

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 033 of 2007

BETWEEN : GENERAL MACHINERY HIRE LIMITED a limited liability Company
having its registered Office at Bouwalu Street, Lautoka in the Republic
of Fiji Islands

PLAINTIFF

AND : CARPENTERS FIJI LIMITED a limited liability Company having its
registered Office at Suva, Fiji

DEFENDANT

Appearances : Mr Mishra V for **Plaintiff**
Ms Narayan B for **Defendant**

Date of Hearing : 28th April 2014

Judgement

1. **Introduction**

In these proceedings the Plaintiff Company seeks the following reliefs against the defendant company

- a) An injunction restraining the Defendant from proceeding any further with the Winding Up proceedings against the Plaintiff.
- b) That the Defendant do pay the Plaintiff damages in the sum of \$67,721.25 and the price for the purchase of an alternative vehicle.
- c) Damages for breach of contract.
- d) General damages
- e) Damages at the rate of 10% per annum.
- f) Costs in this action

2. **The Statement of Claim**

- 2.1 The Statement of Claim states that the plaintiff is a limited liability company conducting transportation and other such business involving general and specialised machinery.
- 2.2 The Defendant supplied a Prime Mover Motor Vehicle Registration No. ET 640 to the Plaintiff for good consideration.

- 2.3 The Defendant was informed that the vehicle was being purchased for an existing transportation contract which the Plaintiff had entered into and that the vehicle was to be used for carting of heavy goods. The Defendant was aware that the plaintiff was relying on it for its expertise in vehicles and its suitability and fitness for certain work.
- 2.4 The defendant gave the Plaintiff a warranty for the said vehicle.
- 2.5 There were problems with the vehicle soon after it was sold to the Plaintiff within the warranty period and it was not able to perform the work that it was purchased for. Particulars are as follows:
 - a. Vehicle pulling to the left hand side.
 - b. Diesel leaking from injector pump.
 - c. Dash board meter not working.
 - d. Mal-function of high and low gearbox
 - e. Cab bushing and turn table play worn out or defective.
 - f. Right hand side door rubber defective
- 2.6 The Defendant's Lautoka Office was informed of this and agreed that there were defects with the machine and that it was not fit for the purpose of carting heavy goods.
- 2.7 The Plaintiff had emphasised that the vehicle was needed for an on going contract.
- 2.8 It took the Defendant over a year to carry out repairs and/or alterations despite numerous reminders. The plaintiff suffered losses of up to \$67,721.25 approximately up to September 2006 and had to purchase a re-placement vehicle.
- 2.9 The vehicle was given by the Defendant under a warranty and the Defendant breached its contract and its duty of good faith by supplying a defective machine and/or a machine which was not capable of carrying heavy goods.
- 2.10 Both the Plaintiff and the Defendant have made claims and there has been correspondence. The Plaintiff does not owe the defendant monies alleged and the Defendant is well aware of the dispute.
- 2.11
 - (a) The Defendant despite the dispute between the parties gave a notice under Section 221 of the Companies Act.
 - (b) The same is an abuse of process in the circumstances.
 - (c) The said notice is defective and cannot support a Winding Up Petition.
- 2.12 That any advertisement to winding up proceedings against the Plaintiff will be oppressive to the Plaintiff in any event as the Plaintiff does not owe any monies to the Defendant.
- 2.13 The Plaintiff claims special damages against the Defendant in the amount of \$67,721.25 plus the cost of the replacement vehicle it purchased.
- 2.14 The Plaintiff claims general damages against the Defendant.
- 2.15 The Plaintiff claims interest on damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.

3.0 Amended Statement of Defence and Counter Claim

- 3.1 The Defendant admits it supplied a Prime Motor Vehicle No ET 640 to the Plaintiff for good consideration.
- 3.2 The Defendant denies that it was informed of the purpose of purchasing the vehicle by the Plaintiff Company and states that it was a purely a commercial transaction and the Plaintiff was well aware or should have been aware of the risk involved in purchasing second hand vehicles.
- 3.3 The Defendant agrees that the vehicle had a 3 months or 6,000 km warranty in respect of the mechanical parts of the vehicle but all major repairs were outside of this time frame.
- 3.4 The defendant denies that there were major repairs to the vehicle as during the warranty, minor complaints were made in respect of the vehicle and this was promptly attended to by the Defendant.
- 3.5 The Defendant is not aware of its Lautoka Office being informed of the major repairs of the vehicle and that they agreed it was not fit for the purpose of carrying heaving goods.

It is also not aware that the Plaintiff had emphasized that the vehicle was needed for an on going project.

- 3.6 In reply to paragraph 8 (paragraph 2.8 hereof) the Defendant states that in good faith, the Defendant repaired the said vehicle in respect of general wear and tear without any charge after the warranty had lapsed. In relation to the other repairs, it was substantial and certain parts that needed to be replaced had to be obtained from overseas. As such delay as alleged by the Plaintiff was not deliberate on the Defendant's part as it was beyond the Defendants control.
- 3.7 In reply to paragraph 10 (2.10 hereof) Defendant states that there is no dispute because the vehicle has been repaired and the plaintiff has since collected it.
- 3.8 The Defendant states further that its counsel has withdrawn the section 221 notice on the 25th of May 2007 and as such the said Notice is no longer in issue.
- 3.9 In regard to the Winding Up proceedings the Defendant states that its justified in cases where the debt is not disputed.
- 3.10 The Defendant has denied that the Plaintiff is entitled to any damages, cost and interest as claimed in the Plaintiffs Statement of Claim.

3.11 The Counter Claim

The Defendant claims from the Plaintiff the sum of \$65,326.59 being moneys due and owing for goods sold and delivered by the Defendant to the Plaintiff for the period of march 2006 to April 2006 at the request of the Plaintiff and full particulars of which were well known to the Plaintiff. The Defendant also claims interest on the said sum and costs of this action.

- 3.12 Accordingly, the Defendant has prayed that the Plaintiffs claims be dismissed with cost of this action on a Solicitor – Client indemnity basis.

4.0 **The Reply to Amended Defence and Defence to Counter-claim.**

- 4.1 The plaintiff states that it relied on the Defendants expertise and experience in vehicles as a seller of different types of vehicles for different purposes and the Defendant assured the Plaintiff of its suitability and capability for carting heavy goods. That the Plaintiff purchased the same in reliance of the Defendants advice that the vehicle was capable of carting heavy goods and was in good condition and the Defendant knew it was purchased for an existing contract of the Plaintiff.
- 4.2 The vehicle gave problems within three weeks of delivery and well within the three months warranty period; in fact the Defendant gave the Plaintiff a defective vehicle which was not suitable for carting heavy goods.
- 4.3 There were complaints as to both major and minor repairs. The major repairs took many months to repair and the Plaintiff had to purchase another vehicle to carrying out its contract at considerable expense and inconvenience.
- 4.4 It denies repair to general wear and tear and existing of warranty. As to delay the Plaintiff offered to carry out repairs itself if the Defendant would pay for the parts under the warranty and it was estimated that repair with transportation of parts would take about a week and not a whole year.
- 4.5 The Plaintiff gave several reminders to the Defendant but the Defendant just seemed to ignore the Plaintiff and the difficulties it faced as a result of the Defendants conduct and/or delay.
- 4.6 The Plaintiff is owed money by the Defendant and not the other way around due to the matters referred to in its Statement of Claim. The Plaintiff admits that the Defendant withdrew its Section 221 Notice dated 2nd January 2007 on or about 25th may 2007. The Plaintiffs Solicitors had written to the Defendants Solicitors on or about 10th January 2007 disputing the debt stated in the Section 221 Notice and giving the Defendants Solicitors time to respond the Defendants Solicitors informed the plaintiffs Solicitors on or about 24th of January 2007 that the Defendant intend to proceed with the Winding Up petition. That there was a full hearing on the Plaintiffs application for injunction on 25th May 2007 at which time the Defendant withdrew its Section 221 Notice. The Plaintiff states that the Section 221 Notice was defective and invalid in any event, and that it has incurred substantial costs in defending against same. It also states that the debt is disputed and the Defendant had been aware of the same of all times.
- 4.7 The Plaintiff denies the Counter Claim and states it acknowledges demand for payment had been made.
- 4.8 The Plaintiff seeks that the amended Statement of Defence and Counter-claim be dismissed with costs on Solicitor-Client basis in favour of the Plaintiff.

5.0 **Admitted Facts and Documentary Evidence Adduced at the Hearing**

- 5.1 There are five admitted facts which are in the Pre-trial Conference minutes. They read as follows:
- a) *“The Plaintiff is a limited liability company conducting transportation and other business involving general and special machinery.*
 - b) *The Defendant sold and supplied a Prime Mover Vehicle registration No. ET 640 to the Plaintiff.*

- c) *The vehicle had a 3 months or 6000 k.m warranty.*
- d) *Certain repairs were carried out on the vehicle by the Defendant after being sold to the Plaintiff and the Plaintiff has collected the vehicle from the Defendant after such repairs.*
- e) *The Plaintiff had also maintained a trade account number 227 595 – OICM with the Defendant pursuant to which the Defendant had sold and delivered goods to the Plaintiff on credit”*

5.2 Certain affidavit if the Plaintiff and the Defendant which were filed in interlocutory proceedings for injunction were admitted as evidence by consent subject to cross examination.

5.3 For the Plaintiff the affidavits admitted as evidence were:

- a) Plaintiff's affidavit in reply to Defendant Supplementary affidavit of Alvin Kumar Singh sworn on 19th April 2007 and filed on 20th April 2007.
- b) Additional affidavit in support of Ex-parte Notice of Motion of Alvin Kumar Singh sworn and filed on 12th February 2007.
- c) Affidavit in reply of Alvin Kumar Singh sworn on 1st February 2010 file don 17th February 2010.

5.4 For the Defendants the Affidavits admitted as evidence were;

- a) Defendants supplementary affidavit of Prakash Narayan sworn on 20th March 2007; filed on 22nd March 2007.
- b) Affidavit in support of Prakash Narayan sworn on 9th November 2009; filed on 12th November 2009.

6. **The Issues**

The issues to be determined by this Court as per the Minutes of the Pre-Trial Conference are as follows:

- 6.1 Whether the Defendant was informed that the Plaintiff purchased the vehicle for an existing transportation contract and it was used for carting goods.
- 6.2 Whether the Defendant was aware that the Plaintiff was relying on it for its expertise and ability to recommend the suitability of the vehicle and its suitability and fitness for carting of heavy goods or whether the transaction for the sale of the vehicle was a purely commercial transaction and the Plaintiff was well aware or should have been aware of the risks involved in purchasing second hand vehicles.
- 6.3 Whether the vehicle faced problems and what repairs were done.
- 6.4 Whether the Defendant's Lautoka Office was informed and had agreed that there were defects in the vehicle within the warranty period as per the following particulars and that it was not fit for the purpose of carting heavy goods:

- a) Vehicle pulling to the left hand side
 - b) Diesel leaking from injector pump
 - c) Dash Board meter not working
 - d) Mal-function of high and low gearbox
 - e) Cab bushing and turn table play worn out or defective.
 - f) Right hand side door rubber defective.
- 6.5 Whether there were major problems with the vehicle within the 3 month warranty period or there were only minor problems which were promptly attended to by the Defendant and all major repairs were outside of this time frame.
- 6.6 Whether the Plaintiff had emphasised to the Defendant that the vehicle was needed for an on going contract.
- 6.7 Whether the Defendant took over a year to carry out repairs and/or alterations to the vehicle despite numerous reminders by the Plaintiff or whether the Defendant in good faith had repaired the vehicle in respect of general wear and tear without any charge after the warranty had lapsed and in relation to other repairs, they were substantial with certain parts that needed to be replaced had to be obtained from overseas and as such delay was not deliberate being beyond the Defendant's control.
- 6.8 Whether the Defendant breached its contract and its duty of good faith by supplying under a warranty a defective machine and/or a machine which was not capable of carrying heavy goods.
- 6.9 Whether the Plaintiff suffered losses of up to \$67,721.25 up to September 2006 and had to purchase a replacement vehicle and whether the Defendant is liable to the Plaintiff for special damages in the said sum and the cost of the replacement vehicle.
- 6.10 Whether the Plaintiff owes the Defendant the sum of \$65,326.59 for goods sold and delivered by the Defendant to the Plaintiff for the period of March 2006 to April 2006 at the request of the Defendant under trade account number 227 595-01CM.
- 6.11 Whether the Defendant has properly given a notice under Section 221 of the Companies Act or is the same an abuse of process.
- 6.12 Whether the Plaintiff or the Defendant is entitled to their respective claims made herein including, damages, interest and costs of this action.

7.0 The Issue Arising out of the Counter Claim of the Defendant and the Determination (Issue No. 10)

- 7.1 I will first deal with the issue 10 of the Minutes of Pre-Trial Conference (6.10 hereof) which relates to the Defendants Counter-claim against the plaintiff.
- 7.2 Though an issue is raised on the Counter-claim it was not opposed by the Plaintiff at the trial. The documents pertaining to the Counter-claim are produced in the Defendants bundle of document from item 6 to 124 and oral evidence was given on the said documents by Mr Prakash Narayan the Financial Controller of the Defendant.
- 7.3 Both Directors of the Plaintiff in their oral evidence adduced at the hearing confirmed that they did not deny the Defendants Counter-claim but disputed payment on the basis of their claim against the Defendant.

7.4 Hence I hold that the Defendant's Counter-claim against the Plaintiff has been established on the evidence adduced at the hearing.

8. **The Trial**

8.1 At the Trial the Plaintiff called two witnesses who were Directors of the Plaintiff. They were PW 1 Mr Alvin Kumar Singh and PW 2 Mr Ajnil Singh

8.2 The Defendant called three witnesses. They were:
DW 1 Mr Christopher Dennis Williams
DW 2 Mr Prakash Narayan
DW 3 Mr Ropate Koroninasu

9. **Evidence of the Plaintiff**

9.1 PW1, Alvin Kumar Singh in his evidence stated that he is a director of the Plaintiff company and handled the transaction of purchasing vehicle No ET640 with General Manager Ajay Lal of the Defendant Company. He also said in evidence it was purchased in April 2005 to work for Fiji Industries Cement Company to transport cement and that he spoke to a person from the Defendant Company about the use of the truck but he cannot recall the name. He also spoke to General Manager Ajay Lal regarding it.

9.2 The vehicle had a warranty period of six months. After two weeks of delivery the vehicle started giving problems. Gear box oil came out and lots of defects came up. He called Ajay Lal within three weeks and Ajay told him to send the vehicle to them. They fixed it and sent it back without doing major repairs to gear box and engine. It was sent back to them.

9.3 PW1 states further that he called Ajay lot of times, head of department called Carpenters and he went there several times but nothing was done to the vehicle. Then he wanted the money back. But Ajay said there were no trucks in stock and he will fix it without delay. It took 16 months and affected the contract as they had to buy another truck for \$50,000. PW1 referred to Exhibit – 1 to prove the income loss was due to the delay of repairing the vehicle and Exhibit 12 to prove that the company paid for a new truck.

9.4 PW1 refers to document No. 1 signed by R Sharma and stated that it was written to the Defendant on his direction and the response was document No 2 signed by Ajay Lal. The Defendant has asked for \$16,000 for tyres but the Plaintiff did not settle because they had to lease a new truck. Then the Defendant gave a winding up notice and the plaintiff got an injunction.

9.5 The defendant offered the Plaintiff to repair the vehicle but when the Plaintiff sent a quotation they did not agree. If they had parts in stock repair will take two days, otherwise for as 45 days.

9.6 Answering in cross examination PW1 states that he cannot recall whether he went to purchase the truck, he spoke to Ajay Lal and negotiated the prices. He stated further that he cannot recall clearly Arvind Prasad sold it, he is mentioning the name because it was mentioned in the letter. He does not go down to purchase the truck, it was at Suva. According to Defendants document No. 3 confirms it was sold by Jitend and the delivery date given is 1/7/2005. He admitted that there is no document to the effect that Defendant was advised about the Plaintiffs contract with Fiji's Industries.

- 9.7 In answer to whether the first repair was done in August 2005 witness said he can't recall. When Defendants Document No. 4 was shown he admitted it was the repair order 9/8/05 and it was within the warranty period. He admitted that the vehicle was repaired in July 2005 and given to the Plaintiff. He stated that when the vehicle came back they came to know it was not repaired therefore they sent it back to the Defendant and it was with them from April till 11 months.
- 9.8 In answer to cross examination PW 1 said that a brand new Primer Mover at that time was around \$200,000 but they purchased a second hand re-conditioned Japanese one. When questioned by purchasing it for haulage whether they had a risk, PW 1 said they had around 5 other trucks and there were no problems. He also said that they took a mechanic but cannot test a truck without a load on the trailer.
- 9.9 When it was suggested to PW 1 that they bought another truck in October 2005 not because of the defective truck but as it was needed for Plaintiffs business PW1 stated it had to be purchased due to the Defendants not supplying parts for the defective truck.
- 9.10 When questioned whether the Plaintiff has any documents on the losses claimed PW 1 referred to letter sent to Ajay Lal (P1) and if the defendant wished they could have provided.
- 9.11 In re-examination PW 1 said that D125 refers to injector, the types of things which were wrong and at the first repair 1st and that the Defendants did not attend to the said repairs.
- 9.12 When questioned whether they told the defendant the purpose they need the vehicle PW 1 said he told Jitend and that Jitend comes to his office.

PW 2

- 9.13 The second witness called by the Plaintiff PW 2 was Mr Ajnil Singh a director of the Plaintiff company. In his evidence he stated that they use trucks to deliver to customers of Fiji Industries and that the purchase of ET 640 was handles by PW 1. He also sated the mechanic who went to inspect the truck has gone abroad.
- 9.14 He said that when they purchased the truck and put it to use there were minor repairs and the Defendants did a quick fix. When they took it back there were problems again. Major one was transmission. The Defendant asked the Plaintiff to repair it and that they will pay.
- 9.15 When asked how long was the truck with the Defendant he said more than a year and later he said 9 months.
- 9.16 When PW 2 was shown P8 he admitted that he signed it and when he took it to Carpenters they accepted it.
- 9.17 When P12 was shown to him he stated that it's the purchase price of the other truck and they purchased as they needed it for the Contract.
- 9.18 In answer to cross examination PW 2 stated that he did not go to purchase the vehicle.
- 9.19 When questioned whether he could recall the period of returning the vehicle PW2 stated that he think it was August 2005 and kept by the Defendant till September 2006.
- 9.20 When PW 2 was shown D4 he agreed that it was the 1st repair order. When D125 was

referred to him as repair order dated 17/7/2006 he admitted it but denied that it was not the 2nd time the vehicle was brought outside the warranty. He stated that it was the date the repairs were over.

- 9.21 When questioned as to whether they wrote a stern letter to the Defendant regarding the delay of repairing he stated he is not sure.
- 9.22 He also admitted that there is no date or a address in P8. He further stated that it is meant to Carpenters and it was signed by him. When he was questioned whether he could recall to whom it was written he said "may be to solicitors"
- 9.23 He admitted that in the statement of claim it is stated the vehicle was with carpenters for one year though he said it was 9 months. When questioned which is correct PW 2 stated "more than a year"
- 9.24 In answer to the question as to why the Plaintiff got an old truck for heavy carting PW 2 stated because they cannot afford a new one which costs \$350,000.00.

10. **Evidence of the Defendant**

- 10.1 Mr D.W. Williams, the Workshop Supervisor of the Defendant was called as DW 1.
- 10.2 In his evidence he stated that he is currently the workshop Supervisor of heavy commercial trucks doing day to day heavy mechanical repairs and taking care of customer needs.
- 10.3 DW 1 was shown Defendants repair order dated 9.8.2005 and the Defendants counsel requested him to explain the repairs mentioned in it.
- 10.4 DW 1 stated that the said repair order is for replacement of crank shaft, removal of gear box, clutch plate, pressure plate and flywheel.
- 10.5 When Defendants document No.12 was referred to him and requested to explain the nature of repair he stated that its to replace the king pin and it's a major repair. He also stated that other repairs mentioned in the said order such as head lamp replacement are minor repairs. When questioned further on the two repair orders DW 1 stated that the 1st repair order was in August 2005 and this one was in 17.7.2006 and the repairs are due to normal wear and tear as these trucks carry heavy loads. When asked whether the vehicle was in running condition he said he believed so because in the first repair order mileage is given as 423263 km and on the 2nd repair order it is 428213 km.
- 10.6 In answer to cross examination DW 1 admitted the 1st document KM reading is 423263, second one is 428213 and the difference is 5000 km.
- 10.7 He admitted that the non warranty endorsement in the 1st repair order was wrong and it was within 3 months from the date of delivery of the vehicle.
- 10.8 He admitted that after the repairs are done the person getting the vehicle acknowledges its in good condition by signing a delivery note and that he does not have such a delivery note. He also stated that there is a possibility of the vehicle being not returned as there is no delivery note. In answering further he stated that former supervisor was Waheed and he did not personally inspect or see the vehicle.
- 10.9 In answer to re-examination DW1 stated that his evidence is limited to repair orders and that he did not know what Ajay Lal did. He stated further that by looking at 1st

repair order and the second repair order km cannot increase if the vehicle did not run within that period and that second repair order D125 is not within the 3 months warranty.

- 10.10 Defendants called Mr Prakash Narayan, the Financial Controller of Carpenters as its second witness (DW 2).
- 10.11 In evidence Mr Narayan stated that invoice is generated when the job is completed. He admitted that the job was completed on the 1st repair.
- 10.12 When referred to 2nd repair order D125 dated 17/7/2006 DW 2 stated that he is familiar with what happened and that repair was done outside warranty. Answering further DW2 stated that the 2nd repair order was done at Managers discretion and that its not unusual as there were good will accounts with the Defendants company.
- 10.13 In answering as to whether the vehicle was with Carpenters from the 1st repair order till the 2nd repair order DW2 has stated that it was given back after the 1st repair but he doesn't know when.
- 10.14 Answering in cross examination DW 2 stated that he doesn't know when the parts were imported and he doesn't have the orders placed to import parts.
- 10.15 He admitted the non warranty endorsement on the 1st repair order was wrong as it is within 3 months.
- 10.16 The Branch Manager of Carpenters, Lautoka DW3 was called as the 3rd witness of the Defendant.
- 10.17 In his evidence DW 3 stated that he was with the Defendant company earlier in 1995 till 2004 and joined again in 2012 as Team Leader and then Branch manager. He also stated that he was earlier dealing with sedan cars and from 2012 in heavy vehicles. When questioned as to whether he would advice to customers when they need a vehicle for a particular purpose he stated that they don't really chose for them, they only show the vehicles for the customers to choose.
- 10.18 In answer to cross examination he admitted that usually customer signs the delivery document when the repairs are complete and that was Carpenters practice before and even till now.

11. Analysis and Determination

- 11.1 I will first deal with the issues 1 and 6 (6.1 and 6.6 hereof) which are related to each other. That is to determine "*whether the Defendant was informed that the Plaintiff purchased the vehicle for an existing transportation contract and it will be used for carting goods and weather the Plaintiff had emphasised to the Defendant that the vehicle was needed for our on-going contract.*"
- 11.2 In its statement of claim the Plaintiff has not pleaded to whom in particular in the Defendant company did the Plaintiff inform that its purchasing the Prime Mover for the use of a particular purpose.
- 11.3 In his evidence in chief PW1 Alvin Singh stated that he informed about the use of the truck to the Defendant but he can't recall the name. He also says that he spoke to Ajay Lal too.

- 11.4 In answer to cross examination PW1 stated that he cannot recall whether he went to Carpenters to purchase the truck. When questioned whether he could recall who sold the truck PW 1 stated that he has brought number of trucks and he spoke to Ajay to negotiate the prices . He also stated that he cannot recall clearly whether Arvind Prasad sold it.
- 11.5 Furthermore, PW1 stated that the truck was in Suva and he did not go to purchase it.
- 11.6 He admitted that there is no document to the effect that the Defendant was informed about the use of the prime Mover for a contract with Fiji Industries contract. PW 1 merely states that the Defendant knew about the contract. In answer to re examination PW1stated that the purpose the Plaintiff needed the vehicle was told to Jitend and he comes to his office.
- 11.7 Though PW 1 in re-examination stated that he told Jitend of the purpose the plaintiff needed the vehicle, initially he stated that the transaction was handled by Arvind Prasad whose name appear in Plaintiffs document No. 2. After seeing Mr Jitends name on the invoice in cross examination PW 1 changed his initial statements whereby he claimed that Mr Jitend who sold the vehicle and not Arvind Prasad.
- 11.8 Ajnil Singh, PW 2, in answer to cross examination stated that PW 1 purchased the truck and he did not go to Carpenters to purchase it.
- 11.9 In considering the evidence of PW 1 and PW 2 as above, I am of the view that they did not give evidence from their personal knowledge or had personally dealt with the purchase of the vehicle. Therefore their evidence cannot be considered as credible evidence to prove on a balance of probabilities that the Defendant was informed or emphasised that the vehicle was needed for an on-going contract.

12. **Issue No. 2**

- 12.1 I will now get onto the next issue to be determined on the evidence adduced at the trial. Issue 2 is as follows:- *whether the defendant was aware that the Plaintiff was relying on it for its expertise and ability to recommend the suitability of the vehicle and its suitability and fitness for carting of heavy goods or whether the transaction for the sale of the vehicle was purely commercial transaction and the plaintiff was well aware or should have been aware of the risks involved in purchasing second hand vehicles.*
- 12.2 No evidence was adduced by the plaintiff at the trial to prove that the Defendant company had in fact given expert advice of the suitability of the truck for carting heavy goods. Even if I assume that the Defendant had given such advice to the Plaintiff it is difficult believe that they will solely depend on such advice being an established Company conducting transportation and other such business involving general machinery for some time. The evidence of the Plaintiff reveal that they are in transportation business for some time and they were also in possession of some other trucks, which means they had the expertise/skill to determine which vehicle is suitable for them.
- 12.3 In answer to cross examination PW 1 stated that a brand new Prime Mover would have cost around \$200,000 at the time and that they purchased a second hand reconditioned Japanese one. In answer to cross examination PW 2 stated that they got an old truck as they could not afford a new one which costs \$350,000.00.
- 12.4 In my view any objective assessment will clearly show that the plaintiff having chosen

to purchase and use a second hand Prime Mover which had done 423263 km and costs only \$60,000.00 as opposed to a brand new one which costs around \$350,000.00 for heavy carting of cement over a period of time has taken the risk of the wear and tear of such a vehicle and that there is no necessity for the Plaintiff to rely on any expert advice to determine the suitability of such a vehicle.

- 12.5 Furthermore, by accepting a warranty of 3 months or 6000 km for the truck which in my view is a very limited warranty, it is evident that the Plaintiff has willingly undertaken the risk of purchasing a used heavy vehicle.
 - 12.6 As discussed above, I hold that the plaintiff has failed to prove on a balance of probabilities that the Plaintiff relied on defendants expertise and ability to recommend the suitability of the vehicle. Further, that the plaintiff was well aware or should have been aware of the risks involved in purchasing second hand vehicle which has done a substantial millage of 423263 km.
 - 12.7 The Plaintiff has referred to **Section 16 (3) of the Sale of Good Act, Cap 130** of the Laws of Fiji in its written submission. Section 16(3) makes provision that where a buyer makes the purpose for which goods are bought known to the seller there is an implied condition that the goods are reasonably fit for that purpose.
 - 12.8 The exception to the above section provides where the circumstances show that the buyer does not rely or that it is unreasonable for him to rely on the sellers skill or judgement the implied condition will not apply.
 - 12.9 As I have already held that the Plaintiff has failed to establish that the Defendant was informed of the purpose of purchasing the vehicle or the Plaintiff had emphasised to the Defendant that the vehicle was needed for an on-going contract I do not find that the Defendant has breached the implied condition provided by Section 16(3) of the Sale of Goods Act.
 - 12.10 Furthermore, as discussed in the above paragraphs plaintiff has purchased a re-conditioned vehicle which has done over 400 000 km for carting of heavy loads of cement. They have accepted a warranty of 3 months or 6000 km for the vehicle which appears to be a limited warranty. By purchasing a re-conditional Prime Mover which had done a substantial mileage for a lesser price and a limited warranty it is unreasonable for the Plaintiff to rely on the seller's skill or judgement of its suitability for the alleged haulage contract. I am of the view that the Plaintiff being a company engaged in transporting goods for sometime and possessing other trucks had knowingly taken the risk of buying a re-conditioned vehicle.
 - 12.11 As such I find that the exception provided under section 16(3) of the Sale of Goods Act would be applicable to the circumstances of this case.
13. **Issue No. 3 and 5**
- 13.1 *I will now deal with issue No. 3 and 5 which relates to the repairs done to the vehicle.*
 - 13.2 It is appropriate at this point for me to decide whether Mr Christopher Dennis Williams, Defendants witness No 1 (DW 1) is an expert witness or not as Mr Mishra for the Plaintiff objected to his evidence being led on the ground that he is an expert witness. He contended that DW 1 had no direct actual knowledge of the events and repairs which had occurred and that he is trying to express his opinion on the repairs done as an expert. Mr Mishra submitted further that if such evidence is to be adduced witness was obliged to give a copy of his expertise opinion in a report so that the plaintiff could

prepare and get another expert to look at it. He quoted **G.P. Reddy & Company Limited – V- New India Assurance Company Limited Lautoka High Court Action No HBC 48 of 2008** in support of his argument and sought an order from Court which the court reserved to incorporate in the Judgement it self.

13.3 Ms Narayan for the Defendant submitted that the witness was called only to explain what repairs were done by looking at documents.

13.4 DW 1 stated in evidence that he is currently workshop supervisor of heavy commercial trucks. He explained the nature of the repairs by looking at the two repair orders. In my view he did not express any views or an opinion beyond what was in the repair orders and his evidence was nothing more than explaining what those repairs were. Any mechanic or vehicle owner with basic knowledge of Motor Vehicles would be able to explain the nature of the repairs that are described in the said repair orders by perusing them. Therefore, I hold that evidence of DW 1 cannot be considered as evidence of an expert witness.

14. **Analysis of Evidence in Regards to the Repairs carried out to the Vehicle**

14.1 Plaintiffs witness No. 1 Mr Alvin Singh admitted in answer to cross examination that the first repair order dated 9/8/05 was within the warranty period. According to the invoice D5 the cost of the repair is \$556.89.

14.2 When asked from PW 1 whether the repairs were carried out according to the order witness stated that if it was done they would not have sent it back for repairs. When questioned on the repair cost of \$556.89 he stated that it was only for sealing done to the crankshaft and not for replacing parts.

14.3 In evidence in chief PW 2 Mr Ajnil Singh stated that when the truck was put to use there were minor repairs and the defendant did a quick fix. He stated further that when they took the vehicle back to the Defendant there were major problems, one was transmission and it was found out that they had to take gear box out and replace parts.

14.4 Mr Christopher Dennis Williams the workshop supervisor of the Defendant DW 1 was shown invoice D5 and repair order D125 in examination in chief.

14.5 He stated that the two repair orders would be due to normal wear and tear as the trucks carry heavy loads and this truck was a used one before purchased in Fiji. Looking at the 2nd repair order he stated that replacing King Pin is a major repair and other repairs such as head lamp replacement etc; were minor repairs.

14.6 In analysing the evidence of both parties I find that the 1st repair order which is within the warranty period is only for a minor repair on the vehicle. Though the PW1 stated that the defendant was to do repairs to gear box and engine repair order D4 does not mention such a repair to be carried out. It is evident from D4 that the gear box, clutch plate, fly wheel and crankshaft were removed to replace the crank shaft seal.

14.7 In examination in chief PW 2 stated that when the vehicle was put to use there were minor repairs and the Defendant did a quick fix. He also stated that when they took it back there were major problems, one was transmission and it was found out they had to take gear box out and put parts.

14.8 In considering the evidence adduced as discussed above it is proved on balance of probabilities that the 1st repair to the vehicle was a minor repair done within the warranty period and that the Plaintiff has to taken the vehicle after it was attended to in

a short period. It is also proved that the second repair which was outside the warranty period was for major problems of the vehicle.

15. **Let me now consider the evidence adduced in relation to issue No. 4**

15.1 *Issue No. 4 is whether the Defendant Lautoka office was informed and had agreed that there were defects in the vehicle within the warranty period as per the particulars a to f stated on paragraph 5 of the statement of claim and that it was not fit for the purpose of carting heavy goods.*

15.2 Particulars of defects stated are:

- a) Vehicle pulling to the left hand side
- b) Diesel leaking from injection pump
- c) Dash board meter not working
- d) Mal-function of high and low gear box
- e) Cab bushing and turn table play worn out or defective
- f) Right hand side door rubber defective

15.3 The plaintiff has not disclosed in its statement of claim as to who in Lautoka office it informed that there were defects in the vehicle as particularised above. No evidence was adduced at the trial by the Plaintiff to establish this allegation. The two repair orders D4 and D125 does not contain majority of the alleged defects. Therefore, I hold that the Plaintiff has failed to prove on a balance of probabilities that it had informed the defendants of the defects as alleged in paragraph 6 of its statement of claim.

16. **Issue No. 7**

16.1 Next I will deal with issue No 7, *“Whether the defendant took over a year to carry out the repairs and/or alterations or whether the Defendant in good faith had repaired the vehicle in respect of general wear and tear without any charge after the warranty lapsed and in relation to other repairs, they were substantial with certain parts that needed to be replaced had to be obtained from overseas and as such delay was not deliberate being beyond the Defendants control”*

16.2 PW 1 Alvin Singh in answer to cross examination admitted that the vehicle was repaired in July 2005 and given to them. He stated further that when the truck was driven they came to know it has not been repaired and then they sent it back to the Defendant may be the next day and the truck was with the Defendant from April till 11 months. When it was suggested to PW1 that it was in July 2006 he gave the truck for repairs again PW1 stated “That’s when they got their parts. It was parked at Carpenters”

16.3 PW2 Mr Ajnil Singh in answer to cross examination stated he think that the vehicle was returned to the Defendant in 2005 August and from August till September 2006 it was with the Defendant. When asked again whether it was with them he stated he thought it was kept by the Defendant.

16.4 When the 2nd repair order dated 17/7/2006 was shown to PW2 and asked that was when vehicle was brought for 2nd time outside warranty he stated that it was the date repairs were over.

16.5 When asked whether he wrote a stern letter to the Defendant PW2 stated that he is not sure.

16.6 In answering further he confirmed the vehicle was with the Defendant for 9 months. When paragraph 8 of the statement of claim was referred to him he admitted that it

states the vehicle was kept for 1 year. When asked which is correct 9 months or one year he stated it was more than a year.

- 16.7 In answer to evidence on Chief PW1 stated that he called Ajay lots of times, Head of Department called and that he went to the Defendants premises but nothing happened, the vehicle was parked. Though PW1 says he called the General Manager of the Defendant several times they have not sent any warning letters to the Defendant about their income loss as a result of the alleged delay. It is difficult to believe that the Plaintiff who now claims damages for not having the vehicle was only calling the Defendant on the delay without writing to them.
- 16.8 In analysing the evidence of PW1 and PW2 I find that they could not say with certainty as to which date the vehicle was handed back to the Defendant after the 1st repair and as to which period the vehicle was actually in possession of the Defendant. Furthermore, PW2 stated in evidence that he cannot recall writing a stern letter about the delay in repairing the vehicle. No documentary evidence was provided by the Plaintiff to prove that they reminded of the delay to the Defendant, other than P1 written on 20th September 2006.
- 16.9 Next I will consider the evidence adduced by the Defendant on this issue.
- 16.10 When DW 1 Mr Christopher Dennis Williams was giving evidence he stated that he believed the vehicle was in running condition between the two repair orders. When asked how did he say that DW1 stated the miles have changed in repair order 1st 423263 km to 428213. In answer to cross examination he stated the difference is 5000 km.
- 16.11 DW 1 admitted that after repairs are done the person getting the vehicle acknowledges that its in good condition. He stated further that he doesn't have such a delivery document after repairs were done under repair order D125.
- 16.12 When suggested by the Plaintiffs counsel that the delivery documents are not available either because the vehicle was not delivered, DW1 stated that there is a possibility.
- 16.13 He admitted in answer to cross examination that the customers signs delivery document when the repairs are complete and it was the practice of Carpenters before and even now.
- 16.14 Mr Prakash Narayan DW2 stated in evidence in chief that the 1st repair was carried out and the vehicle was delivered but he doesn't know the date. Under re-examination he stated that invoice D5 and D126 are issued when the jobs were completed.
- 16.15 In analysing evidence of both parties above, I find that Plaintiffs contention that the vehicle was in possession of the Defendant for one year between the 1st repair order and the second repair order is negated by the fact that the 1st repair order date 9/8/05 (D4) shows the vehicle has done 423263 km and in the second repair order dated 17/7/06 (D125) it is shown that the vehicle had done 428713 km a difference of 5450 km. If the vehicle was parked at the Defendants premises after repair in August 2005 till the date of the 2nd repair order it would not have done 5450 km.
- 16.16 Although DW1 and DW3 stated in cross examination that a customer has to sign a delivery note after repairs are done to a vehicle and that they are not producing such a delivery note, on the evidence adduced and analysed as above I hold that the Plaintiff has failed to prove on balance of probabilities the fact that the vehicle was with the defendant from July 2005 to 2nd repair order dated 17.7.06.

- 16.17 Even the letter dated 20/9/2006 by the Plaintiffs senior accountant does not support the contention that the Defendant delayed the repair by one year. It only speaks of an income loss from the vehicle for 9 months without mentioning a specific period.
- 16.18 Therefore, I accept the Defendants evidence that the vehicle was given for 1st repair in August 2005 and as per invoice D5 it was done on 24/8/05 and handed over to the Plaintiff. I also accept that the Plaintiff has handed over the vehicle on 17.7.2006 for the second repair according to repair order D125 and that it was completed within 2 months according to invoice D126.
- 16.19 When D125 was referred to DW2 he stated it was outside warranty and in such instances it was Managers discretion to get the repair done at the Defendants expense as there are goodwill account holders with the Defendant. He stated that the Plaintiff were customers of the Defendant for a while. In document P1/D126 the Plaintiffs Senior Accountant Mr Ravin Deo Sharma speaks of the long standing relationship between the Plaintiff and the Defendant. In response Mr Ajay Lals letter dated 22nd September 2006 P2 speaks of the repairs being done in good faith to assist in repairs that pertained to wear and tear”
- 16.20 It is evident from repair order D125 and invoice D126 that the repair was done within a period of 2 months 17.07.2006 to 20.09.2006. In P2 General Manager of the Defendant has stated that they had to procure certain components from abroad for this repair.
- 16.21 On the evidence before me as discussed above I find that the defendant has in good faith repaired the vehicle in respect of general wear and tear without charging the Plaintiff after the warranty period. I also accept the Defendants contention that the repair was substantial and the delay of 2 months was not deliberate as they had to get certain parts from overseas.
17. ***Next issue to be decided in this matter is whether the Defendant breached its contract and its duty of good faith by supplying under a warranty a defective machine and/or a machine which was not capable of carrying heavy goods. [Issue No. 8]***
- 17.1 Though the Plaintiff is seeking damages for breach of contract it has not pleaded the existence of any contract between the Plaintiff and the Defendant. The Defendant has not breached the conditions of the warranty as determined herein before. 1st repair has been done within the warranty period and the second repair outside the warranty period. The Defendant has gone to the extent of not charging the Plaintiff for the second repair due to the goodwill that prevailed between them. It transpired in evidence that the vehicle has been handed over to the Plaintiff in 2006 after the 2nd repair and there is no issue as to its use by the Plaintiff thereafter. The Plaintiff has not even called an engineer or a mechanic to give evidence to prove that the vehicle was defective and not capable of carrying heavy goods. Therefore, I hold that the Plaintiffs allegation of the Defendant supplying a defective machine and/or a machine which was not capable of carrying heavy goods is not proved on credible evidence. Therefore defendant is not in breach of any contract and its duty of good faith.
18. ***I will now consider whether the Plaintiff suffered losses of up to \$67721.25 up to September 2006 and had to purchase a replacement vehicle and whether the Defendant is liable to the Plaintiff for special Damages on the said sum (issue No. 9)***
- 18.1 I have already dealt with the previous issues and determined that the vehicle was not with the Defendant from August 2005 to September 2006 as alleged by the plaintiff. Therefore, I cannot accept the Plaintiffs contention that it purchased another truck due

to delay in repairing the vehicle though it was revealed in evidence that the Plaintiff has in fact purchased another truck.

18.2 Furthermore, it is evident from Documents P10 to P15 of the Plaintiff bundle of documents that the Plaintiff has purchased the re-placement vehicle just 3 months after purchasing vehicle ET 640 on 1st July 2005. Therefore the Plaintiffs claim that it had to purchase a re-placement vehicle due to the Defendants delay of one year to repair the truck cannot be accepted.

18.3 I will also not consider the Plaintiffs claim for special damages on the alleged losses due to the Defendant taking over a year to carry out repairs as I have already determined that the Defendant did not take one year to do the repairs.

19. ***Issue No. 11 to be determined is whether the Defendant has properly given a notice under Section 221 of the Companies Act or is the same an abuse of process.***

19.1 The Winding Up Notice issued by the Defendant related to the debt by the Plaintiff under a Trade Account. The Plaintiff has not denied the debt owed under the Trade Account.

19.2 If transpired in evidence that the Plaintiff raised the issue of their vehicle repair in September 2006 when they received a call from the Defendants that their vehicle had been repaired and was ready for delivery but the release of the truck was subject to the payment of debt owed to the Defendant under the Trade Account.

19.3 The Plaintiff had failed to prove its claim against the Defendant as determined herein and therefore I hold that the Defendant was entitled to give a Notice under Section 221 of the Companies Act

19.4 Though it is wrongly mentioned in the said notice that the monies due on a purchase of a truck in addition to equipment, the amount due was admitted by the plaintiff to be correct. The Plaintiff knew for what items the money was due. Therefore I find that the said Notice is not defective and that the Defendant has not abused the process in issuing the said Notice.

20. ***I have now come to the final issue to be determined whether the Plaintiff or the Defendant is entitled to their respective claims made herein including damages, interest and cost of this action. (Issue No. 12)***

20.1 Considering my findings and determinations as above, I conclude that the Plaintiff is not entitled to any of its claims.

I hold that the Defendant is entitled to Judgement being entered on its counter claim of \$65,326.59 payable by the Plaintiff, to the Defendant.

20.2 The Defendant claims interest on the said sum and cost of this action. In the exercise of my discretion under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27, I award interest at the rate of 3% per annum on the sum of \$65,326.59 from the date of writ till the date of judgement.

21. **Orders**

I hold as follows:

- (i) The Plaintiffs claim for damages in the sum of \$67,721.25 and the price for purchase of an alternative vehicle declined.
- (ii) The Damages of breach of contract refused.
- (iii) Claim for General Damages refused.
- (iv) The Plaintiffs claim for interest and costs refused.
- v) The Defendant is entitled to counter claim and interest.
- vi) The Plaintiff to pay the Defendant a sum of \$65,326.59 together with interest at the rate of 3% per annum on that sum from date of writ 6th February 2007 till date of this Judgement.
- vii) The Plaintiff shall pay to the Defendant costs summarily assessed in a sum of \$3,500.00



Lal S. Abeygunaratne
Judge
05/09/2014

