BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Suit No.1604 of 2009

BETWEEN

SIMEON MENELIK JOHN	**FIRST CLAIMANT**
SIMON MAKONEN JOHN	**SECOND CLAIMANT**

AND

JEFFREY McALLISTER	**DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2012: July 11
2015: June 16, 23, 30
October 12
2016: February 22
2018: December 14

Appearances:
Ms. Liesel Weekes, Attorney-at-Law for the Claimants.
Ms. Kendrid Sargeant, Attorney-at-Law for the Defendant.

DECISION

Introduction

[1] This case requires a determination by the Court as to whether the Claimants are entitled to a refund of the purchase price paid for a second-hand motor car,

together with damages, interests and costs.

The Undisputed Facts

[2] On the 12 March 2009, the Claimants purchased a second-hand 2001 Mitsubishi Lancer motorcar from the Defendant for twenty thousand dollars. The Claimants had taken their personal vehicle to Matthew "Precious" Batson's garage to be repaired. They expressed an interest in purchasing a Cherokee jeep that was on sale at Batson's garage. The Cherokee was owned by the Defendant.

[3] The Defendant's Mitsubishi Lancer was also at the same garage. Having seen the Lancer, the Claimants indicated their preference for purchasing the Lancer. The Defendant was persuaded to sell this vehicle to the Claimants. At the time of the negotiations to purchase and sell the Lancer, Batson was the mechanic for all the parties.

[4] One of the Claimants test drove the vehicle twice. The Defendant told them that the Lancer was driving sluggishly because its throttle position sensor ("the TPS") needed fixing. The Defendant agreed to replace the TPS and service the vehicle before it was delivered to the Claimants. Batson was engaged to do this work for the Defendant.

[5] The Claimants took delivery of the vehicle, and it appeared to be in good working order. However, after approximately one week of use, the car was

taken to another mechanic, Kenmore "Doc" Bryant. Bryant was asked to check the car because it was accelerating sluggishly. Bryant took the car to Simpson Motors for a diagnostic check which revealed that its TPS was dysfunctional and faulty, and needed replacing.

[6] Bryant also checked the vehicle himself, and found the oil to be black and full of sludge. He changed the TPS, spark plugs, oil filter and oil. He sourced a TPS, while the other materials were purchased by the Claimants from Simpson Motors.

[7] After Bryant worked on the car, the Claimants continued to drive it. However, on 31 March 2009, the car stalled on the highway while the Second Claimant was driving. It could not be driven, and so the Claimants towed the vehicle to Bryant's garage, where it remained overnight. The following day, 01 April, Bryant inspected the car. He found that:

> "….the oil was very black again, notwithstanding that I had changed it less than two weeks earlier. I also found that the transmission filter was choked causing the transmission pump to draw less fuel…if there is no fuel the plates and clutches rub against each other cause friction and burn causing the car to stall". (See page 3, second unnumbered paragraph of Affidavit filed on 04 November 2010).

[8] Bryant determined that the vehicle's transmission was faulty. He advised the Claimants to notify the Defendant. They did so, and the Defendant came over to Bryant's garage. How many persons gathered there; what was said there

and by whom; and what, if anything, was agreed there, is hotly disputed.

[9] Suffice it to say at this stage that the vehicle was towed to Matthew Batson's garage. The Defendant purchased a transmission which he delivered to Batson to replace the faulty transmission. Batson installed the transmission, but the Claimants never took possession of the car after it was taken to Batson's garage.

The Pleadings

[10] The Claimants filed these proceedings on 18 August 2009. Trial of the matter began on 11 July 2012. During the course of the trial, counsel for the Claimants applied for leave to further amend the Statement of Case. Leave to amend was granted on 23 June 2015, and leave was also granted to the Defendant to further amend his Defence.

[11] The claim is for:

(1) Damages for breach of contract and/or breach of implied condition;

(2) Further or in the alternative damages for fraudulent misrepresentation;

(3) Further or in the alternative damages for conversion;

(4) Interest;

(5) Further or other relief as this Court deems fit; and

(6) Costs.

[12] The Defendant admitted paragraphs 1 to 5 of the Further Amended Statement

of Claim. However, he either denied or made no admissions to the other 15 paragraphs of the Statement of Claim. The important concessions by the Defendant are as follows:

(1) An oral contract was concluded between the parties on 12 March 2009;

(2) The Claimants agreed to purchase a 2001 Mitsubishi Lancer from the Defendant for twenty thousand dollars;

(3) The contract was a contract of sale as defined by section 3 of the Sale of Goods Act, Cap.318;

(4) The Claimants received the vehicle in exchange for a payment of twenty thousand dollars;

(5) The Defendant issued a receipt to the Claimants dated 12 March 2009; and

(6) The implied conditions in the contract of sale were that the vehicle was free from defects at the time of sale; that it was fully functional; and that it was fit for use as a mode of private transportation.

The Sale of Goods Act

[13] Cap.318 is an old piece of legislation; 123 years old to be exact. Its model is England's 1893 Sale of Good Act (56 & 57 Vict. c.71). The relevant sections that apply to this matter are sections 12(1) (a) and 15 (a). They provide (in reverse order) as follows:

> "15. Subject to the provisions of this Act, and of any statute in that behalf, 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 as follows, that is to say –
>
> (a) 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".
>
> "12. (1) (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated".

[14] Counsel for the Defendant in his written submissions filed on 19 October 2016, argued that on the evidence and the law "…the Defendant did not breach the oral contract or the implied warranties". (Page 7 at para.1). He also contended that as the Defendant sold a second-hand vehicle in his private capacity, and not in the course of business, there was no implied warranty as to fitness.

[15] There was never an application or request on behalf of the Defendant to amend

his pleadings. Therefore, the Defendant is bound by his concession that certain conditions, *not* warranties, were implied in the contract of sale. These conditions are that the car was free from defects at the time of sale; that it was fully functional; and that it was fit for use as a mode of private transportation. (See para.[12] supra). All these conditions speak to the quality or fitness of the vehicle at the time of purchase.

[16] The questions to be answered, in the context of the pleadings and the evidence, are whether the vehicle was free from defects at the time of sale; whether it was fully functional; and whether it was fit for use as a mode of private transportation? A negative finding of fact in relation to any of these questions could impact the outcome of this case.

Condition of Vehicle at Time of Breakdown

[17] The Defendant insisted that he sold the Claimants a second-hand car that was in good working order. Any defect in the transmission was due to the fact that one of the Claimants put in the wrong transmission oil in a car that required a special transmission oil, and that parts were changed on the vehicle. The Claimants countered that the only time the transmission oil was changed was by Kenmore Bryant, who used the correct oil. The Court finds that any parts changed by the Claimants had no deleterious effect on the transmission. This conclusion is supported by the oral evidence of Bryant and Batson, the two

mechanics who dealt with the car.

[18] The Claimants only had use of the vehicle for approximately 19 days before the transmission problem was identified by Bryant. The magnitude of the problem made the car unusable until the transmission was replaced.

[19] The Defendant's evidence is that the vehicle he sold to the Claimants did not have a transmission problem. All that it required before delivery to the Claimants was a TPS. He said in his evidence in chief that:

> "After I sold the car to them one of them told me that the transmission fluid was low, and that he went to the gas station and put in transmission fluid in the car. I told him "Big man you put the wrong transmission fluid in the car". ……I asked him why he went to the gas station to put in transmission fluid. That transmission is a transmission that does not take insults. After [speaking] with one of the [Claimants] I asked for the other [Claimant]. He said his brother was at work. After me and he came to a realisation, I said he should not have put the wrong transmission fluid in the car but I would take my loss and buy a transmission to put in the car".

[20] The Defendant added in his cross examination that:

> "He told me that he was driving on the road. He stopped at a gas station to get some transmission fluid, and he put the transmission fluid in the car. I listened to him. When he finished speaking, I told him he had bought the wrong transmission fluid. He told me that after he put transmission fluid in the car is when it start to give trouble. That is what he said to me. He said the car stalled. It was the wrong fluid. I can't recall if he said to me that he had bought the wrong transmission fluid. I knew he had

> bought the wrong fluid because he purchased it at a gas station. The transmission fluid for that type of car does not sell at a gas station. It is a different grade transmission fluid. You could only purchase it at Simpson Motors. It comes in a can, not in a plastic bottle".

[21] Both mechanics agreed that the car could not be used unless the transmission was replaced. Although he believed that he was not responsible for the malfunction, the Defendant purchased a transmission for $4,200.00 to replace the bad transmission. He did this he said "from love of my heart".

[22] Two days after the car broke down, counsel for the Claimants wrote to the Defendant demanding a return of the purchase price. (See Tab 8 of the Agreed Bundle of Documents filed on 17 July 2012). Counsel for the Defendant responded by correspondence dated 20 April 2009. This letter said in part that:

> "[The Defendant] was subsequently informed by [the Claimants] that they had changed the oil in the car and on checking the car [the Defendant] noticed that the oil meter was reading half full, the battery leads were changed and the [TPS] which was located under the gas pedal was changed even though there were no problems with that sensor before. These changes were brought to the attention of [the Claimants]. The mentioned parts were changed without any notice to or consultation with [the Defendant]….
>
> [The Defendant] is of the opinion that any problem the car developed on or about the 31st day of March 2009 were as a result of [the Claimants']

> negligence and/or tampering with the said vehicle by changing parts on it….."

[23] It is noticeable that less than a month after the car stalled, there is no mention in this letter of the Claimants admitting to the Defendant that the wrong transmission oil was put into the car. There is no specific allegation in counsel's letter about the use of the wrong transmission oil.

[24] The original Defence was filed on 07 September 2009. At paragraph 4 it is alleged that any problem arising in the vehicle "….was as a result of the [Claimants] tampering with the said vehicle….". Again, there is no plea of negligence in relation to the use of the wrong transmission fluid by the Claimants.

[25] The next document is the Defendant's Witness Statement filed on 20 October 2011. Paragraph 8 says that:

> "I was subsequently informed by the [Claimants] that they had changed the oil, the battery leads and [TPS] which was located under the gas pedal of the said motorcar. I verily believe that the problems with the motorcar's transmission were as a result of the [Claimants] tampering with and changing parts and the transmission oil on the said motorcar.

This is the first hint that the Defendant is alleging that by changing the transmission oil the Claimants damaged the vehicle's transmission. But he does not allege that the Claimants used the wrong transmission oil.

[26] Interestingly, when the Further Amended Defence was filed on 29 June 2015,

there was no mention of damage as a direct result of changing the transmission oil or using the wrong transmission oil. The Defendant stated in this document that he believed that the car's problems were caused by the Claimants "tampering with and changing parts on the said vehicle". (See para.6).

[27] Matthew Batson supported the Defendant's version about the Claimant's putting the wrong transmission fluid in the car. In his evidence in chief he said that:

> "I had got a call from one of [the Claimants] saying that the car broke down out Flagstaff by he mudda side. A couple minutes after [the Defendant] called me and said the guys say the car break down outside Flagstaff. [The Claimants] called me back again. I tried to figure out what was the problem from what they were telling me. They had a problem with it the night before and went to a gas station and put in transmission fluid. Afterwards the vehicle was working worse is what they tell me".

[28] Despite this apparently corroborating evidence from Batson, the Court had credibility issues with his evidence. First, he told the Claimants that the car needed to have the TPS replaced. There is no evidence that he also told the Claimants that the vehicle was "giving a little bucking and the engine check light was on". It is not clear from his evidence that the bucking and the check light were all manifestations of a faulty TPS, and not associated with additional problems with the car.

[29] Secondly, although Batson received a confirmatory diagnostic that the replacement TPS was in working order, Bryant still had to replace that TPS in a matter of days. This aspect of Bryant's evidence was never challenged; and Batson offered no explanation as to why the TPS he installed would have failed so quickly.

[30] Another concern about Batson's evidence is its serious divergence from the other witnesses in relation to when the Defendant purchased a replacement transmission. The Defendant said he purchased and delivered a transmission to Batson on 01 April 2009. A receipt showing a cash payment of $4,200.00 to Trans-Tech Inc. on that date was produced at Tab 11 of the Agreed Bundle of Documents.

[31] The First Claimant's evidence is that the day after the vehicle stalled on the highway, there was a meeting between the parties at Bryant's garage. While the First Claimant was there:

> "[The Defendant] disappeared for a while and he came back with a transmission and some other guys and they towed away the car".

[32] The Second Claimant informed the Court that on the same day:

> "I was there for a while and [the Defendant] came back with a transmission on his truck that he said be bought from Trans-Tech".

[33] Bryant's evidence is that he knew that a transmission was bought for the car.

However, he did not say if the saw the Defendant bring a transmission to his garage on 01 April 2009.

[34] Batson's oral evidence differs from that of the Claimants and the Defendant. In his witness statement filed on 20 October 2011, Batson deposed that on 01 April the Defendant bought a transmission from Trans-Tech and brought it to his garage. (Para.13). However his oral evidence was a complete reversal of this statement. He told the Court that:

> "The Defendant bought a transmission. We had to wait a little while because the people from Trans-Tech ordered one from Japan".

[35] And during cross-examination, Batson's response to counsel for the Claimants was:

> "[The Defendant] went trying to source a transmission for the car. We had to wait a month and some for the transmission, not a full two months…… [The Claimants] were still checking on the [car] to see if the transmission had come in as yet….I don't agree that I received the transmission from the Defendant on 01 April 2009, on the day I saw the car at [Bryant's] garage. I do not remember it that the transmission was brought to [Bryant's] garage before the [car] left [Bryant's] garage".

[36] While the Court accepts that a number of years elapsed between Batson's witness statement and his oral evidence, this new evidence about having to wait a while before the Defendant delivered a transmission to him certainly undermined his credibility. And counsel for the Defendant never asked

Batson to explain this new evidence in light of the evidence in his witness statement. For all these reasons the Court was sceptical about Batson's evidence in relation to the use of the wrong transmission oil by the Claimants.

[37] Part of the Defendant's evidence about the use of the wrong transmission oil by the Claimants is also suspect. The general tenor of his oral evidence is that he got this information when he went to Bryant's business place on 01 April 2009. Having heard that the Claimants had made a mistake with the transmission fluid, the Defendant still decided to take the loss and purchase another transmission for the vehicle. (See para.[19] supra and the final sentence of the quotation). Yet still, during his cross examination the Defendant stated that he only found out about a mistake with the transmission fluid:

> "….after I had agreed to replace the transmission. I had already bought the transmission when I found this out. The only reason for the car being in that condition was because of wrong transmission fluid".

[38] Batson supposedly confirmed for himself that the wrong transmission fluid was put into the car by the Claimants. According to him:

> "I checked the car by the second mechanic. I pulled the dip stick. It was up past the full mark. The texture of the fluid was not right. The [Claimants] were present when I did this. The fluid was also burnt with metal debris on the dip stick….You can tell it was other fluid in the

> transmission and not the same as the fluid I had put in and not at the same level either… When I checked the dip stick it was way past the mark so it had too much fluid in it".

[39] Interestingly, the Defendant did not give any evidence about checking the dip stick. However, his counsel informed counsel for the Claimants, in the correspondence of 20 April 2009, that "….on checking the car [the Defendant] noticed that the oil meter was reading half full…". So Batson looks at the dip stick and the oil is "up past the full mark". The Defendant checks the oil meter and it is reading half full. Assuming that the oil meter was functional, both versions cannot be accurate.

[40] There was no attempt to resolve this apparent inconsistency in the evidence. Such a resolution was crucial in circumstances where the Defendant and his witness are alleging that the Claimants used the wrong fluid in the transmission. Batson wished the Court to surmise that the high level of oil, shown by the dip stick on 01 April 2009, was consistent with his story that one of the Claimants told him that he had put oil in the car on the night of 31 March 2009. (See para. [27] supra).

[41] Batson claimed that he was able to look at the oil and observe that it was the wrong oil that was put into the car. On the other hand Bryant made no such claim. Bryant examined the car twice. On the first occasion the Claimants had owned the car for about one week. The complaint was sluggish

acceleration. A diagnostic once again revealed a faulty TPS. He sourced and replaced the TPS, and changed the oil filter and the oil. He used a specialised oil from Simpson Motors that was suitable for that type of vehicle. The oil he removed "was black and full of sludge". (See para.2 on page 2 of Witness Statement filed on 04 November 2010).

[42] After Bryant's first intervention, the car was driven until it stalled on 31 March 2009. The car was towed to Bryant's garage. When he checked the car the following day he found that "the oil was very black notwithstanding that I had changed it less than two weeks earlier". (See para.2 on page 3 of his Witness Statement). He identified the problem as a faulty transmission.

[43] The Court prefers the evidence of Bryant to that of Batson. Unlike Batson, Bryant has no previous dual relationship with the parties. He was not privy to the negotiations over the purchase of the vehicle; he had not examined the car prior to the sale; he had never repaired the car before it changed hands. Bryant had no interest to serve.

[44] What is noticeable about Bryant's evidence is that he never spoke of any conversations with the Claimants where the use of the wrong transmission oil was mentioned. If such a conversation had occurred, Bryant had no reason to withhold this evidence. The Court reflected that it was passing strange that the Claimants would so readily reveal to the Defendant and Batson that they

had bought transmission fluid from a gas station and put it in the car on 31 March 2009, and not share this information with Bryant.

[45] Bryant asserted that:

> "We never had any discussion about using the wrong transmission oil in the vehicle. As a mechanic I would not be able to tell what kind of transmission oil was in the vehicle…..I would not be able to tell the type of transmission fluid because when I drained it, it was black".

Indeed, neither the Defendant nor Batson refer to any conversations with Bryant about the use of the wrong transmission fluid in the vehicle.

[46] The Court also noted that the Claimants would have been made aware by Bryant that they needed to purchase a particular transmission oil for the vehicle from Simpson Motors. They did so when Bryant first inspected and repaired the car. Therefore, it is highly unlikely that after Bryant returned the car to them on the first occasion, that either of them would have purchased transmission fluid from a gas station. The Second Claimant's oral evidence is that "I never knew before going to Simpson Motors that the car required a special transmission fluid". This was the same Claimant who was driving the car when it stalled. The First Claimant said that "[Bryant] told me the car carried a special grade of transmission fluid".

[47] Finally, the Court finds it to be incredible that, armed with information given to both himself and Batson that oil from a gas station was used in the car, the

Defendant would volunteer to replace the transmission out of the goodness of his heart. Assuming that the Defendant became aware that the Claimants made a mistake with the transmission oil after he had purchased the transmission, (which this Court does not accept), the Defence was never amended to counterclaim for the money spent on replacing the transmission. The Defendant would have had ample time to counterclaim after allegedly making this discovery. The Further Amended Defence was filed almost six years after the initial claim.

[48] The Court does not believe that either Claimant admitted to the Defendant and to Batson that the wrong transmission fluid was purchased from a gas station on 31 March 2009, and poured into the vehicle. The Court finds that the cause of the breakdown on that date was a faulty transmission. The Court also finds, on a balance of probabilities, that the transmission was defective at the time of purchase. There is no evidence to suggest that the Defendant was aware of the latent defect. Neither Bryant nor Batson asserted that a degrading transmission could be identified before the sale of the vehicle to the Claimants. And the Court accepts that the Claimants would not have purchased the vehicle had they known that the transmission was faulty.

The Case Law

[49] In **Bartlett v Sidney Marcus Ltd [1965] 2 All ER 753**, Lord Denning MR,

opined that:

> "A second-hand car is "reasonably fit for the purpose" if it is in a road-worthy condition, fit to be driven along the road in safety, even though not as perfect as a new car. Applying those tests here, the car was far from perfect. It required a great deal of work to be done on it; but so do many second-hand cars. A buyer should realise that, when he buys a second-hand car, defects may appear sooner or later; and in the absence of an expressed warranty, he has no redress. Even when he buys from a dealer the most that he can require is that it should be reasonably fit for the purpose of being driven along the road". (Page 755G).

[50] In **Bartlett,** the second-hand car was purchased with the knowledge that the clutch needed repairs. The purchase price was lowered by £50, and the purchaser undertook to carry out the clutch repairs himself. When the purchaser took the car to be repaired, it was found that the clutch thrust was worn out and needed replacing. The purchaser paid £45 for the repairs. The court found that the car was reasonably fit for the purpose of being driven along. Although more work was required on the car than the purchaser anticipated, at the time of the sale it was fit for use as a car.

[51] Another case is **Business Application Specialists Ltd v. Nationwide Credit Corporation Ltd [1999] GCCR 1225.** There, a second-hand Mercedes was let to the plaintiff on hire purchase. After the car was driven for about 800 miles, it broke down because of a number of problems associated with worn

out engine valves. The price of the car was £15,000, and the cost of repairs £635. The plaintiff argued that the vehicle was not reasonably fit for its purpose, that is, to be driven on the road.

[52] The Court of Appeal dismissed the case. Lord Parker said:

> "I am satisfied that the learned Judge, had he applied the correct test – that is to say, had he taken into account all the circumstances – would have been perfectly justified in reaching the conclusion of fact that this car was reasonably fit for the purpose….I myself would have come to the same conclusion. The car as driven away exhibited no defects for some 800 miles, by which time it was two-and-a-half years old and had 37,800 miles on the clock. Some degree of wear must therefore have been expected. The degree of wear involved repairs to the tune of £600 odd. There is no evidence whatever that at the time this vehicle was sold its compression and oil consumption was not satisfactory. The fact that within 800 miles and two months it had become unsatisfactory is no doubt some evidence that at the time of sale the valves and the valve guides of this car were worn….it still seems to me correct to say, as Lord Denning said, that the buyer of a second-hand car must expect that defects will develop sooner or later. In this case defects did develop. It then became a matter of degree. I would not accept in this case that a breach of either of the conditions imposed by [the UK 1979 Sale of Goods Act] have been made out…".

[53] The third case is **Crowther v. Shannon Motor Co. [1975] 1 All ER 139.** The facts are that the plaintiff purchased a second-hand Jaguar from a motor car dealer for £390. It was then eight years old at the time of purchase. About

three weeks after purchase, and after driving 2,300 miles, the engine seized up completely. An examination of the car revealed that the engine was in extremely bad condition and had to be replaced.

[54] The Court of Appeal in **Crowther** held that the fact that the engine had seized up after only three weeks was evidence that, at the time of the sale, the car was not reasonably fit for the purpose of being driven on the road. Therefore, the judge was entitled to conclude that the defendant was in breach of the implied condition under section 14 (1) of the English Sale of Goods Act 1893. Section 14(1) is in *pari materia* with section 15 (a) of Cap.318.

[55] Lord Denning MR distinguished **Bartlett** as follows:

> "Here we have a very different case. On the dealer's own evidence, a buyer could reasonably expect to get 100,000 miles life out of a Jaguar engine. Here the Jaguar had only done 80,000 miles. Yet it was in such bad condition that it was 'clapped out' and after some 2,300 miles it failed altogether. That is very different from a minor repair. The dealers themselves said that if they had known that the engine would blow up after 2,000 miles, they would not have sold it. The reason obviously was because it would not have been reasonably fit for the purpose". (Page 141 a-b).

[56] The learned Master of the Rolls added that:

> "The relevant time is the time of sale…. If the car does not go for a reasonable time but the engine breaks up within a short time, that is evidence which goes to show it was not reasonably fit for the purpose at the time it was sold. On the

> evidence in this case, the engine was liable to go at any time. It was 'nearing the point of failure', said the expert…The time interval was merely 'staving off the inevitable'. That shows that at the time of the sale it was not reasonably fit for the purpose of being driven on the road….the judge on the evidence was quite entitled to find there was a breach of s.14 (1) of the 1893 Act and I would therefore dismiss the appeal". (Page 149 c-d).

[57] The facts of the present case are that the car broke down completely, within 19 days of purchase, because of a faulty transmission. Both mechanics who dealt with the car agreed that the transmission could not be repaired; it had to be replaced. The cost of the replacement transmission was nearly a quarter of the purchase price paid for the vehicle. This was not a minor repair. The car was not in use for a reasonable time after purchase before the transmission gave out. The Court draws a reasonable inference that at the *punctum temporis* the vehicle's transmission was on the way out. It was purchased with a major latent defect and therefore unfit for the purpose for which it was bought.

Breach of Condition

[58] The Defendant was in breach of the conditions implied in the contract. And it was open to the Claimants to repudiate the contract and demand the return of the purchase price together with their incidental expenses. In this regard, section 12 (1) (a) of Cap.318 becomes relevant. This section allows the buyer

to either waive the condition, or treat the breach of the condition as a breach of warranty. (See para. [13] supra).

[59] Chitty on Contracts explains that waiver by election:

> "….is used to signify the "abandonment of a right which arises by virtue of a party making an election". **[Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corp of India [1990] 1 Lloyd's Rep.391, 398]**. Thus it arises when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them. Affirmation is an example of such a waiver, since the innocent party elects or chooses to exercise his right to treat the contract as continuing and thereby abandons his inconsistent right to treat the contract as repudiated. It is important to appreciate that, in this context, the party who makes the election only abandons his right to treat the contract as repudiated: he does not abandon his right to claim damages for the loss suffered as a result of the breach". (Vol.1, 30th ed, (2008) at para.24-007).

[60] The Court finds, based on the evidence presented, that the Claimants elected to treat the breach of condition as a breach of warranty, and agreed that the Defendant would replace the transmission. The evidence of the First Claimant is that:

> "It was agreed between my brother, me, Mr. Batson, [Mr. Bryant] and [the Defendant] that Mr. Batson would install the new transmission. The reason for the car being towed to Mr. Batson's garage was for Mr. Batson to put in the transmission. [Mr. Bryant] said he was not putting it in. I understood that the purpose of towing the car to

> Batson's garage was for the transmission to be installed".

[61] The First Claimant denied that there was any agreement with the Defendant for him to replace the transmission. He admitted that there was a discussion pertaining to the Defendant replacing the transmission. But he wishes the Court to believe that the negotiations broke down after Mr. Bryant declined to accept the job of installing the transmission. In his words:

> "The discussion was between myself, my brother and [the Defendant] about replacement of the transmission. After the discussion it was a very toucheous conversation. My brother and I agreed we were not paying for a transmission. It wasn't a full month since we had the vehicle. We had a conversation with Mr. Bryant to see if he would put in the transmission if we agreed to take the transmission….. Mr. Bryant said he did not want to put himself in a contentious thing. He didn't agree to do it. Our request for a refund came after the conversation with Mr. Bryant".

[62] Bryant's evidence did not assist the Court in determining the content of the conversation between the Claimants and the Defendant. All that he was able to tell the Court is that someone had a conversation with him about buying a new transmission, and that he could not replace the transmission.

[63] The vehicle was sold to two co-owners. And the Defendant was entitled to agree with either or both Claimants that he would replace the transmission. It is enough that one co-owner admits that such an arrangement was made with

the Defendant. By agreeing to accept a replacement transmission, the Claimants represented to the Defendant that they would not exercise their strict legal rights to treat the contract as repudiated. Their election was final with a permanent effect. (See Chitty supra para. [59] at para.24-008).

[64] The Defendant also alleges in his *viva voce* evidence that the Claimants not only accepted his proposal to replace the transmission, but that they also agreed to pay Batson for installing the transmission. There is no reference to this agreement to pay Batson in the Defendant's Witness Statement. All that he said there is that:

> "….I agreed with them that I would replace the transmission without any cost to them and I replaced the transmission at the cost of $4,200.00. A copy of the invoice is hereto attached and marked "JM-2" for identification." (Para.7 of Witness Statement filed on 20 October 2011).

[65] When counsel for the Defendant replied to counsel for the Claimants by letter dated 20 April 2009, he too only mentioned an agreement between the parties whereby the Defendant would replace the transmission at his expense. Again there is no reference to the Claimants paying whoever replaced the transmission.

[66] The Defendant said to the Court:

> "I agreed to replace the transmission and they would pay whoever put it in… The guy agreed with [Batson] that he would pay to get the

> transmission put in. [Batson] came over and spoke with the guy…. I told him that he and his brother had to work out with [Batson] about paying by instalments because I had already paid forty-two hundred dollars…I don't agree that neither of the [Claimants] agreed for Batson to install the transmission….All the arrangement was that I get the transmission, they pay [Batson]".

[67] As the individual who replaced the transmission, the Court looked to Batson's Witness Statement to see what he had to say about any agreement to replace the transmission, and about his payment for doing the work. His Witness Statement only mentions that the Defendant brought a replacement transmission to his garage. It says nothing about an agreement between the parties, farless how Batson was to be paid.

[68] Like the Defendant, Batson's oral evidence is where he alleges the extent of the agreement between the parties:

> "The Defendant said "Let we come to an agreement then". He would purchase a transmission, even though he doesn't have to, to get the matter resolved, and that the Claimants would have to pay to get it put in. The question was brought up who would work on the vehicle. The parties decided as I was the mechanic for both parties I would work on the vehicle and they would pay for labour….We did not discuss the cost of putting in the transmission. I spoke to the one at CBC and I told him what it would cost. I agreed to take $450.00 and that was cheap for a four wheel drive car. I did not issue them an invoice".

[64] The Second Claimant admitted at the trial that during the discussions on 01

April 2009:

> "[The Defendant] also said that if he replaces the transmission we would have to pay him for the transmission….He said something about not bearing the full burden of buying the transmission, and that we would have to pay to have it replaced. He said he wasn't taking the full burden because we damaged the transmission".

[70] The Second Claimant never accepted that any agreement was reached with the Defendant to replace the transmission. It was the First Claimant who admitted this. (See para.[60] supra). All that the First Claimant said in relation to paying to have the transmission installed was that "I did not hear [the Defendant] say that he would buy a transmission but that we would have to pay to install it".

[71] The Second Claimant heard the terms on which the Defendant was prepared to replace the transmission. Therefore, when (according to the First Claimant) they agreed to the Defendant's proposal to replace the transmission, the reasonable inference is that they also agreed to pay Batson to install the transmission. The First Claimant said that he understood that the vehicle was taken to Batson's garage to have the transmission replaced.

[72] There is no evidence that the parties agreed the source, age, manufacturer or model of the transmission to be provided by the Defendant. And there is no evidence that the transmission purchased by the Defendant was unsuitable for

the purpose. For all intents and purposes, the Defendant satisfied his part of the agreement. It was too late for the Claimants to repudiate the original contract, after one or both of them agreed to allow the Defendant to replace the transmission, and to pay to have it replaced; and on the faith of that agreement the Defendant provided another transmission.

Disposal

[73] Having treated the breach of the implied condition as a breach of warranty, the Claimants are not entitled to a refund of the purchase price or the additional expenses associated with their loan repayment. Neither are they entitled to damages for fraudulent misrepresentation nor conversion. However, the Claimants are responsible for paying Batson the $450 which he charged for replacing the transmission. Ownership of the vehicle remains with the Claimants.

[74] The claim against the Defendant is dismissed, and the Court will hear the parties on the matter of costs.

Sonia L. Richards
Judge of the High Court