EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV2010/0929

BETWEEN:

COMMPRESSOR & EQUIPMENT RENTAL COMPANY

Claimant

and

DARCHEVILLE CONSTRUCTION EQUIPMENT
SALES & RENTAL SERVICES LTD

Defendant

Appearances:

Mrs. Petra Jeffrey-Nelson of Counsel for the Claimant
Ms. Paulette Francis of Counsel for the Defendant

2018: October 30th

JUDGMENT

[1] Wilkinson J. The Claimant filed its claim form and statement of claim on 20th October 2010, for breach of contract on purchase of a 1996 Ingersol Rand Double Drum 25 Roller S/N 55208 Engine Number F2C511 (the Roller) at the price of EC$44,000.00 and which was found to be not fit for purpose. It sought by way of relief: (a) the sum of $145,000.00 being EC$37,000.00 paid on deposit and $108,000.00 being loss of a rental contract, (b) damages for breach of contract, (c) interest pursuant to article 1009A of the Civil Code from May 2005, until date of payment, (d) costs, and (e) further and other relief.

[2] The Defendant denied breach of contract and counterclaimed for the balance outstanding on the contract for sale of EC$24,178.50, and for storage fees from 7th June 2005, to 20th December 2010, when the Roller was returned to and left at the Defendant's premises.

The Issues

(1) What were the terms of the contract between the Parties.
(2) Was there a term implied into the contract by law or by agreement of the Parties that the Roller would be fit for the purpose purchased.
(3) Was the defect with the Roller a latent or apparent defect.
(4) Was either Party entitlement to damages, if any.

The Evidence

[3] The Claimant contracted the services of the Defendant, who is in the business of selling and renting heavy equipment. Under the contract, the Claimant purchased a used Roller HP 30.5 costing EC$44,000.00, from the Defendant with the expectation that the Roller was fit for the purpose purchased.

[4] The Roller was delivered to the Claimant in May 2005, the Claimant paying to the Defendant part of the purchase price in the sum of EC$37,000.00. The Claimant Inspected the Roller and further while possessed of the Roller, serviced the Roller by changing the oil filters and engine mounts.

[5] By 20th May 2005, the Roller was out of use, allegedly found to be unable to perform the task for which it was purchased. It lacked engine power and the double drum did not function. The Roller was returned and left at the premises of a related company of the Defendant on 7th June 2005, and remains there to date.

[6] The Claimant alleges that it has lost a six-month contract with a value of EC$108,000.00 and the part payment made in the sum of EC$37,000.00 for a total EC$145,000.00.

[7] The Defendant denies that it was contracted to sell a Roller to the Claimant, rather it alleges that it was contracted to source a Roller for the Claimant, which Roller the Claimant purchased based on its satisfaction of the performance of the Roller. The Defendant counterclaimed for the balance of the purchase price and for storage fees owing to an unrelated Third Party.

[8] Mr. Jose Mendes a director of the Claimant and contractor by profession gave evidence on behalf of the Claimant. He was the person who on behalf of the Claimant entered into the contractual arrangement with the Defendant. He stated that in May 2005, the Claimant was awarded a long-term contract for the rental of a 3-Ton double roller truck. The Claimant already had a 3-Ton roller in its possession, but it had to purchase another one specifically for the upcoming rental to a Resort, as such the Claimant needed to purchase another Roller almost immediately. According to him, the Defendant was told that the Roller was required to have power on both wheels, some forward and reverse to compact some base material, because the road which the Claimant had to do, was already compacted by a heavier roller and so a lighter one was needed for the finishing of the road. A Roller was needed to traverse the steep inclines of Soufriere. The only place the Claimant knew had a 3-Ton roller available was the Defendant.

[9] Mr. Mendes spoke with a sales representative of the Defendant in the presence of one of the Claimant's employees and informed him that because of the nature of the job they were about to undertake, they required a 3-Ton roller with double drum drive in good working condition and that both drums will function and drive simultaneously in forward and reverse at all times. They were assured by the sales representative and also by a mechanic employed by the Defendant that the Roller met the specifications which they requested and that they would not regret the purchase.

[10] A mechanic of the Claimant visually inspected the Roller and concluded that it appeared to be in good condition. A request was made as to whether the Roller could be taken on a test drive up a hill, but the sales representative refused, stating that the Defendant's policy demanded that payment be made for any equipment before it was allowed to leave the bond/premises. Based on the representations made by the Defendant's sales representative and the Defendant's mechanic, the Claimant agreed to purchase the Roller from the Defendant for the agreed price of EC$44,000.00.

[11] On 13th May 2005, the Claimant paid the Defendant a deposit of EC$37,000.00 and also gave the Defendant a post-dated cheque, dated 3rd June 2005 for the sum of EC$7,000.00 being the balance of the purchase price. The invoice no. 9261 described the Roller sold to the Claimant as a 1996 Ingersoll Rand Double Drum 25 Roller, 8/n #52205, engine #F2L511 – HP30.5. The Claimant took possession of the Roller on 14th May 2005.

[12] Mr Mendes stated that the representations made by the Defendant as to the condition, power and ability were found to be false, on the very day the Roller was picked up by employees of the Claimant from the Defendant's business premises. Upon leaving the Defendant's business premises and in attempting to take the Roller to Bisee where the Claimant's business premises are located, the Roller encountered problems traversing the small incline at L'Anse Road. He was informed by one of the Claimant's employees that the Roller had no power when attempting to climb hills and only one of the double drums was working. It was discovered then that the Roller was not a double drum drive. Mr. Mendes instructed the employees to immediately return the Roller to the Defendant's business premises but it was found to be already closed.

[13] At the suggestion of employees of the Claimant that the problems may probably have been caused by dirty fuel filters, Mr. Mendes instructed his employees to bring the Roller to the Claimant's business premises to have it checked out. Upon arrival of the Roller at the Claimant's business premises, Mr. Mendes telephoned the managing director of the Defendant, Mr. Goddard Darcheville and informed him of the problems which were reported to him. Mr. Mendes then proceeded to thoroughly inspect and test out the Roller accompanied by one of the Claimant's mechanics. Upon inspection and testing, he found that the Roller did not have a double drum drive and it lacked power to drive even up a small incline. He discovered even further problems, that there were bad engine mounts, dirty fuel filters and electrical problems.

[14] Mr. Mendes stated that being under pressure to fulfil the contract in Soufriere, which was commencing on 17th May 2005, and being that there was no time to source another Roller, he undertook to try to fix the problems himself, so the Claimant proceeded to change the filters and engine mounts and to service the Roller and address other problems that could have been fixed. This was all undertaken at the Claimant's expense.

[15] Mr. Mendes said that the Claimant had a six-month verbal contract for rental of the Roller in Soufriere commencing on 17th May 2005 at a rate of EC$18,000.00 a month and did not want to lose this contract. On 17th May 2005, he transported the Roller to Soufriere for delivery to the work site pursuant to the rental contract. By the end of 20th May 2005, the Roller was put out of use due to a lack of engine power and the non-functioning of the double drum function and power vibration. Mr. Mendes stated that he immediately informed Mr. Darcheville of the situation and requested a refund or a suitable replacement which Mr. Darcheville nether agreed or disagreed to.

[16] The Claimant, he stated was unable to fulfil its obligations under the contract in Soufriere due to unsuitability of the Roller for the purpose for which it was purchased. The Claimant attempted to transport the defective Roller to Castries from the 24th May 2005, but encountered problems traversing the access road out of the work site, as it was very steep and uneven caused by previous rain. The Claimant again attempted to transport the Roller on 2nd June 2005, but was again hampered by heavy rains. The Roller was finally transported back to Castries on 8th June 2005, and was immediately brought to the Defendant's business premises after hours and where Mr Mendes said a security guard accepted possession of the Roller. This occurred about 7:30 p.m.

[17] Mr Mendes said he cancelled the post-dated cheque of EC$7000.00 issued by the Claimant and which was to cover the balance of the purchase price and requested a refund of the EC$37,000.00 paid, from the Defendant. He said that the Claimant has suffered loss due to the Defendant's failure to sell the Claimant a Roller fit for the purpose for which it was bought.

[18] On cross examination Mr. Mendes denied that when the Roller was returned it was merely placed on the roadside near the Defendant's business premises. He also stated that he was satisfied that this was the same Roller that had been rented to Mr. Nathaniel St. Ville after he returned it to the Defendant, as he (Mr. Mendes) had seen this Roller parked at the roadside near El Paso trading hardware store at Babonneau, where Mr. St. Ville had parked it.

[19] Mr. Mendes denied that he never sought a refund of the cost of the Roller, until his lawyers had cause to write the Defendant in 2010. He states that he contacted Mr. Darcheville many times, who kept putting him off, or he was told by staff of the Defendant's office that Mr. Darcheville was off island or not in office. He said that when he did bump into Mr. Darcheville out and about, Mr. Darcheville always told him to come in to see him, but nothing would come of it. He confirmed that before his Counsel's letter, he was in verbal contact with Mr. Darcheville, but no effort was

made by Mr. Darcheville to provide a refund or to give another piece of equipment in substitute.

[20] Mr. Nathaniel St. Ville gave evidence on behalf of the Claimant. He is also a contractor and has also conducted business with the Defendant. In 2005 he purchased a Dynapack roller from the Defendant which he was forced to return for repairs to the Defendant and in the interim he was loaned an Ingersoll Rand Roller double drum which proved to be useless as it had no power. It was returned to the Defendant. A short while later he returned to the Defendant requesting a proper roller for his use, and he was told that Ingersoll Rand Roller had been repaired and was available for use, provided its owner, the Claimant, agreed to it being rented out. Having purportedly made a quick call, he was given the Ingersoll Rand Roller and it proved useless as it had no power. Mr. St. Ville telephoned the Defendant and told them they could collect the Roller at the roadside in Babonneau. He says the Roller remained there for three months before it was removed.

[21] On cross examination Mr. Nathaniel stood on everything he had said in his evidence-in-chief.

[22] Mr. Goddard Darcheville gave evidence on behalf of the Defendant. He is the managing director of the Defendant. He states that sometime in 2005, Mr. Mendes of the Claimant approached him and asked him to source a second-hand double drum asphalt roller for him. The Claimant had previously purchased a single drum used roller from the Defendant. The Defendant sourced the roller for Mr. Mendes as per his specifications and when it was found, pictures of the roller were shown to Mr. Mendes. Mr. Mendes was told that he would receive a 1996 Ingersoll Rand DD 25 Roller HP 30.5 at a cost of EC$44,000.00. According to Mr. Darcheville, and as was the case with the Claimants' previous purchase, he was told that all used heavy equipment was sold without a guarantee and that the Claimant was free to inspect and test the roller with the aid of its mechanic.

[23] When the 1996 Ingersoll Rand DD 25 Asphalt Roller arrived in Saint Lucia from the USA, it was serviced by the Defendant. Mr. Mendes was contacted and told that the Roller had arrived and that he should visit to inspect it. Mr. Mendes, who is also a mechanic, visited the Defendant's premises and he personally inspected the Roller and he subsequently requested an open bill for the purchase of the Roller and asked for a discount. Mr. Mendes, he said, also asked for a one month guarantee but his request was not granted. Mr. Darcheville said he reminded Mr. Mendes that used heavy equipment was not sold with a guarantee and the invoice reflected the same.

[24] On 11th May 2005, Mr. Mendes visited the Defendant's premises with three workers and asked for permission to test the Roller on an asphalt pot-holing job he was conducting in the immediate vicinity of the Defendant's premises, this being in the Sans Souci area. Permission was granted to Mr. Mendes and he used the Roller for about two hours on his pot-holding job before returning the Roller to the Defendant's premises.

[25] Mr. Mendes who was satisfied with the condition and performance of the Roller, after having used it for two hours, returned on 13th May 2005, to the office of the Defendant and paid for the Roller with a cheque for EC$37,000.00 and promised to pay the balance of EC$7,000.00 within thirty days. Mr. Mendes collected the Roller from the Defendant's premises on 14th May 2005, and left with it. An invoice was issued by the Defendant to the Claimant. The Claimant has not paid the balance of EC$7,000.00. Neither did the Claimant ever issue to the Defendant a post-dated cheque for EC$7,000.00.

[26] Mr. Darcheville states that about one month after the Claimant purchased the Roller, Mr. Mendes called to inform him that the Claimant was working in Soufriere with the Roller, it was raining heavily and that the Roller could not operate in mud. He informed Mr. Mendes that the Roller was indeed an asphalt Roller designed to compact asphalt and was not designed for the purposes of working in muddy

conditions. He immediately dispatched the machine operator, Mr. Matthew Peter to the site in Soufriere where the Roller was found being operated in muddy conditions.

[27] Sometime towards the latter part of June 2005, the Claimant returned the Roller to the premises of Reliable Motors Limited, which is one of his companies, where it has remained to date. Reliable Motors Limited, by letter informed the Claimant that the Roller was illegally parked on its premises and that it could not guarantee the security of the Roller. The Claimant was also informed that Reliable Motors Limited would have to charge storage fees for having the Roller parked on its premises.

[28] Mr. Darcheville stated that the Claimant never informed him or spoke to him as to why the Roller was parked on the premises of Reliable Motors Limited. The Defendant was never given the keys for the Roller. The Roller was just left on the premises without a word from the Claimant, until he received a lawyer's letter dated 17th May 2010 from Messrs. Greene, Nelson & Associates. Neither the Defendant nor Reliable Motors Limited ever accepted or took possession of the Roller from the Claimant. It was just placed on the premises.

[29] Mr. Darcheville states that in the letter dated 17th May 2010, Mr. Mendes admitted that the Roller could not traverse the access road due to heavy rains. Mr. Mendes, he states was using the Roller in mud and not on asphalt as it was designed for. The Roller was designed as an asphalt compactor and was fit for the purpose for which it was purchased, but Mr. Mendes was using the Roller for the wrong purpose.

[30] Mr. Darcheville states that the Roller was fit for the purpose for which it was purchased and that the Defendant is not indebted to the Claimant but that the Claimant owes the Defendant the balance of purchase price for the Roller.

[31] On cross-examination Mr. Darcheville acknowledged that a post-dated cheque may have been received by the Defendant from Mr. Mendes, although he states that he did not receive this post-dated cheque personally. He maintained that he was never

informed by the Claimant that the Roller was required for a job in Soufriere. He stated that after the Claimant had purchased a first machine from him, the Claimant informed him that a second roller would be needed, and he promised the Claimant that he would source the second roller and would inform him with pictures after he had sourced it from his suppliers.

[32] Mr. Darcheville stated that the Roller was in working condition when it was sold to the Claimant and submitted that he was unable to attest to its fitness for the purpose purchased as he may not know the intention of the person purchasing the equipment. The equipment purchased may in fact prove to be too big or too small for purpose. He admitted that its purpose was for compacting asphalt. He also disagreed that a double drum roller would have more power than a single drum and distinguished them on their weight and compacting ability.

[33] Mr. Darcheville denied being told why the Claimant needed the Roller, other than the fact that the Claimant needed one, at which point he promised to source the Roller for the Claimant.

[34] Mr. Vincent Guard, a mechanical engineer and an expert who has held the position of chief mechanic in several establishments, was deemed an expert by the Court on the agreement of both Parties and was provided with terms of reference for the provision of his expertise. His evidence was useful in two material respects. He was able to assist the Court by clarifying that a double drum roller was more powerful and an easier to handle machine. Such a roller would be able to traverse a hill more easily than a single drum which would be prone to skidding. He also satisfied the Court that his inspection took place at the premises of Reliable Motors Limited. Mr. Guard however, acknowledged that his assessment and examination of the Roller was over 10 years after the date of the transaction between the Parties and from his assessment the machine was in a dilapidated condition, with many parts missing.

Findings and Analysis

[35] The Claimant contends that it was aware that the Defendant had a double drum roller at its premises for sale and through its managing director Mr. Mendes, made inquiries about the Roller and subsequently purchased it. The Defendant disputes that the Claimant came to its premises and purchased a Roller which had been in its possession. The Defendant instead, alleges that it had been initially asked to source a roller for the Claimant, and the Claimant paid for the Roller after it had arrived at the Defendant's premises.

[36] On the issue of the terms on which the Parties contracted, the Court prefers and accept the Claimant's version of the events. The Claimant struck the Court as being a simple, honest and humble man. His version of events leading to the contract of sale, accord with the documentation exhibited, in particular with invoice no 9261, issued by CES Office World, for Darcheville Construction and which records a deposit of EC$37,000.00 (BSL3280) and balance EC$7000.00 post-dated cheque June 7, 2005 (BSL 3282). The Court believes that 'BSL' refers to Bank of Saint Lucia. The Defendant while disputing the Claimant's version of events, did not produce any evidence to contradict this version of events, nor did it provide proof to support its version of the events. The Defendant produced nothing to show that its role was to source a roller; it did not produce any emails or other correspondence of suppliers, shipping documents and customs entry verifying in whose name the Roller was imported, or showing the time of arrival consistent with Mr. Darcheville's version of events. Although he stated that after sourcing the Roller, he sought the Claimant's approval with pictures, neither the email nor pictures were put in evidence. It is also inconsistent with Mr. Darcheville's version of events, that the Roller was imported specifically for the Claimant, as when the Claimant sought to test run the Roller, the Defendant denied him access so to do.

[37] The Court therefore finds the more credible version events to be, that the Claimant, being in urgent need of a roller went to the Defendant and purchased a used 1996 Ingersoll Rand DD 25 Roller HP 30.5, serial Number: 32205, Engine Number:

F2L511 at a cost of EC$44,000.00, for which he paid a deposit of EC$37,000.00 (BSL 3280) and issued a post-dated cheque (BSL3280) dated 7th June 2005, for the balance of EC$7000.00.

[38] Even if the Court were to believe the Defendant's version of events that the Defendant was to have sourced a roller for sale to the Claimant, this would not have made any material difference to the transaction as concluded, or at law, as the Court finds on the evidence that the ownership or property in the Roller was with the Defendant until the 13th May 2005, and transferred to the Claimant on that day after the payment to the Defendant of the sum of EC$37,000.00 together with delivery of the Roller to the Claimant. That was when a contract of sale was concluded.

[39] The Court's conclusions are supported by article 288 of the Commercial Code Chapter 244, which provides that:-

> (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."

[40] The invoice accepted by this Court and the evidence of both Mr. Mendes and Mr. Darcheville, reflect that until there was payment of the deposit of EC$37,000.00, the Claimant had no access to the Roller, nor had he acquired an interest in it. The staff of the Defendant were well versed with what the conditions were, before property left their premises. Additionally, invoice no. 9261 reflects that at the time of the payment for the Roller, the Defendant was the seller and the Claimant the buyer.

[41] In regard to the second issue of whether there was a term implied into the contract by law or by agreement of the Parties that the Roller be fit for the purpose purchased. Counsel for both Parties directed the Court to the Civil Code of St. Lucia on the Obligations of the Seller contained in articles 1401 to 1441 which provisions are inconsistent with article 285 of the Commercial Code of St. Lucia

Cap.244 as it relates to implied warranties and conditions. For the reasons explained below, the Court has preferred the statutory provisions of the Commercial Code of St. Lucia and have relied on it, to reason the obligations of the Parties.

[42] The preface to the Commercial Code edited by Frank Herbert Coller, in force from 1st July 1917, and subsequently amended, but which amendments left article 285 intact, provides the raison d'état for the promulgation of a separate Commercial Code removed from the Civil Code provisions relating to Goods and Merchandise. It provides that in Saint Lucia, commercial law is generally speaking English, while the law of property and civil rights is French. The Civil Code however contained provisions relating to Goods and Merchandise which were not always in harmony with English law. It was therefore determined that there needed to be a revision of the Civil Code by a publication of a volume dealing solely with commercial law containing provisions of abridged commercial statutes.[1] That rationale, together with the fact the Commercial Code was promulgated after the Civil Code and with provisions inconsistent with the Civil Code, satisfies the Court that the inconsistencies are to be resolved in favour of the Commercial Code and that it is to article 285 of the Commercial Code, the Court must have regard to resolving and determining the obligations of the seller and buyer in the transaction before the Court. Article 3 of the Commercial Code also provides that the rights and obligations of all parties before a court shall primarily be governed by the Code.

[43] Article 285 provides:-

> "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 purpose:

[1] See preface to the original text of the Commercial Code 1917.

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.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(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."

[44] The Court accepts Mr. Darcheville's evidence that the Defendant offered no warranty on the Roller sold. However, the sale of goods provisions under the Commercial Code provides a buyer with warranties under certain conditions even where it was not an express term of the contract between the parties.

[45] In application of article 285(1) and (2) it is to the evidence of the Parties that the Court must have recourse to determine the express and or implied intent of the Parties. In the main, these circumstances are disclosed in the testimony of Mr. Mendes, and Mr. Darcheville, the documents exhibited by the Parties, and in the pleadings of the Parties.

[46] It is not in dispute that the Defendant was in the business of the sale and rental of heavy equipment. That was as much pleaded in the statement of claim and was admitted by the Defendant. The Court is satisfied that the heavy equipment included drum rollers, as one was previously sold by the Defendant to the Claimant. It is a fair conclusion therefore that the Roller is equipment which is in the course of the Defendant's business to supply.

[47] What continues to be the point of contention, is whether the Claimant made known to the Defendant the purpose for which the Roller was required. Mr. Mendes' evidence is that he purchased the Roller as the Claimant had been awarded a long-term compacting contract for the rental of a 3-Ton double drive roller to a resort in Soufriere. Although the Claimant already owned a roller, another was needed immediately for the rental contract to the resort. He communicated his requirements to a sales representative of the Defendant. In particular he stated that the Claimant needed a 3-Ton roller with double drum drive and in good working order. The Defendant's Mr. Darcheville disputes that version of events. He states instead, that Mr. Mendes approached him and asked him to source a second-hand double drum asphalt roller for him. He stated that the roller sold to the Claimant was an asphalt roller not intended to be used on a surface other than asphalt.

[48] The question whether on a sale of goods, the buyer made known to the seller the purpose for which the goods were required, so as to show he relied on the seller's skill or judgment, is one of fact depending on the circumstances of the case. The case of Priest v Last [1903] 2KB 148, referred to by both Parties in support for that contention and the cases of Jones v Bright [1829] 5 Bing 533;30 R.R 728, Brown v Edgington [1841] 2 Man & G 279; 58 R.R 408 and Shepherd v Pybus [1842] 3 Man & G 868, are authority for the principle that a warranty will be implied where there was some distinct communication of the particular purpose for which the item was purchased, beyond what might be implied from the mere name of the item.

[49] Neither Party put any documentary evidence before the Court as to the identified capabilities of the Roller, which could easily put an end to any contention on this issue. Unfortunately, it is left for the Court to determine who among these two experienced business persons have represented the version of events that are true. The Court had indicated earlier that it accepted Mr. Mendes' evidence that he had represented to the Defendant that he intended to use the roller on a job in Soufriere. The Court did not accept the evidence of Mr. Darcheville that he had communicated to the Claimant the limited functions of the Roller, simply because, the Court

accepted the evidence of Mr. Mendes that when he made enquiries about the Roller and its capabilities, it was to a sales representative and not to Mr. Darcheville that he spoke, and the sales representative satisfied him that it met the specifications of his job. Further the sales representative did not inform him of it being limited to asphalt compacting. The evidence suggest that Mr. Mendes relied on that representation made to him by the sales representative of the Defendant. It is therefore the Court's conclusion, supported by the evidence, that the first time Mr. Mendes was told that the Roller was designed for asphalt compacting only, was after it had been put in use by the Claimant at the worksite in Soufriere.

[50] In any event, the Court also accepts Mr. Mendes' evidence that he encountered problems with the Roller from the very day he acquired the Roller, when it was to traverse a small incline just after it left the business premises of the Defendant. That evidence suggests to the Court that the problems with the Roller were far more significant than the Roller being used in the mud on the Claimant's job in Soufriere. The Court also accepts the evidence of both Mr. Mendes and Mr. St. Ville that the Roller leased to Mr. St. Ville was the very same Roller sold to the Claimant, which Mr. Mendes saw parked at the roadside in Babonneau near El Paso trading. The Roller was parked there by Mr. St. Ville as it simply could not perform the asphalt job that he had attempted to use it to do.

[51] The Court is satisfied that on a balance of probability that the Defendant whether by itself or by its servants or agents knew the purpose for which the Roller was purchased, by the Claimant and the agents had assured the Claimant that the Roller was reasonably fit for that purpose. The result therefore, is that under article 285 (1) the Court finds implied that the Roller had to have met quality or fitness for purpose identified by the Claimant.

[52] In regard to article 285 (2), the Court had earlier established that the Defendant admitted in his pleading, to being in the business of selling or renting heavy equipment, and which without more, would provide the Claimant with the benefit of

an implied condition of merchantable quality. This however is lost where a buyer has examined the goods and the circumstances are such that this examination should have reasonably revealed the defects complained of.

[53] Counsel for the Claimant addressed this issue in her submissions by the question of whether the defects identified with the Roller were latent or apparent. A latent defect is defined in Black's Law Dictionary 5th ed, as a hidden or concealed defect, one which could not be discovered by reasonable and customary inspection, one not apparent on the face of goods, product document etc.

[54] The Court concludes on the evidence on this issue that (a) the mechanical problems with the Roller were far more significant than it simply being used in the mud, and refer to the Court's comments above; (b) the problems identified with the Roller drum, namely that it lacked power and was unable to traverse inclines are not problems that could have been visible to an experienced eye and would have required the Roller to be tested - the Court is supported in that reasoning as neither the Claimant's experienced mechanic nor Mr. Mendes, himself a mechanic, nor Mr. St. Ville, an experienced road contractor, were able on visual inspection to identify these defects, (c) the policy of the Defendant, not to allow the equipment to be tested before it was paid for, prevented the Claimant from conducting a full inspection and here article 305(1) and (2) of the Commercial Code are instructive as it provides that a buyer must be provided with a reasonable opportunity to examine the goods, before he is deemed to have accepted them; that type of inspection was done by the Claimant only after it had purchased the Roller an taken it to its garage.

[55] The Court does not consider the evidence of the limited use of the Roller on a potholing job in the vicinity of the Defendant's premises prior to purchase to be sufficient to compensate for the type of examination sufficient to discover a defect other than an apparent defect. The defects with the roller, were not discoverable by the exercise of reasonable care.

[56] On the test of merchantable quality and fit for purpose, Dixon LJ in Australian Knitting Mills and John Martin & Co td v Grant [1930] 50 CLR 387 explained the phrase "merchantable quality" as being:-

> "the condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition without special terms."

And in Rogers v Parish (Scarborough) Ltd [1987] 2ALL ER 232 Sir Edward Eveleigh said this:–

> "whether or not a vehicle is of merchantable quality is not determined by asking whether it will go. One asks whether in the condition in which it was on delivery, it was fit for use as a motor vehicle of its kind. A vehicle with defective seals, gearbox, and an engine in an unsatisfactory condition, all of which needed attention to bring it up to a standard normally found in such a vehicle indicates to my mind that it was not of merchantable quality..."

[57] For these reasons, the Court concludes that the Claimant benefits from an implied condition or warranty that the Roller had to have been of merchantable quality and it was not. The Court further concludes that there were latent defects with the Roller, undiscoverable by ordinary inspection.

[58] The Commercial Code does not define a condition or a warranty but article 282 (2) does distinguishes between a condition and a warranty as follows:−

> "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."

[59] Case law however has assisted in the definition of these terms. In Poussard v Spiers (1876) 1 QBD 410, a condition was defined as a major term of the contract which goes to the root of the contract. If a condition is breached the innocent party is entitled to repudiate the contract and claim damages, and in Bettini v Gye 1876 QBD 182, warranties were defined as minor terms of a contract which are not central to the existence of the contract. If a warranty is breached the innocent party may claim damages but cannot end the contract.

[60] The Court is satisfied based on its assessment of the evidence above that the defects encountered with the Roller were defects that went to the root of the contract and were sufficient enough for the Claimant to treat the defects as a breach of a condition as the Roller was simply unable to perform as it was purchased to do.

[61] However, the Claimant's access to the remedies for a breach of a condition are complicated by his actions after taking delivery of the Roller. The evidence reveals that despite being aware within days of taking delivery of the Roller that it was unable to perform as the Claimant needed it to do, the Claimant chose to undertake repairs of the Roller and to use it, because he was in a desperate situation and needed the Roller to start the job at Soufriere. Mr. Mendes states in his evidence in chief:−

> *"Upon inspection and testing, I found that the roller did not have a double drum drive and it lacked power to drive even a light incline. I discovered even further problems, that there were bad engine mounts, dirty fuel filters and electrical problems."*
>
> *"….. being under pressure to fulfil the contract in Soufriere, which was commencing on the 17th of May 2005 and being that there was no time to source another roller, I undertook to try to fix the problems myself, so we proceeded to change the filters and the engine mounts and to service the roller and address other problems that could have been fixed."*

[62] The Court is guided by article 323 of the Commercial Code which provides as follows:

> "Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of 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:−
>
> (1) (a) Set up against the seller the breach of warranty in diminution of extinction of the price; or
>
> (b) Maintain an action against the seller for damages for the breach of warranty.
>
> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.
>
> (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.
>
> (4) The fact the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage."

[63] The Court is also guided by article 282(3) which provides that in the case of a sale of a specific good, (which the Roller was) the property in which has passed to the buyer, (which it has), 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 expressed or implied to that effect. The section provides as follows:-

> "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."

[64] There was no pleading by the Claimant as to an express or implied term that the goods would be rejected if it did not meet the Claimant's specifications. In the circumstances the Defendant's breach is to be treated as a breach of a warranty.

[65] The Claimant has pleaded that the Defendant is bound to repay the Claimant the sum paid by him for the Roller and is also responsible for any loss directly and naturally arising accrued by the Claimant because of the breach of warranty. The Court agrees. Under article 323 (1) the Claimant is entitled to the extinction of the price of the Roller. The Court will therefore order that the Claimant be refunded the sum of EC$37,000.00, the deposit paid on the Roller. The Claimant is also entitled to interest on that sum at the judicial rate of 6% from the 13th May 2005 and continuing to the date of payment in full.

[66] In regards to the Claimant's claim of consequential loss arising from loss of a contract totalling $108, 000.00, there was no evidence by way of documentation. This was also was also challenged by the Defendant. Although the Court was satisfied that the Claimant was working the Roller at a location in Soufriere, the Court is unable to conclude as to the nature of the contract or its contract price without documentary support. The Court therefore will make no award for consequential loss.

[67] The Defendant had by its counterclaim sought the balance of the purchase price. However, the Court having accepted that the Claimant was entitled to the extinction of the price as a remedy for the breach of warranty, the Defendant's counterclaim for the balance of the purchase price must fail.

[68] In regard to the Defendant's claim for storage fees for Reliable Motors Ltd., the Defendant pleaded that the Claimant had simply deposited the defective Roller outside the premises of Reliable Motors, which is another company with links to Mr. Darcheville. Other evidence established that the Roller was within the compound owned and controlled by the Defendant. What is clear to the Court in any event is that any claim for storage fees can only be brought by Reliable Motors Limited, which is not a party to these proceedings. The Defendant has not pleaded or established any nexus, right or entitlement to the storage fees and so the claim for damages for storage fees must also fail.

[69] Court's Order

1. Judgment is entered for the Claimant. The Defendant's counterclaim is struck out.
2. The Defendant is to pay the Claimant the sum of EC$37,000.00 within 21 days.
3. Interest is awarded at 6 percent per annum from 13th May 2005.
4. Prescribed costs are awarded to the Claimant.

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar