2) of the Commercial Code).

[117] Mr. Morille is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation. (*Article 1005 of The Civil Code*).

[118] Article 323 (2) of the Commercial Code and Article 1005 of the Civil Code reflect the Rule governing remoteness of damages laid down in Hadley -vs- Baxendale (1854) 9 Exch 341 at p. 355 and which was reformulated in Victoria Laundry (Windsor) Limited -vs- Newman Industries Limited [1949] 2KB 528 at p. 539; [1949] 1 ALL E.R. 997.

[119] The rule as stated by Asquith L.J in the latter case is that - "*In cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. What was at that time reasonably so foreseeable depends upon knowledge then possessed by the parties or, at all events, by the party who commits the breach.*

For this purpose knowledge "possessed" is of two kinds one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things and consequently what loss is liable to result from a breach of contract in that ordinary course. . . [T]his knowledge, which a contract breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable".

[120] If Mr. Marius has suffered damage that is not too remote, he must so far as money can do it, be restored to the position he would have been in had the particular damage not occurred: Wertheim -vs- Chicoutime Pulp Company [1911] AC 301 at p. 307.

- [121] At paragraph 9 of the Amended Defence it was pleaded that Mr. Marius failed to take reasonable steps to mitigate the loss he suffered.
- [122] The law imposes a duty upon Mr. Marius to take all reasonable steps to mitigate the loss caused by the breach of contract, and debars him from claiming compensation for any part of the damage which is due to his neglect to do so (*British Westinghouse Electric and Manufacturing Company -vs- Underground Electric Rys Co. of London* [1912] A.C. 673 atp. 689 per Lord Haldane).
- [123] Consequently, in my view, the sum claimed by Mr. Marius for storage costs (*being \$23,592.00*) cannot be allowed, since in the ordinary course of events, having accepted the bus, his duty to mitigate his loss required him to fix the bus, instead of storing it, and allowing it to deteriorate for 5 years to the condition that Mr. Laborde found it in.
- [124] Regarding the \$30,800.00 claimed for losing the benefit of contracts, and in particular the contract with Tropical Villas (*being \$350.00 daily for 88 days*); Mr. Marius testified that he had intended to use the Nissan Caravan to transport tourists under this contract. Though this was communicated to Mr. Morille by the letter from Mr. Marius' lawyers dated 3rd June 1998 there is no evidence that Mr. Morille know of these special circumstances outside the ordinarily course of things at the time of the contract in March 1998. In fact, Mr. Marius denied having any discussion with Mr. Morille about the bus prior to the 9th March 1998. He testified that his driver had told him about the bus, that he went to Mr. Morille with his driver, enquired about the price of the bus, they negotiated for \$50,000.00, and Mr. Morille permitted him to take the bus away for body work repairs.
- [125] It was Mr. Morille who testified that Mr. Marius told him that the bus would be ideal for his line of work since he operated a taxi.
- [126] The question therefore that I have to answer is - What type of damage could Mr. Morille at the time of the contract have predicted had he known of the latent defect in the bus?
- [127] Case law suggests that if the kind of damage caused by a breach of contract is within the reasonable contemplation of the parties at the time when the contract was made, then it is immaterial that its results are far more serious than could have been reasonably contemplated: (*Vacwell Engineering Company Limited -vs- 13 DH Chemicals Limited* [1970] 3 ALL E.R. 553; *wroth -vs- Tyler* [1973] 1 ALL E.R. 897).
- [128] In my view, if Mr. Morille had known that the bus had this latent defect, he could reasonably have regarded loss of income from transporting passengers as a likely consequence of that breach since he was aware that the bus would be used for taxi purposes.

[129] I therefore find that this sum claimed is not remote. However, I have to take into account Mr. Marcus' liability to pay tax to the Inland Revenue. The principle laid down in British Transport Commission -vs- Gourlay [1955] 3 ALL E.R. is applicable to contract. It states that in measuring the damages for loss of income or profits the Court must deduct an amount equivalent to the sum that Mr. Marius would have paid by way of income tax had he continued to receive such yearly income (Parry -vs- Cleaver [1969] 1 ALL E.R 555; Taylor -vs- O'Connor [1971] A.C 115).

[130] In the absence of any evidence concerning Mr. Marius' tax liability, the amount to be deducted is a matter of guess work (PER Lord Reid in Taylor -vs- O'Connor at page 129).

[131] I recognize further that this gross sum claimed should further be reduced by a sum representing an estimate for operation expenses which more probable than would have been incurred for such transportation of tourists. I shall therefore allow 60% of the amount as an estimate of loss of earnings.

[132] This \$18,480.00 has to be further reduced by 10% for tax liability. So the sum to be awarded for loss of earnings is \$16,632.00.

[133] Applying Article 1436 of The Civil Code, or Article 323 (3) of the Commercial Code, the loss incurred by Mr. Marius since he kept the bus, is the difference between the value of the bus at the time it was delivered to him, and the value it would have had if it answered to the warranty. In other words, the damages to be awarded is an amount representing the purchase price less the market value of the bus at the date of the breach of contract.

[134] There is no evidence before me as to the diminution in value of the bus because of the latent defect. Consequently it is left to the Court to assess as best as it can what it considers to be an adequate recompense for the loss suffered by Mr. Marius.

[135] I therefore consider \$8,000.00 to be adequate in the circumstances.

Conclusion

[136] Judgment is entered for the Claimant in the following sum:-

\$16,632.00	for loss of earnings
<u>\$ 8,000.00</u>	<u>for general damages</u>
\$24,632.00	= TOTAL

[137] Pursuant to Article 1009 A of the Civil Code, I exercise my discretion and order that the Defendant do pay a further sum for interest at the rate of 5% per annum on this sum from the 2nd October 1998 to the 2nd October 2004. I calculated this interest to be \$7,389.60.

