BARBADOS

Suit No: CV 622 of 2006

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

BETWEEN

VICTOR FREDERICK - PLAINTIFF

AND

MORRIS LEE - DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Q.C., Judge of the High Court (ag)

2007: September 27; October 9.

Mr. Joseph Serrant for the Plaintiff, the Defendant not appearing nor repreaented

DECISION

[1.] **Crane-Scott J:** This is an application by Victor Frederick ("the Plaintiff") brought by Summons dated April 18, 2007 for assessment of damages for breach of contract pursuant to a Default Judgment obtained against Morris Lee ("the Defendant") on June 13, 2007.

[2.] Prior to hearing the application for assessment of damages, the Court had regard to an Affidavit of Service sworn to by a Rowehan Walcott and filed on September 24, 2007 confirming that the Defendant had been personally served with the Summons for Assessment of Damages, an Opinion on Damages and a Take Notice returnable for September 27, 2007.

[3.] After the Court Marshal had duly called three times for the Defendant who made no answer or appearance, the Court then proceeded to hear the application.

[4.] **<u>The Evidence</u>:** The Plaintiff was duly sworn and gave evidence in relation to the agreement which had been entered into in or about May 17, 2005 for the purchase from the Defendant of an ABKAI 29-seater minibus for the price of $200,000.00. The Plaintiff tendered in evidence a copy of a BNB cheque dated May 17, 2005 in the amount of $200,000.00 ("VF 1"), together with a copy of a receipt ('VF 2") dated September 2, 2005 and signed by the Defendant acknowledging payment in full of the agreed purchase price of $200,000.00.

[5.] The Plaintiff gave details of the Defendant's breach of contract and more specifically, his breach of an implied condition as to fitness for purpose of the minibus. He outlined the many serious problems encountered with the minibus following its delivery to the Plaintiff on or around September 2, 2005 and gave an account of the circumstances which eventually led to the Plaintiff returning the vehicle to the Defendant sometime during October, 2005.

[6.] The Plaintiff's evidence regarding the payment of the purchase price to the Defendant, was supported by that of his daughter,

Shernelle Frederick, who, on behalf of her father, had made the initial arrangements with the Defendant for the purchase of the minibus.

[7.] It also appeared from the evidence, that during the negotiations leading up to the purchase of the vehicle, the Defendant had been made aware that the Plaintiff intended to use the minibus for the transport of passengers on the roads.

[8.] According to the Plaintiff, when the minibus was rejected by him and returned to the Defendant in October 2005, the Defendant had agreed to take back the bus and had also requested a period of two (2) months to repay the purchase price paid of $200,000.00.

[9.] As things turned out, the Plaintiff was forced to institute the action in April 2006 after it became clear that the Defendant had no intention of returning the purchase price.

[10.] **The Claim for Damages:** Counsel for the Plaintiff submitted that the measure of damages for the breach of the implied condition by the Defendant is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of the implied condition. He cited the case of ***Hadley v. Baxendale (1854) 9 Ex. 341*** and **McGregor on Damages, 13th edition** para 596 at page 423 as the legal authority for his submission.

[11.] Counsel for the Plaintiff also submitted that the Plaintiff is entitled to recover as damages the sum of $244,473.61 being the loss suffered by the Plaintiff which, in his view, had directly and naturally resulted from the breach of the said contract as follows:

Return of purchase price paid	-	$200,000.00
Interest paid to date on BNB loan	-	$ 29,208.61
Road tax on the vehicle	-	$ 6,000.00

Insurance paid to insure the vehicle	-	$ 2,060.00
Legal fees paid to date	-	$ 7,205.00
Total	-	$ 244,473.61

[12.] **The applicable measure of damages:** The Court is aware that the appropriate starting point in resolving a problem involving the measure of damages for breach of contract is the general rule that the Plaintiff is entitled to be placed, so far as money can do it, in the same position as he would have been in had the contract been performed. [See **McGregor on Damages, 16th edition** paragraphs 10-11]

[13.] The general rule is, however, not without limits and the full loss which a Plaintiff may be compensated for under the general rule is liable to be cut down by a variety of factors and considerations all of which are discussed in numerous decided cases and legal texts.

[14.] The celebrated case of ***Hadley v. Baxendale*** *(cited above)* introduced an important limitation on the general rule that a party whose rights have been violated is to be put in the same position, so far as money can do, as if his rights had been observed. The principles enunciated in the case were later re-stated and clarified by Asquith L.J. in the case of ***Victoria Laundry v. Newman [1949] 2 K.B. 528, C.A***. in the following terms:

> *"(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position as money can do so, as if his rights had been observed. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however*

unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2) 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****.*

(3) What was at that time reasonably so foreseeable ***depends on the knowledge then possessed by the parties****, or, at all events, by the party who later commits the breach.*

(4) 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****. This is the subject matter of the 'first rule' in Hadley v. Baxendale. But to this knowledge,…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.*

*(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach….****It suffices that, if he had considered the question, he would as a***

> ***reasonable man have concluded that the loss in question was liable to result.***
>
> *(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss.* ***It is enough…if he could foresee it was likely so to result. It is indeed enough if the loss…is a 'serious possibility' or a 'real danger'…****"*

[15.] In the light of the foregoing principles, the Court turns now to consider the Plaintiff's claim for damages in this case.

[16.] *Loss of profits:* Although a claim for loss of profits had initially been included in the Particulars of loss and damage in the Plaintiff's Statement of Claim, this item of loss appears to have been abandoned since it is not included in the total amount claimed and additionally, no particulars of loss of profits were adduced in evidence at the hearing.

[17.] *BNB Loan interest:* With respect to the Plaintiff's claim to recover the sum of $29,208.61 being interest paid on the BNB loan, the Plaintiff in his oral testimony stated that he had up to the date of the hearing paid an amount of $29,208.61 as interest on the principal loan.

[18.] Applying the principles in ***Hadley v. Baxendale***, it appears that the Court could award damages for such loss if the Plaintiff were to establish that at the time the contract was entered into, the Defendant (with actual knowledge that the Plaintiff had approached BNB for a loan to purchase the vehicle) would, as a reasonable man, have

foreseen that if the minibus did not meet the required standard of fitness for purpose, there was a 'serious possibility' that the Plaintiff would hold him liable for payment of the interest payable on the BNB loan.

[19.] However, at the hearing, apart from tendering the BNB cheque as proof of the payment of the purchase price to the Defendant, no other evidence was led as to whether the Defendant knew that the Plaintiff had approached BNB for a loan in respect of the purchase price. Furthermore, no documentary evidence was led to substantiate: a) the fact that the Plaintiff had actually taken out a loan with BNB to facilitate the purchase of the minibus; b) the interest rate payable on such loan; or c) the total amount of interest paid on the loan to date. In the circumstances, the Court finds that the Plaintiff's claim to recover the sum of $29,208.61 as loan interest paid to BNB on account of the loan is too remote and is accordingly disallowed.

[20.] *Road taxes & insurance:* It is considered that the loss occasioned by the Plaintiff in respect of expenditure for road tax and insurance would, in all the circumstances, have been reasonably foreseeable as liable to result from the breach in 'the ordinary course of things' and would have been recoverable under the 'first rule' in ***Hadley v. Baxendale***. However, no supporting evidence was led to support the Plaintiff's assertion that he had paid the sums of $6.000.00 to the Licensing Authority as road tax on the minibus and $2,060.00 for insurance. These amounts are unsubstantiated and accordingly disallowed.

[21.] *Legal fees:* The legal fees claimed of $7,205.00 would appear to be 'attorney/client fees' incurred by the Plaintiff to date. While 'in the

ordinary course of things', it might be expected that the parties to a contract would have reasonably foreseen, as a matter of principle, that expenditure for legal fees would be liable to result from a breach of the contract, it is doubtful whether the parties would have foreseen or expected that the Plaintiff's 'attorney/client' fees would have been recoverable by the Plaintiff *as part of an award of damages.*

[22.] The Court is of the view that in the 'ordinary course of things', the parties in this case would only have contemplated that any legal fees which may have arisen from a breach of the agreement, would either have been agreed, or taxed *on the 'party and party basis'* pursuant to an order of the Court in the usual way in any civil proceedings brought in respect of the breach.

[23.] In the absence also of evidence of a special agreement with the Defendant that he would have been liable to pay a specific amount of legal fees *as damages* in the event of a breach of contract, it is considered that the claim for fees of $7,205.00 was not within the contemplation of the parties to the contract and is therefore too remote to be recovered. The claim for legal fees of $7,205.00 is accordingly disallowed.

[24.] Having regard to the totality of the evidence, the Court finds that the only loss and damage which has been satisfactorily established to flow directly and naturally from the breach of the implied condition as to fitness for purpose in this case is the loss of the sum of $200,000.00 being the purchase price paid to the Defendant for the minibus.

[25.] **Disposal**: As it has been established a) that the Plaintiff returned the minibus to the Defendant in October 2005; and b) the

Defendant accepted its return and agreed to repay the purchase price to the Plaintiff, the Court orders that the Plaintiff is entitled to recover the sum of $200,000.00 from the Defendant being the full purchase price paid.

[26.] The above award will bear interest at the rate of 4% per annum from the date of the issue of the Writ until today, and thereafter at the rate of 8% per annum until payment.

[27.] The Plaintiff will have his costs certified fit for one Counsel to be agreed or taxed.

Maureen Crane-Scott
Judge of the High Court (ag)