SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CIVIL

Claim No. 2006/0934

BETWEEN:

GODFREY FERDINAND

Claimant

AND

DOTHAN DELIGNY

Defendant

Appearances:

Mr. Horace Fraser for the Claimant
Mr. Alvin St. Clair for the Defendant

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2008: May 29
June 6
September 26
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JUDGMENT

[1] In accordance with the pretrial review order of 12th November 2007 the sole issue of liability stands to be determined.

Background

[2] The Defendant agreed to secure a particular type of reconditioned dump truck for one Naitram. On the Defendant's instructions, Naitram wire transferred some monies to the dealers in Japan for the purchase of the truck. The arrangement between Naitram and the Defendant broke down when a different type of truck was to be shipped. Naitram requested a return of his monies.

[3] The Claimant and his brother then agreed with the Defendant to purchase the truck which by this time had arrived on the Island and in the process to pay to Naitram the sum of money which he had advanced.

[4] After the Claimant collected the truck from storage at the Castries Port and was in the process of mounting it (the truck had been shipped in parts in a container), it was discovered that one of the differentials was defective and needed to be replaced. This was brought to the attention of the Defendant.

[5] The Claimant has never been able to put the truck to the use for which it had been purchased and now claims against the Defendant for damages for breach of implied condition of fitness and merchantability as well as for loss of income. The Claimant further seeks damages for distress and inconvenience, together with costs and interest.

[6] The evidence of Naitram is critical to the resolution of this matter.

[7] The evidence which this court accepts is that Naitram agreed with the Defendant that the Defendant would import from Japan in his (the Defendant's) name a truck which Naitram identified via the computer. The Defendant admitted in evidence that he had earlier imported a bus for himself from Japan and that he had personal contact with a salesman there. The Defendant instructed Naitram how to transfer the purchase monies to Japan and with the help of the Defendant's wife who accompanied him to the bank, Naitram did so.

[8] I accept as credible the evidence of Naitram that because of the protracted delay in receiving the truck, he contacted the salesman in Japan only to discover that the truck he had wished to purchase had been already sold because the money he had sent, went to defray a balance owed by the Defendant and that a truck different from the one he had requested had been sent. I do not accept the Defendant's version – that it was the tardiness of Naitram in remitting the funds which caused the particular truck to be sold and an alternative shipped.

[9] It is my view that that up to that point an agency existed given the provisions of the Civil Code which by Article 1601 states:

> *"Agency is a contract by which a person, called the principal, commits a lawful business to the management of another, called the agent, who by his acceptance binds himself to perform it"*

"The acceptance may be implied from the acts of the agent, and in some cases from his silence"

By Article 1602 it is provided

"Agency is gratuitous unless there is an agreement or an established usage to the contrary"

[10] It was the evidence of the Defendant that he was acting gratuitously. However Naitram testified a testimony I accept that the two (2) of them agreed that he would give the Defendant "something".

[11] Article 1603 provides that the agency may be special i.e. for a particular purpose. However in accordance with Article 1604 the agent can do nothing beyond the authority given or implied by the agency.

[12] As indicated in the testimony of Naitram - which the court accepts – when he contacted Japan he discovered that his money had been put to alternate use.

[13] I find therefore that the Defendant having gone beyond the authority implied by the agency reneged on any agreement there was between himself and Naitram, and Naitram having requested a refund of his money, caused the agency to be extinguished.

[14] Naitram having refused to take possession of the truck, the Defendant is now obliged to off load it. He has patently agreed that Naitram should get his money back.

[15] The evidence disclosed that the Defendant told Naitram that he was going to sell the truck, a decision with which Naitram agreed because he was no longer interested in that truck and only wanted his money back.

[16] The circumstances relating to the purchase by the Claimant is not in my view relevant i.e. whether it was the Claimant and/or his brother who approached the Defendant regarding the sale and purchase of the truck or whether it was Naitram who informed the Claimant of the existence of the truck.

[17] Suffice it to note that in agreeing to the purchase, the Claimant paid Naitram the sums he had expended and the Defendant the balance of the purchase price.

[18] The question which remains is whether in selling the truck to the Claimant, the Defendant warranted that it was of merchantable quality.

[19] Article 285 of the Commercial Code provides 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 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 purposes: 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"

[20] It is in evidence that the Defendant knew of the trade which the Claimant plied and of the purpose for which he was purchasing the truck. Secondly the Defendant admitted that he was a mechanic by trade and also a businessman. It can be assumed therefore that the Claimant relied on the Defendant's skill and judgment with respect to the fitness of the truck. What might give pause to the complete application of this Article of the Code is whether "the goods are of a description which it is in the course of the seller's business to supply". It has been revealed that the community in which the parties all live is a small one and everybody knows everybody's business. The Claimant would therefore surely be privy to the information that the Defendant admitted in evidence i.e. that he operated a bus transport service and that he has imported several vehicles in the past and so he knows about vehicles and their fitness.

[21] I find support for this conclusion in the decision in the case of Frost v The Aylesbury Dairy Co., Ltd (1905) 1 KB 608 in which the Court of Appeal dealt with the interpretation of Section 14 (1) of the Sale of Goods Act 1893 the equivalent section of our Article 285. That case concerned the supply of milk which proved to be contaminated. The Court of Appeal

held that on sale of an article for a specific purpose there is a warranty by the vendor that it is fit for the purpose and that there is no exception as to latent undiscoverable defects.

[22] In the premises I find that the Defendant is liable to compensate the Claimant.

[23] The Claimant submits that although the Defendant had located a second hand differential at a cost of TT$8500.00, the Claimant was entitled to a new one at the cost of TT$45,000.00 since there was no guarantee that the second hand one would work.

[24] No evidence was adduced with respect to reconditioned vehicles i.e. as to whether the parts used in much vehicles are new or themselves reconditioned. I take it to mean that certain parts are new and wherever possible others are reconditioned. With my limited knowledge of things mechanical. I am of the belief that a secondhand/reconditioned differential would work in a reconditioned vehicle. In the circumstances I am prepared to offer as damages half the cost of a new differential i.e. TT$22,500.00

[25] The Defendant contends that the Claimant is duty bound to take all reasonable steps to mitigate his losses. With this the Claimant is an agreement and claims for loss of income for six (6) months, a period which he considers reasonable. He bases his claim on the fact that he had no money to replace the differential and the Defendant refuses to pay for the replacement.

[26] Even were I to accept the Claimant's submission that it was the Defendant's intransigence in refusing to replace the differential, I consider unreasonable a six month delay by the

Claimant in attempting to mitigate his loss. It is my view that the Claimant ought to have made good his loss within three months.

[27] The Claimant has produced various invoices to indicate that he earns from $20.00 per day to a maximum of $800.00 per day. He has also provided letters of commitment from two construction companies in the sums of $6,500.00 and $10,000.00 per month respectively. He however claims loss of income at a rate of $20,000.00 without further proof.

[28] I consider as fair an average of the two (2) commitment sums i.e. $8,400.00. The award will therefore be for $24,000.00. a sum which represents loss of income of $8,400.00 per month for a period of three (3) months.

ORDER

Judgment entered for the Claimant as follows:

Cost for replacing differential TT$22,500	EC$11,250.00.
Loss of income for 3 months at a rate of $8,000.00 per month	EC$24,000.00

Interest at the rate of 6% per annum from the date of judgment until payment.

Costs prescribed on total.

SANDRA MASON QC

High Court Judge