In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No 131 and 2010: No 130

BETWEEN:-

SOMERS KENNETH TUZO

Plaintiff

-v-

EUROCAR SERVICE LTD

Defendant (2009: No 131)

AND

EUROCAR LTD

Defendant (2010: No 130)

JUDGMENT

(In Court)

Date of hearing: 29th and 30th October 2012, 6th and 7th December 2012
Date of judgment: 17th January 2013

Mrs Lauren Sadler-Best, Trott & Duncan, for the Plaintiff
Mr Sean Crockwell, MJM Limited, for the Defendants

Overview

1. As this is quite a long judgment, it may assist the reader if I set out the different sections in a table of contents in which I include the amounts of damages that I have awarded. Both the claims and the counterclaim were successful in part. References in brackets are to paragraph numbers.

(d) There was a breach of condition with respect to the transmission (160 – 162)

(e) There was no breach with respect to the miscellaneous faults (163)

(f) Mr Tuzo's purported exercise of his right of rejection was not effective (164 – 167)

(g) Mr Tuzo can recover damages for breach of the sales contract

(i) Loss of use of motor vehicle. Damages assessed at $10,975.00 (173 – 184)

(ii) Cost of repairs. Damages assessed at $3,573.56 (185)

(iii) Summary. Total damages assessed at $14,548.56 (186)

(8) Finding on breach of service contracts (187 – 196)

(a) There was no breach of an express term of either service contract (187 – 188)

(b) There was no breach of the implied term of the first service contract, but there was a breach of the implied term of the second service contract, that the repairs would be carried out within a reasonable time. Damages assessed at $7,625.00. But they are co-extensive with the damages for same period awarded against the Sales Company: damages for this period cannot be recovered twice (189 – 196)

(9) Findings on counterclaim (197 – 204)

(a) The Service Company can recover the cost of repairs to the vehicle. Damages assessed at 10,336.47 (197 – 198)

(b) The Service Company can recover the cost of repairs to the loaner vehicle. Damages assessed at $260.00 (199)

(c) The Service Company cannot recover the cost of storage of the vehicle (200 – 203)

(d) Summary. Total damages assessed at 10,596.47 (204)

(10) Interest (205 – 206)

(11) Summary. Damages recoverable by Mr Tuzo against Eurocar exceed damages recoverable by Eurocar against Mr Tuzo by $3,592.09 (207 – 209).

2. In this judgment I shall refer to:

   (1) The Renault Espace motor vehicle, registration T164, as "the vehicle";

   (2) The Plaintiff, Somers Kenneth Tuzo, as "Mr Tuzo";

   (3) The Defendant in No 131 of 2009, Eurocar Service Ltd, as "the Service Company";

   (4) The Defendant in No 130 of 2010, Eurocar Ltd, as "the Sales Company"; and

   (5) The Defendants collectively as "Eurocar".

Introduction

3. This is a case about a Renault Espace motor vehicle, registration T164. The letter "T" at the start of the registration mark indicates that the vehicle is a taxi.

4. Mr Tuzo, is a taxi driver.

5. The Service Company services and repairs motor cars by way of business.

6. The Sales Company sells motor cars by way of business and is an authorised dealer for the car maker Renault.

7. Eurocar operate from garage premises at 4 Woodlands Road North in Pembroke ("the Garage").

8. Mr Tuzo bought the vehicle from the Sales Company. He claims that in breach of the implied terms of the contract of sale it was not of satisfactory quality nor fit for the particular purpose for which it was bought. He submits that these implied terms were conditions and not merely warranties, and that as they were breached he was entitled to reject the vehicle. He claims repayment of the purchase price plus damages for additional loss.

9. Mr Tuzo used to take the vehicle to the Service Company to be repaired. He claims that on two such occasions the company expressly agreed to repair the vehicle within a specified period, but that on both occasions, in breach of contract, it failed to do so. Further or alternatively, he claims that on both occasions, in breach of an implied contractual term, it failed to repair the vehicle within a reasonable time. He claims damages for breach of contract.

10. Eurocar disputes these claims. Moreover, the Service Company counterclaims damages for the cost of repairs done to the vehicle, and to a replacement vehicle (or "loaner" car) which they supplied to Mr Tuzo on a temporary basis, and for storage charges for the vehicle.

11. I gave been greatly assisted by the able representation provided by Lauren Sadler-Best ("Ms Sadler-Best") for Mr Tuzo and Sean Crockwell ("Mr Crockwell") for Eurocar.

Breach of contract of sale

12. On 10th February 2006 Mr Tuzo purchased the vehicle from the Sales Company. The company had advertised the vehicle as suitable for use as a taxi and, it is common ground, knew that Mr Tuzo was buying it for this purpose. At the same time, Mr Tuzo purchased from the company the registration plates for the vehicle, a dispatch radio, and a global positioning system. He also purchased a yellow roof light marked "taxi". The overall price was $43,034.99, of which $37,500.00 was the price of the vehicle and the remainder was the price of the additional items.

13. These items were all installed in the vehicle by the Sales Company. This was because their after-sales manager told Mr Tuzo that if Mr Tuzo had his mechanic install them the warranty covering the vehicle would not be honoured. The company added some additional wiring when the roof light was fitted.

14. It is therefore not disputed that, when Mr Tuzo purchased the vehicle, the Sales Company was well aware that he intended to use it as a taxi.

15. The contract for sale of the vehicle was subject to the implied undertakings as to quality or fitness contained in section 14 of the Sale of Goods Act 1978 ("the 1978 Act"):

"*(1) Except as provided by this section and section 15, and subject to the provisions of any other Act, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.*

(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods−

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied;

(b) appearance and finish;

(c) freedom from minor defects

(d) safety; and

(e) durability.

(2C) The term implied by subsection (2) does not extend to any matter making the quality of goods unsatisfactory−

(a) which is specifically drawn to the buyer's attention before the contract is made;

(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal; or

(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

(3) Where the seller sells goods in the course of a business and the buyer expressly or by implication makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment."

16. Section 15A of the 1978 Act provides for the modification of remedies for breach of condition in non-consumer cases. This was not a consumer contract as defined in section 1 of the 1978 Act as both parties were dealing in the course of a business.

"*(1) Where in the case of a contract of sale−*

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15; but

(b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the contract of sale is not a consumer contract, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the seller to show that a breach fell within subsection (1)(b)."

17. Section 35 of the 1978 Act is also relevant. Insofar as material, it provides:

"*(1) Subject to subsection (2), the buyer is deemed to have accepted the goods−*

(a) when he intimates to the seller that he has accepted them; or

(b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.

(2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) until he has had a reasonable opportunity of examining them for the purpose−

(a) of ascertaining whether they are in conformity with the contract; and

(b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

(3) Where the contract of sale is a consumer contract, the buyer cannot lose his right to rely on subsection (2) by agreement, waiver or otherwise.

(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(5) The questions that are material in determining for the purposes of subsection (4) whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2).

(6) The buyer is not by virtue of this section deemed to have accepted the goods merely because–

(a) he asks for, or agrees to, their repair by or under an arrangement with the seller; or

(b) the goods are delivered to another under a sub-sale or other disposition."

18. Mr Tuzo claims that in breach of the implied term at section 14(2) of the 1978 Act the vehicle was not of satisfactory quality, and that in breach of the implied condition at section 14(3) of the 1978 Act the vehicle was not fit for the purpose of being a taxi for which it was bought.

19. He alleges that the vehicle came with a number of faults. He contends that they were not specifically drawn to his attention before the contract was made and were not of a kind that an examination of the vehicle before purchase ought to have revealed.

20. These faults fall under various headings. Under each heading I shall set out in italics the fault alleged and underneath what the Service Company had to say about it. The latter information is drawn from a chronological history of the vehicle prepared from the company's records by its head technician, Darrell Mellor, who worked on the vehicle.

21. Mr Mellor joined the Service Company in August 2007, and was therefore not present when any repairs were carried out before that date. His personal recollection of matters occurring after that date did not appear to me to be very clear. Ms Sadler-Best demonstrated that when work was carried out, company records were not always updated to reflect this, so that work which had been completed might be recorded as both having been done and needing to be done. However I accept that in general the company records accurately record the work that was carried out.

Engine

In February 2007 a fault was discovered in the fuel injector.

22. The Service Company's records state that on 20th January 2007 the vehicle was brought in to the Garage for a small service. The injection warning light was coming on. The mechanic found fault with an air pressured solenoid valve and the part was ordered. Mr Tuzo brought the vehicle back on 24th February 2007 and the valve was replaced for no charge.

In or around January 2008 the vehicle's Exhaust Gas Recirculation ("EGR") valve needed to be replaced.

23. The Service Company's records state that Mr Tuzo brought the vehicle in for repairs on 4th April 2007. The fuel injection warning light was coming on again. Upon inspection the EGR valve was found to be clogged up. It was replaced for no charge.

24. The Service Company's records further state that Mr Tuzo brought the vehicle in again on 30th November 2007. He complained of engine power loss. The company found that the EGR valve was clogged up again. They cleaned out the valve for no charge and road tested the vehicle. The fault returned and Mr Mellor concluded that a new EGR valve was required. The old EGR valve was replaced on or about 14th April 2008. Mr Tuzo was charged $575.52, which he paid.

In May 2008, the vehicle's computer registered a fault in the fuel injector system, oil began to leak, there was loss of power and the vehicle began to emit considerable volumes of smoke. This was assessed to be as a result of the failure of the turbochargers.

25. The Service Company's records confirm that on 10th May 2008 they made this diagnosis. It is common ground that the company then contacted Renault to ascertain whether the manufacturer would be willing to contribute to the cost of repair.

26. Mr Tuzo said in evidence that he went back to the garage about a week later and spoke to Tim Astley, the service manager, who told him that Renault would bear 70 per cent of the cost, leaving Mr Tuzo responsible for 30 per cent. Mr Tuzo said that he asked Mr Astley how much that would be, and Mr Astley said $2,000.00. The Service Company disputes this. Mr Tuzo said that he agreed to pay this sum and arranged to bring the vehicle in for repairs. The earliest date available was 5th August 2008.

27. One of Mr Tuzo's drivers duly brought the vehicle in for repairs on 5th August 2008. The Service Company's records show that they carried out the turbocharger and associated parts repair. There was also an air/fuel circuit ceiling problem that took time to investigate and rectify.

28. The Service Company found a secondary problem, namely that they were unable to communicate with the injection computer. After what the company described as extensive fault finding and replacement of parts, including the fuel injection computer and the engine wiring loom, the problem was rectified.

29. In its pleaded case the Service Company claims $4,604.84 for this work. Ie $5,756.05 for the cost of repair, less 20 per cent, or $1,151.21, which was paid by Renault. Mr Tuzo disputes the claim.

30. Richard Davidge, the President of the Service Company, wrote to Mr Tuzo's attorneys, Trott & Duncan, on 12th February 2009. He confirmed that Renault had paid the 20 per cent. However Mr Mellor stated in evidence that Renault refused to pay the 20 per cent, and that the company now sought to recover the full $5,756.05. Mr Davidge was not called to explain this inconsistency and Mr Mellor did not do so. No written evidence of Renault's alleged failure to pay was adduced. I therefore find that Renault probably did pay 20 per cent of the cost.

31. The vehicle has a diesel engine. But on four occasions the vehicle was inadvertently filled with gasoline instead of diesel: 26th May 2006, 29th January 2007, 19th March 2007 and 10th December 2007.

32. Mr Tuzo's evidence was that on each occasion the error was discovered promptly and the vehicle taken directly to the Garage for the tank to be drained. He stated that on the first two occasions it was towed to the garage and on the second two occasions it was driven. The first time that it was driven, he drove it from the Blue Hole gas station near the airport to the Garage – a distance of some seven miles.

33. Mr Tuzo stated that he was in the habit of keeping the vehicle topped up with diesel, buying small amounts regularly and often. It was his evidence that when he was driving the vehicle, in keeping with this habit, only small amounts of what turned out to be gasoline were purchased: $12.00 on the first occasion and $21.00 and $21.05 respectively on the second and third occasions. He was not present on the last occasion when gasoline was pumped into its tank. But, when cross-examined, he said that the driver told him the amount was $20.00.

34. It was put to Mr Tuzo that his evidence that only a small amount of gasoline had been purchased was a recent fabrication, and that in fact large amounts of gasoline had been pumped into the tank. This was on the basis of an invoice from the Service Company dated 29th January 2007 which showed under the heading "*customer complaint*" the words "*drain car fill with gas*".

35. Mr Tuzo had no prior notice of this allegation. Yet he was immediately able to produce from his folder of documents a manuscript note he had prepared showing that the price paid for the gasoline on that occasion was $21.00. He was a methodical man who was in the habit of keeping notes of his business related income and expenditure. I accept that the note was made on or shortly after the date on which the gasoline was purchased and that it accurately records the price.

36. The $21.05 price of the gasoline purchased on 10th March 2007 was supported by a similar note, the accuracy of which I also accept. Mr Tuzo said that he had made a note of the $12.00 amount but that he had given it to the owner of the gas station when he had the car towed. The other Service Company invoices shed no light on the amount of gasoline pumped into the

vehicle. But they contain nothing to contradict Mr Tuzo's evidence on the matter, which I accept.

37. Both parties accept that gasoline pumped into a diesel engine is capable of damaging that engine.

38. Eurocar contend that the gasoline probably caused the engine damage, although they concede that the damage to the fuel injection computer may have been caused by an electrical fault.

39. Their independent expert, Ian Hind, stated that putting gasoline in the fuel tank of a diesel powered vehicle would cause problems, the severity of which would depend on the amount of gasoline put in the tank; whether or not there was diesel in the tank, and, therefore, the extent of dilution; whether the vehicle was driven for any length of time with gasoline in the tank; and the number of occasions on which this error was made.

40. Mr Hind stated that gasoline will cause two types of damage to a diesel engine. First, the gasoline will have a detrimental effect to various degrees on the seals. Secondly, diesel has lubrication properties whereas gasoline does not. Thus gasoline will have a detrimental effect on the mechanical moving parts of the engine. The effects might include loss of power and damage to the turbocharger and EGR valves.

41. Mr Hind was asked what effect $20.00 of gasoline would have if used to top up the fuel tank of a vehicle with a diesel engine. He replied that the effect on the engine of simply placing the gasoline in the fuel tank would be minimal if there was a small amount of gas relative to the capacity of the tank. However he stated that if the ignition key was turned the effect would be greater, with multiple turnings of the ignition key leading to cumulatively greater damage, and that if the engine was started and the vehicle driven away the impact would be greater still.

42. Mr Hind accepted that if the seals were not damaged, that was an indication of the level of damage sustained by the fuel injection system. However he stated that it was possible for the engine to be damaged but with no leakage

of fuel. This was relevant because there was no evidence of damage to the seals of Mr Tuzo's vehicle.

43. Mr Mellor also gave evidence about the damage to the engine. I accept that he has expert knowledge of the vehicle's mechanics, but approach his evidence with caution as he is not an independent witness. He stated that the main fault with the engine was a lack of air supply, causing power loss.

44. Mr Mellor explained that the air for the air/fuel mix needed to supply the engine came via two routes. First, it was sucked from the atmosphere, driven through the turbocharger, and rammed into the engine. In his opinion, damage to the turbocharger was caused by an increase in the exhaust temperature, which was in turn caused by fuel contamination.

45. Secondly, Mr Mellor explained, exhaust gas was recycled into the engine through the EGR valve. The valve had become clogged with carbon build up and needed replacing. In his opinion, this could be caused by slow driving speeds as well as fuel contamination.

46. Mr Mellor stated that filling the tank with incorrect fuel on four occasions was "*condemning*". He added that whether the engine was started or not was irrelevant as there was an electronic pump which primed the fuel system when the ignition was turned on. He stated that in order to move the vehicle one would have to turn the ignition on so as to unlock the steering and handbrake systems. From this I infer that on Mr Mellor's evidence it would have been necessary to turn on the ignition when the vehicle was towed.

47. Mr Mellor stated that whereas older diesel engines were purely mechanical, this engine had a "*common rail*" fuel injection system, which he described as "*an electro-mechanical advanced engine management system with precision timing*". He and Mr Hind agreed that a mechanic who did not understand common rail principles could not understand the engine on the vehicle.

48. Mr Tuzo's expert witness did not accept that the engine damage was probably caused by gasoline. He was Dr Larry Franklin. In his written report, on letterhead emblazoned with the words "*Dr. Larry W. Franklin's*

VIP Service", Dr Franklin described himself as being a Doctor of Science in Automotive Mechanics (Magna Cum Laude) from Rochville University in Maryland. This qualification sounds, and was meant to sound, impressive.

49. Rochville University is or purports to be an online university offering courses and qualifications through distance learning. On cross-examination, it transpired that the doctorate was awarded not on the basis of a course of study or research but on Dr Franklin's resume. His qualifications, as listed in his report, and presumably in his resume, do not include any relevant bachelors or masters degrees. In the circumstances, I attach no weight to the "doctorate", and consider its inclusion in his list of qualifications unfortunate.

50. Under cross-examination, Dr Franklin accepted that he is a friend of Mr Tuzo, whom he has known since the 1990s. I am surprised that he did not mention this in his report. I have no doubt that Dr Franklin has considerable practical experience of automotive mechanics, but I do not regard him as an independent witness. That is not to say that his evidence has no value: merely that, like Mr Mellor's, it is to be treated with caution.

51. Dr Franklin was asked whether, if a brand new diesel engine had gasoline put in it on four occasions, the engine would suffer problems. He said that it was possible, and would depend on the amount of gasoline in the engine and whether the engine was started. It was not possible if the engine was not started. If the engine was started, then it would cut out, but the engine might be damaged if this process of starting and cutting out was repeated over a long period of time. He stated that diesel engines are built a lot tougher than gas engines.

52. As to the EGR valve, Dr Franklin stated that over time the build-up of carbon from the exhaust would cause it to get "*stuck*". Gasoline contamination could contribute to this process but would not be the main cause. Damage to the turbocharger would be caused by a damaged EGR valve and not by fuel contamination. If fuel contamination had caused

damage to the EGR valve then Dr Franklin would have expected to see damage in the fuel pump, through which it would have to pass to get there.

53. Dr Franklin stated that he was not familiar with common rail diesel.

Electrical

In August 2006 a cable broke. This caused electrical malfunctions in the rear lights, requiring the replacement of a fuse.

54. The Service Company's records state that on 22nd August 2006 the fuse was replaced.

On 20th August 2007 the vehicle began demonstrating electrical malfunctions with the rear bulbs, for which the fuse had blown.

55. The Service Company's records show that they replaced the fuse.

On 30th August 2007 the fuse for the rear bulbs had blown again.

56. The Service Company's records state that they checked the wiring, replaced rusty roof light bulbs, and cleaned the roof light connections. Mr Tuzo was charged $109.00, which he paid.

In or around November 2007 the fuse for the passenger side lights had blown again and the roof light was malfunctioning.

57. The Service Company's records confirm these malfunctions, noting that there were problems with the roof light connections getting corroded. Each time the company cleaned the connections, replaced the fuse, and road tested the vehicle, it worked satisfactorily.

In August 2008 there were additional electrical problems in that the driver's side indicator and the roof light would not turn off with the stated cause being the failure of the vehicle's computer and wiring problems.

58. The Service Company's records state that they investigated this fault. After stripping and checking the dashboard/lighting wiring and connections the fault was found to be within the UCH (body computer). The cause was corroded ground connections on the roof light. These had caused a power surge within the computer. The records state that they could also have caused the failure in the fuel injection computer, although I am not satisfied that they did. The computer was ordered and fitted on arrival, and the roof light connections were cleaned again. The company claims $3,573.56 for this work. Mr Tuzo disputes the claim.

59. With the exception of the initial fault in August 2006, it was common ground that the electrical faults were probably caused by the roof light: either, on Eurocar's case, through a latent defect in the light or, on Mr Tuzo's case, the allegedly faulty manner of its installation. I am satisfied that because of the similarity of the initial electrical fault to the subsequent electrical faults, it too was probably caused by the roof light.

60. Mr Mellor stated that the Service Company has subsequently experienced similar problems with other taxis. He explained that integrity of the sealing to the roof light seems to be susceptible to extreme weather conditions, which cause corrosion and electrical resistance in the connections and bulbs. He pointed out that the company has no choice of supplier as there is only one authorised taxi-sign supplier in Bermuda.

Sunroof

There were electrical faults detected in or around April 2007 in the sunroof.

61. The Service Company's records state that when Mr Tuzo visited the garage on 5th May 2007 he complained about the operation of the sunroof. The mechanic noted that the sunroof required stripping to investigate.

On 20th August 2007 the vehicle began demonstrating electrical malfunctions with the sunroof.

62. On 20th August 2007 the Service Company issued an invoice to Mr Tuzo concerning various matters. One of the items listed as a customer complaint was "*close sun screen – require new sun roof*".

In or around November 2007, the sunroof was still not functioning.

63. The Service Company's records state that on 9th November 2007, when Mr Tuzo brought the vehicle in for a small service, he complained that the sunroof was still not working. The mechanic had difficulty identifying which sunroof part to order, and would need to strip and investigate. The records state that Mr Tuzo did not want to pay.

64. The Service Company's records further state that on 4th February 2008 the vehicle was booked in for a couple of repairs, including the sunroof. It was checked and new motors were ordered. These were special order parts that took two weeks to arrive.

65. When the parts arrived the sunroof was stripped, including removing the entire upper section of the interior. The mechanic found that the motors were burned out and that the cause of the fault was that the pivot levers were seized due to sand and corrosion. New pivot levers were ordered, which took another four weeks. The job was completed by 14th April 2008. The company claims $2,158.07 for this work. Mr Tuzo disputes the claim.

Transmission

In or around January 2008 the vehicle's transmission was diagnosed as faulty.

66. The Service Company's records show that the fault was diagnosed when the vehicle was brought in for a full service on 26th January 2008. Renault was aware of the fault and would replace the transmission at no cost to the customer.

67. The Service Company's records further show that on 4th February 2008 the vehicle was booked in for a several repairs including replacing the transmission. The replacement took around three days.

Miscellaneous faults

In October 2006, the vehicle required a lower engine mount.

68. The Service Company's records state that on 20th October 2006 the vehicle was brought in for a full service and the customer was informed that the engine mount was worn.

69. The Service Company's records further state that this was replaced on 24th February 2007 for no charge.

On 1st August 2007 there were electrical problems with the right front window.

70. The Service Company's records state that when Mr Tuzo brought the vehicle in on 5th May 2007 the driver's window required a new regulator motor as the one touch operation was not working. They further state that on 18th December 2012 the faulty regulator was replaced at no charge to Mr Tuzo.

71. Although this was an electrical fault, there was no evidence that it was caused by the roof light, although I do not exclude that possibility. I have therefore classed it as one of the miscellaneous faults.

On 10th October 2007 the vehicle broke down and required a new cable and ball joint.

72. The Service Company's records state that the vehicle was towed in on 10th October 2007 and that the gear selection cable ball joint was worn. The part was not in stock so the garage carried out a repair/modification to the cable. Mr Tuzo was charged $190.00, which he paid.

Mileage

73. Mr Mellor stated that when the vehicle was brought in for repairs in August 2008 it had clocked up 118,385 kilometres in approximately three years. He stated in his witness statement that an average vehicle would take almost ten years to reach this mileage and when giving oral evidence that it would take 11 years to do so. He stated that, given this mileage, the frequency of repairs required by the vehicle was not unusual or excessive

74. Mr Tuzo said that after the vehicle was brought in for repairs in August 2008 Mr Mellor had told him that the mileage was 109,000 kilometres. When asked about the life expectancy of an average taxi, Mr Tuzo said that it should be able to go for 300,000 to 450,000 miles before needing any real work done on the engine.

75. I accept that, because the vehicle was used as a taxi, its mileage was substantially greater than would be the case for a family car. However I treat the mileage figures given by the Service Company with caution due to internal inconsistencies within its records.

76. For example, an invoice dated 1st November 2006 gave the mileage as 31,966 kilometres, whereas a subsequent invoice dated 24th February 2007 gave the mileage as only 30,290 kilometres. Both invoices, under the heading "*Recommendations and technicians notes*", stated that the next service was due at 30,000 kilometres.

77. I therefore accept Mr Tuzo's evidence as to the vehicle's mileage when it was brought in for repairs in August 2008. However for the purpose of this judgment the difference between 109,000 kilometres and 118,000 kilometres is not material.

78. It is common ground that the vehicle was regularly brought in to the Garage to be serviced. However Mr Mellor gave evidence that, according to the Service Company's records, it was not brought in as regularly as the manufacturer recommended. As I am not satisfied that the mileage is

accurately recorded in those records I am not satisfied that the manufacturer's recommendations were not followed.

Breach of service contracts

79. It will by now be clear that Mr Tuzo frequently had to bring the vehicle into the Garage for repairs. The time taken to carry out those repairs on two occasions gave rise to his claim for breach of service contracts.

First service contract

80. By late January 2008 there was a need for the transmission and the EGR valve to be replaced and for the sunroof to be repaired. Mr Tuzo said in evidence that on 26th January 2008 he received a telephone call from Mr Astley, whom it will be recalled was the service manager, to say that the parts needed to repair the vehicle had arrived. He said that he asked Mr Astley how long the repairs would take and that Mr Astley said two weeks. This concerned Mr Tuzo, as he had to get the vehicle licensed and insured by the end of January. He decided that he would wait to do this until after the vehicle was repaired in case the repairs took longer than two weeks.

81. On 4th February 2008 the Service Company collected the vehicle from Mr Tuzo's home. However the repairs were not completed until 14th April 2008, some ten weeks later, and the vehicle was not returned to Mr Tuzo until 19th April 2008.

82. Mr Tuzo claims that the Service Company was therefore in breach of an express contractual term to repair the vehicle within two weeks, or alternatively that they failed to do so within a reasonable time.

Second service contract

83. Mr Tuzo made an appointment in advance to bring the vehicle in on 5th August 2008 to replace the turbocharger. He said that this was on the

occasion when Mr Astley told him that he would only be charged $2,000.00. He said he was told that the replacement would take two days.

84. The vehicle was brought in for this work on 5th August 2008 by one of Mr Tuzo's drivers, who complained of electrical problems. The garage found a secondary problem with the fuel injection. The vehicle was not fully repaired until 31st January 2009. Mr Tuzo was off-island during this period. He was in sporadic contact with the Service Company both through his driver and in person. He complains that he was not kept informed as to what was going on.

85. Mr Tuzo said in evidence that he requested a loaner vehicle in August or September 2008, but it is common ground that he was not supplied with one until 5th January 2009, 5 months after the vehicle was brought in.

86. Mr Tuzo stated that the repairs were not completed until 31st January 2009. Mr Mellor stated that the vehicle was ready for collection during the first week of January 2009. But if that were the case, I do not understand why Mr Tuzo was supplied with a loaner car on 5th January 2009. I am satisfied that the repairs were not completed until after Mr Tuzo was supplied with a loaner car, and that he was not notified of their completion until 31st January 2009.

87. Mr Tuzo claims that in the circumstances the Service Company was in breach of an express contractual term to repair the vehicle within two days, or alternatively that they failed to do so within a reasonable time.

88. The contractual duty to carry out the repairs within a reasonable time arises under section 4 of the Supply of Services (Implied Terms) Act 2003 ("the 2003 Act"):

> " *(1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not —*
>
> *(a) fixed by the contract;*
>
> *(b) left to be fixed in a manner agreed by the contract; or*
>
> *(c) determined by the course of dealing between the parties;*

there is an implied term that the supplier will carry out the service within a reasonable time.

(2) What is a reasonable time is a question of fact."

89. On 10th December 2008 Mr Tuzo wrote a letter of complaint to Richard Davidge, the President of the Service Company. He relies on Mr Davidge's reply, dated 15th December 2008, to support his claim that the vehicle was not repaired within a reasonable time:

"*Firstly, I wish to apologise for my service centre not looking after your vehicle. Your vehicle has fallen through the system we have in place and I need to address that.*"

90. Later in the letter, Mr Davidge refers to, "*our tardiness in repairing your vehicle*".

91. The Service Company does not accept that on either occasion (i) there was an agreement to repair the vehicle within a specified time or (ii) that the vehicle was not repaired within a reasonable time.

92. Mr Mellor gave evidence that on both occasions additional faults were discovered after the vehicle arrived at the garage; parts had to be ordered from off-island; and the garage was very busy.

93. On the first occasion, Mr Mellor stated, the time taken to repair the vehicle was prolonged because Mr Tuzo was off island and could not be contacted, and, presumably after he was eventually contacted, because he refused to pay for the repairs. When cross-examined, Mr Mellor was unable to recall when the parts needed to repair the vehicle arrived, when the repairs were authorised, or who authorised them.

94. Mr Tuzo denied that he was off island at the time. On cross-examination, it transpired that Mr Mellor's source for this information was another employee of the Service Company who did not give evidence. I am not satisfied that this hearsay evidence was reliable and accept Mr Tuzo's evidence that he was not off island.

95. When cross-examined, Mr Mellor was unable to recall when the parts needed to repair the vehicle arrived, when the repairs were authorised, or who authorised them.

96. On the second occasion, Mr Mellor stated, there was a complicated diagnostic exercise to be carried out with respect to the electrical faults. He said that for part of this period the loaner car needed repairs and was therefore unavailable. That is why it could not be supplied to Mr Tuzo any earlier.

97. Mr Hind, whom it will be recalled was an expert witness for Eurocar, is Director of Operations for Bermuda Emissions Control Ltd, which is a company contracted to carry out vehicle safety inspection and emission testing on behalf of the Government. He stated that, in this capacity, he had worked with every dealership and private garage on the island. In his experience, it was not uncommon that they would require three months to obtain the parts needed for a repair.

Rejection

98. In Mr Tuzo's above-mentioned letter to Mr Davidge of 10th December 2008, he stated that, in view of the enormous amount of mechanical trouble that he had experienced with the vehicle, he did not wish to have it returned to him and that he sought, amongst other things, a refund of the purchase price.

99. This letter was followed by a further letter to Mr Davidge dated 1st February 2009, this time from Mr Tuzo's attorneys, Trott & Duncan. They stated that they were instructed to commence an action against the Service Company for the full value of the vehicle and claimed that when it was supplied it was not fit for purpose.

100. Mr Davidge responded by a letter dated 12th February 2009. He rejected Trott & Duncan's claims and stated that, as he had told Mr Tuzo on returning the loaner car, the vehicle was ready for collection.

101. On 2nd March 2009 the Service Company left a voicemail with Trott & Duncan requesting a date when Mr Tuzo would collect the vehicle.

102. Trott & Duncan replied by a letter dated 16th March 2009. They stated that there was no evidence, given the past mechanical history of the vehicle, that it was road worthy or fit for purpose. They added that, in those circumstances, Mr Tuzo did not intend to collect the vehicle until the matter had been fully settled as particularized in their letter of 1st February 2009.

103. In February or March 2009 Mr Tuzo collected the roof light and other items from the vehicle. He spoke to Mr Astley at the time, so the Service Company was aware that he had done so.

104. Mr Tuzo contends that by his letter of 10th December 2008 he rejected the vehicle. The Sales Company contends that he did not purport to do so until he commenced the action for breach of the sales contract on 15th April 2010. The date of rejection is relevant to whether the vehicle was rejected within a reasonable time.

Counterclaim

105. The Service Company counterclaims against Mr Tuzo. Their claims fall under three heads.

106. First, the Service Company claims for the cost of various repairs carried out to the vehicle. They are set out above, but in summary they comprise work to the sunroof in the sum of $2,158.07; the turbocharger in the sum of $5,756.05; and the indicator light and UCH computer in the sum of $3,573.56. Mr Tuzo contends that he should not have to pay for these repairs as they were carried out with respect to defects, whether patent or latent, which were present when the vehicle was purchased.

107. Secondly, the Service Company claims $260.00 as the cost of repairs to the loaner vehicle, which was damaged while in Mr Tuzo's care. This part of the claim is not disputed.

108. Thirdly, the Service Company claims for the cost of storage of the vehicle from February 2009. They rely on two invoices purportedly issued for the work carried out on the vehicle when it was brought in for repairs in August 2008. Small print at the bottom of the invoices states: "*A $10 a day storage fee will be charged for vehicles not picked up within five days of repair*". The copy invoices before me were dated 31st December 2009. The Service Company produced copies of a number of other invoices for work carried out on the vehicle which included the same statement.

109. When cross-examined, Mr Mellor accepted that the Service Company had not incurred any expenses in relation to the storage of the vehicle.

110. Mr Tuzo did not accept that he had received any of these invoices. However he produced a number of original invoices for other work carried out on the car, none of which mentioned a $10.00 storage fee. The Service Company was unable to explain this discrepancy.

111. Mr Tuzo did accept that in February or March 2009, when he went to collect the taxi light and other items from the vehicle, Mr Astley had told him that as long as the vehicle was left on the garage premises the Sales Company would charge storage at a rate of $10.00 per day.

112. Mr Tuzo says that by that time he had already rejected the vehicle, and that in any case he never agreed to pay any storage fees.

Authorities

Rejection: serious defects

113. Mr Tuzo seeks to reject the vehicle. In order to do so, he must show that there has been a breach of a condition of the contract of sale and not merely a breach of warranty. The 1978 Act does not expressly define what is meant by a "*condition*". However its meaning is well established by case law. Ms

Sadler-Best referred me to Garside v Black Horse Limited [2010] EWHC 190, where at paragraph 27 King J provides a helpful summary:

"*This means that any breach of the term amounts to a repudiatory breach of contract entitling the innocent party – if he so chooses – to accept the repudiation by rejecting the goods. However, he loses this right to reject and thereby treat the contract as repudiated if he elects to affirm the contract and acts upon that election. Once an election to affirm has been made and communicated to the other party, then it is irrevocable.* "*Waiver by election is final and so has permanent effect*" *(Chitty on Contracts 30th ed. vol.1., para 24-008 citing Motor Oils Helles (Corinth) Refineries SA v Shipping Corp of India [1990]1 Lloyds Rep 39 , 398).*"

114. The 1978 Act adopts this meaning by implication. Section 15A of the Act provides that where, in a non-consumer contract of sale, the buyer would otherwise have the right to reject goods by reason of a breach on the part of the seller of a term implied by the Act, but the breach is so slight that it would be unreasonable for him to reject them, then, unless a contrary intention appears, the breach is not to be treated as a breach of condition but as a breach of warranty.

115. Section 1(1) of the 1978 Act defines warranty to mean:

"*an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.*"

116. Section 14(2) of the 1978 Act does not classify the implied term that goods supplied under the contract are of satisfactory quality as a condition or a warranty. Section 14(1) appears to imply that it could be either, or alternatively that it is a warranty. However, given the definition of "*warranty*" in section 1(1), I am satisfied that, to put it no higher, there will be cases where the implied term as to satisfactory quality is a condition.

117. Just as an election to affirm a contract is irrevocable, so too is an election to accept the repudiation and reject the goods. See Chitty on Contracts,

Twenty-Ninth Edition,[1] Volume 1, at paragraph 24-013, citing Motor Oils Helles (Corinth) Refineries SA v Shipping Corp of India at 398.

118. The question arises whether at point of sale the vehicle suffered from faults that were sufficiently serious to breach the implied term that it was of satisfactory quality and/or fit for the purpose for which it was bought.

119. Ms Sadler-Best referred me to Farnworth Finance Facilities v Attryde [1970] 1 WLR 1053, a decision of the Court of Appeal of England and Wales. Lord Denning MR, with whom the other members of the court agreed, stated at 1059 A that any defect is serious if it is likely to cause an accident or render the vehicle unsafe on the road: "*It may be easily remediable, yet, until it is remedied, it is a serious defect*." At 1059 C he referred to a passage from the judgment of Lord Dunedin in Pollock & Co v Macrae & Co, 1922 SC (HL) 192, 200, which Fenton Atkinson LJ set out at 1060 D – E:

> "*Now, when there is such a congeries of defects as to destroy the workable character of the machine, I think this amounts to a total breach of contract, and that each defect cannot be taken by itself separately so as to apply the provisions of the conditions of guarantee and make it impossible to claim damages.*"

120. Ms Sadler-Best also referred me to the decision of the Court of Appeal of England and Wales in Rogers v Parish Ltd [1987] 2 WLR 353. Mustill LJ (as he then was), with whom Woolf LJ (as he then was) agreed, stated at 359 F that when considering whether a passenger vehicle was fit for the purpose for which goods of that kind were commonly bought, one would consider:

> "*not merely the buyer's purpose of driving the car from one place to another but of doing so with the appropriate degree of comfort, ease of handling and reliability and … pride in the vehicle's outward and interior appearance.*"

121. The purpose of citing authorities is to help explain and clarify the principles applicable to the resolution of the dispute before the court. The facts of previous cases are likely to be relevant only insofar as they provide the context in which those principles emerged. That a court reached a particular

[1] There is a Thirtieth Edition, but I have been unable to lay my hands on it.

decision on a different set of facts is in itself of little relevance. The decisions of Wade J (as she was then known) in Warner v Sousa [1993] Bda LR 68 and Ward J (as he then was) in Lathan v Stirling [1987] Bda LR 43, which were both cited to me, turned on their own facts. They do not provide guidance as to how I should resolve the particular set of facts with which I am confronted.

Rejection: reasonable time

122. The question arises whether Mr Tuzo purported to reject the goods within a reasonable time. As noted above, under section 35(4) of the 1978 Act, a buyer is deemed to have accepted goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

123. Ms Sadler-Best relied on Farnworth Finance Facilities v Attryde, where the plaintiff was held not to have affirmed a hire purchase contract with respect to a motor cycle which he had ridden for 4,000 miles. Lord Denning MR, with whom the other members of the court agreed, stated at 1059 E that a man only affirms a contract when he knows of the defects and by his conduct elects to go on with the contract despite them. In this case, the plaintiff complained from the beginning of the defects and sent the machine back for them to be remedied. But they never were. When the rear chain on the motor cycle broke, that was the last straw. It showed that the machine could not be relied on. This knowledge was not brought home to the plaintiff until that final incident.

124. Ms Sadler-Best also referred me to Garside v Black Horse Limited. This was case under the Supply of Goods (Implied Terms) Act 1973. Section 10(2) of the Act provided that there was an implied term that goods supplied under a hire purchase agreement were of satisfactory quality. King J held at paragraph 77 that thirteen months after delivery the plaintiff had not lost the right to reject a vehicle on the ground that it was not of satisfactory quality by the mere passage of time: he had complained promptly about the fault in

question soon after the vehicle was delivered and had throughout that period held on reasonable grounds a belief that the fault would be corrected.

125. Section 35(6)(a) of the 1978 Act provides that a buyer is not deemed to have accepted goods merely because he asks for, or agrees to, their repair by or under an arrangement with the seller. In this regard, Ms Sadler-Best referred me to Clegg v Anderson [2003] 1 All ER 721, another decision of the Court of Appeal of England and Wales. Sir Andrew Morritt VC, with whom the other members of the court agreed, stated at paragraph 63 that the corresponding wording in the Sale of Goods Act 1979 shows that time taken merely in requesting or agreeing to repairs, or for carrying them out, is not to be counted.

126. Mr Crockwell referred me to Douglas v Glenvarigill Company Limited [2010] CSOH 14, a decision of the Outer House, Court of Session in Scotland, in which Lord Drummond Young considered when the time for rejection begins to run in the case of latent defects for the purposes of section 35(4) of the Sale of Goods Act 1979, which has the same wording as section 35(4) of the 1978 Act. I adopt his definition of a latent defect as one that cannot be discovered by reasonable inspection or use of the goods at or immediately following delivery. See paragraph 27. Having considered relevant English and Scottish authorities, he concluded at paragraph 34 that in the case of a latent defect, time begins to run for the purposes of section 35(4) as soon as the goods are delivered. This was for three reasons:

> "*First, the wording of section 35(4), 'after the lapse of a reasonable time', seems clearly to relate to a period running from the date of delivery. That is the obvious meaning in the context in which the subsection occurs; had it been intended that the period should run from the appearance of a defect that would, I think, have called for express wording. Secondly, rejection is a relatively drastic remedy, in that it involves return of the goods and the whole of the price. At a certain stage, commercial closure is required, to permit the seller in particular, but also the buyer to some extent, to arrange his affairs on the basis that the goods have been effectively sold. Thirdly, damages remains as an alternative remedy … thus the buyer is not left without any recourse against the seller*."

127. The court considered that some level of delay in rejection may be reasonable if the defect is not immediately apparent, but concluded at paragraph 36:

"*Nevertheless, the law appears to me to be reasonably clear: rejection is a relatively short-term remedy, and is simply not available when a latent defect manifests itself for the first time more than a year after delivery; in no reported case has rejection been permitted after such a period.*"

128. When considering whether, through passage of time, a buyer has lost the right to reject goods, an important consideration will be his reasons for not rejecting them earlier. The cases suggest that he may have more leeway where the delay is because he has given the seller every opportunity to repair the goods rather than he would have where the delay is because the defects have only recently come to light. In reality, the delay may be for a combination of these reasons. Thus the application of these principles will be strongly fact sensitive.

Acceptance

129. If, as Eurocar contends, Mr Tuzo damaged the engine, the question arises whether this precluded him from rejecting the vehicle, even if he would otherwise have been able to do so, as the vehicle was no longer in its original condition.

130. It is implicit in the structure of the 1978 Act that goods can be rejected if they have not yet been accepted. Section 35 deals with acceptance.

131. On the one hand, under section 35(1), a buyer is deemed to have accepted goods when they have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. Damaging the engine would be just such an act.

132. On the other hand, where goods are delivered to the buyer, as the vehicle was delivered to Mr Tuzo, section 35(2) provides that he is not deemed to have accepted them until he has had a reasonable opportunity of examining them. Absent authority, this provision might suggest that if the goods were damaged in the interim the buyer would still be able to return them if they were defective at point of sale and that the seller's remedy against the buyer would lie in damages.

133. However there is authority directly on point. In Kwei Tek Chao v British Traders and Shippers Ltd [1953] 2 QB 459, Devlin LJ (as he then was) explained at 487 that where property in the goods has passed to the buyer, the ownership of the seller with which the buyer must not act inconsistently is the reversionary interest of the seller which remains in him arising from the contingency that the buyer may reject the goods.

134. This analysis was given *obiter* in a case concerning cif contracts under the Sale of Goods Act 1893. Section 35 of that Act did not contain a provision equivalent to section 35(2) of the 1978 and 1979 Acts. The analysis was nevertheless approved by the Court of Appeal of England and Wales in Clegg v Anderson as being of general application under the 1979 Act. See the judgment of Sir Andrew Morritt VC at paragraph 59, whose summary of Devlin LJ's position I have gratefully adopted in the preceding paragraph. That was a particularly strong Court of Appeal: the other two members, Hale LJ and Dyson LJ, were later appointed to the House of Lords.

135. I conclude that where a buyer takes delivery of goods that are damaged while in his care but before he has a reasonable opportunity to inspect them, then, where the damage occurs because the buyer has acted inconsistently with the ownership of the seller, the buyer will be unable to return the goods. If it transpires that the goods were defective at point of sale, the buyer's remedy against the seller will lie in damages.

Repairs: reasonable time

136. The question arises whether on the two occasions in question the Sales Company repaired the vehicle within a reasonable time. This is another area where the application of the relevant principles will be strongly fact sensitive.

137. Ms Sadler-Best referred me to Charnock v Liverpool Corporation [1968] 1 WLR 1498, in which the Court of Appeal of England and Wales held that garage owners failed to repair the car within a reasonable time as they had

not done so within the time generally recognised in the trade as a reasonable time in which to perform the work. See the judgment of Salmon LJ (as he then was) at 1504 A and E. He added at 1506 H that if the garage owners had wanted to protect themselves against a claim for damages for unreasonable delay, they could and should have warned the car owner that the repairs could not be carried out within that time.

138. Winn LJ agreed. He quoted from the judgment of Lord Herschell LC in Hick v Raymond & Reid [1893] AC 22 at 29:

> "*... the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist ...*"

Warranty

139. A side issue in the case has been the terms of the manufacturer's warranty that came with the vehicle.

140. Mr Tuzo said in evidence that after he had purchased the vehicle he was chatting with the receptionist at the Sales Company and that she had told him that the warranty was for two years from the date of first registration or 50,000 miles, whichever came first. But I have seen what I am satisfied is a copy of the warranty and am satisfied that the distance that it covered was in fact 50,000 kilometers.

141. However the terms of the warranty are not relevant to an assessment of whether the vehicle was of satisfactory quality or reasonably fit for purpose. See the judgment of the Extra Division of the Sheriff Court, delivered by Lord Osborne, in Lamarra v Capital Bank Plc [2006] SC 95 at 115:

> "*In our view, a warranty cannot be seen as a matter bearing upon the quality of the goods supplied. In its nature, a warranty can only be seen as an undertaking by the manufacturer of the goods concerned to remedy defects in the goods which emerge and are within the scope of the warranty and that within a specified period of time. Thus the warranty must be seen as a means whereby the defects in existence at the time of delivery, or emerging thereafter within the specified period, may later be remedied by the manufacturer at no cost to the customer. The fact that such defects may be so remedied appears to us not to bear upon the issue of the quality of the goods at the time of their*

delivery, which is the subject matter of the implied term created by sec 10(2) [that the goods supplied were of a satisfactory quality]. In its nature, a warranty is concerned with the provision of remedial action within a limited period after delivery. In short, it seems to us that, because the issue of whether the quality of the goods is satisfactory requires to be judged as at the time of delivery, the warranty can have no bearing upon that matter."

142. The court was in that case concerned with a contract of hire purchase. But the same principle applies with respect to a contract for the sale of goods. See Rogers v Parish Ltd at 360 A – E and 362 D.

Counterclaim: storage charges

143. Mr Tuzo claims that, as he had rejected the vehicle, he had abandoned the vehicle in the sense that he had divested himself of ownership of it. Thus, he claims, he was not liable for storage charges as the vehicle was no longer his. For a vehicle to be abandoned in this sense, there must be both an intention to abandon and some physical act of relinquishment. See Palmer on Bailment, Third Edition, at paragraph 26-030, which was cited with approval by Mr C Edelman QC, sitting as a Deputy High Court Judge, in Robot Arenas Limited v Simon Waterfield [2010] EWHC 115 at paragraph 14.

144. If goods are abandoned on the land of a property owner, the property owner is entitled to dispose of them. See Robot Arenas Limited v Simon Waterfield at paragraph 19. If the property owner knows the identity of the person who abandoned the goods, then I would have thought that the property owner could claim from that person the expense of disposing of the goods. This is by analogy with the position of a gratuitous bailee, with which I deal in the next paragraph, who can claim expenses in respect of the goods that have been bailed to him. However it is not necessary for me to decide this point, on which I did not hear argument.

145. In the alternative that Mr Tuzo had not abandoned the vehicle, he submits that the Service Company was a gratuitous (ie unpaid) bailee in that it was subject to a non-contractual duty of care towards him with respect to the

vehicle for which it was not entitled to charge storage fees. In Garside v Black Horse Limited, a decision of the High Court of England and Wales, King J rejected at paragraph 122 a counterclaim by a garage for storage charges:

"*This claim to storage charges is misconceived. In principle I accept that the second defendant would be entitled to recover against the appropriate party such expenses it is able to prove which it has incurred in fulfilling its duty of care under the gratuitous bailment imposed upon it through the failure to collect, by one or other of the other parties. See China Pacific SA v Food Corp. of India [1982] AC 939 (HL). However there can on this line of authority be no claim to storage charges as such.*"

146. In light of this decision, the Service Company would be unable to recover service charges as a gratuitous bailee: in order to recover them they would have to establish a contractual right to do so.

147. The Service Company notified Mr Tuzo that it intended to levy a storage charge with respect to the vehicle – if not through some of its invoices, receipt of which is disputed, then through what Mr Astley told Mr Tuzo in February or March 2009. Conduct may constitute acceptance of an offer. The question arises whether, by failing to remove the vehicle from the Garage, Mr Tuzo impliedly accepted the offer to store it for a daily fee of $10.00.

148. There is a Scottish case directly on point, save that abandonment was not an issue. In University of Edinburgh v Onifade in the Sherrif Court (2005) SLT (Sh Ct) 63 the defender parked on property belonging to the pursuer on which was a notice stating that persons parking without a permit would be liable to pay a fee of £30 per day. The defender appealed against a finding that he was liable to pay the fee, maintaining that he was under no contractual obligation to do so. His appeal was dismissed. The Sheriff Principal held at 64 H – I:

"*The pursuers' notice made it plain that their position was that anyone who parked on their property without a permit would have to pay them a fee of £30 per day on that account. The defender, by parking his vehicle on their property without a permit, made it plain that he accepted that position. He signified his acceptance by his conduct in so*

doing. It is nothing to the purpose for him to maintain that he did not intend to pay because he considered that the pursuers were not entitled to make the charge specified. 'The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.' (Gloag on Contract (2nd ed), p 7, approved by Lord Reid in McCutcheon v David MacBrayne Ltd, 1964 SC (HL) 28 at p 35; 1964 SLT 66 at p 67.) On each occasion the pursuers were reasonably entitled to conclude that the defender, by parking without a permit in the knowledge of the terms of the notice, had accepted liability for the payment to them of £30. His position was essentially no different from that of a person who boards a bus or hires a taxi: he thereby undertakes to pay the fare to his destination, even though he may think that the bus company or the taxi driver is not entitled to require it."

Findings on breach of contract of sale

There was no breach with respect to the engine

149. I find that the engine was not damaged at the date of purchase but by the gasoline with which it was filled on four occasions. On each occasion the ignition key was turned, causing gasoline to be pumped into the engine. On two occasions the vehicle was driven, on one occasion for seven miles. I accept the evidence of Mr Hind and Mr Mellor about the effect of gasoline on a diesel engine, and prefer it to the evidence of Dr Franklin, who was not familiar with common rail diesel engines such as this.

There was a breach of condition with respect to the electrical faults

150. I accept the evidence of Mr Mellor that the electrical faults were due to the roof light. It is immaterial that the maker of the vehicle did not supply the roof light to the Sales Company. The company is liable for the electrical damage as it fitted the roof light, which was sold with the vehicle as a package.

151. The electrical faults were that the passenger lights blew on four occasions (in August 2006, twice in August 2007, and in November 2007); the right

indicator would not turn off (August 2008) and the roof light would not turn off (November 2007 and August 2008). The latter two problems were caused by a surge in power, due to corroded connections on the roof light, that damaged the UCH computer.

152. These were niggling problems. However, as the roof light was susceptible to corrosion, there was a strong probability they would have continued to occur. Because the roof light probably had a latent defect that was generic to the roof lights available in Bermuda, replacing it would probably not have solved the problem of recurring faults.

153. Moreover, the Service Company's records from August 2008 state that the corroded ground connections on the roof light could also have caused the computer injection failure. As stated above, I am not satisfied that they did cause it. But the fact that they were capable of doing so is indicative that the latent defect in the roof light had the potential to cause more serious damage to the vehicle.

154. I heard no evidence from which I could conclude that the susceptibility of roof lights to corrosion has caused problems for other models of taxis in Bermuda. Mr Mellor stated that the vehicle had an extremely complicated wiring and computer system. It may be that this complexity made it more susceptible to electrical faults than a less sophisticated model, but that is speculation.

155. Be that as it may, I am not satisfied that Mr Tuzo would have experienced these problems whatever model of taxi he had bought. He is an experienced taxi driver, and it was clear from his evidence that he didn't think so. Thus I am not satisfied that, even if Mr Tuzo had been aware of the latent defect in the roof light, he would have bought the vehicle anyway.

156. Furthermore, Mr Mellor stated, and I accept, that the complexity of the wiring and computer system on the vehicle meant that faults, including electrical faults, took a great deal of time to locate, study and test. Thus even a relatively minor fault might cause the vehicle to be unavailable for

weeks or even months. This would be a serious matter for Mr Tuzo, who needed the vehicle in order to earn his living.

157. There was no breach of section 14(2) of the 1978 Act as the vehicle was of satisfactory quality – at least, so far as its electrical components were concerned – and Mr Tuzo could have avoided damage to the vehicle by removing the roof light.

158. However there was a breach of section 14(3) of the 1978 Act. As the Sales Company well knew, Mr Tuzo required the vehicle for use as a taxi. The roof light was essential for this purpose. For the reasons given above, I find that the defective quality of the roof light was sufficiently serious to constitute a breach of condition. The breach was not so slight that it may be treated as a breach of warranty.

There was no breach with respect to the sunroof

159. I find that the sunroof was not defective at the date of purchase but was damaged subsequently through corrosion.

There was a breach of condition with respect to the transmission

160. I find that there was a latent defect in the transmission at the date of purchase. As at the date of repair, Renault was aware of the fault. Notwithstanding that, on account of the vehicle's mileage, the warranty had expired, Renault replaced the transmission free of charge. I conclude that Renault had experienced faults with the transmission in other vehicles of this model. That is what leads me to conclude that the transmission had a latent defect.

161. There was therefore a breach of section 14(2) of the 1978 Act. This was sufficiently serious that it was a breach of condition. It is axiomatic that a vehicle with a faulty transmission is not of satisfactory quality.

162. However Mr Tuzo did not reject the vehicle when advised that the transmission needed to be replaced. Instead, by accepting the replacement transmission, he chose to affirm the contract. As noted above, Mr Tuzo was not charged for the replacement. But he was without the use of the vehicle for the three days that the replacement took.

There was no breach with respect to the miscellaneous faults

163. I find that the miscellaneous faults were not present when the vehicle was purchased. They developed over the course of the 109,000 or so kilometres for which it was driven over the next two and a half years. This was much further than a vehicle for domestic use, such as a family car, would normally be driven during that time. I accept Mr Mellor's evidence that the miscellaneous faults were not unusual in view of the vehicle's mileage and that they do not suggest that it was defective when it was bought.

Mr Tuzo's purported exercise of his right of rejection was not effective

164. Mr Tuzo purported to reject the vehicle in his letter to Mr Davidge of 10th December 2008. I find that this purported rejection was ineffective because Mr Tuzo had acted inconsistently with the rights of the owner by damaging the engine.

165. Had Mr Tuzo not damaged the engine, I find that the right of rejection would have still been open to him. An electrical fault first occurred in August 2006, which was 6 months after the vehicle was purchased. This is not a case where by the time the latent defect came to light it was already too late to reject the vehicle.

166. Once he was aware of the electrical fault, Mr Tuzo returned the vehicle to the Service Company to be repaired, and did so whenever an electrical fault occurred subsequently. As noted above, the electrical faults all had the same underlying cause, namely a defective roof light. Thus Mr Tuzo did not elect to go on with the vehicle despite its defects, but sought their remedy. He did

not purport to reject the vehicle until he concluded that the Service Company was unable to repair the most recent electrical faults, among other faults, within a reasonable time.

167. When deciding whether Mr Tuzo purported to reject the vehicle within a reasonable time, I have considered what weight should be given to the fact that, as of the date of its purported rejection, its mileage was much greater than that of an average vehicle. I have concluded that this factor is of limited significance. The vehicle's mileage was part and parcel of its use as a taxi. Reasonableness is to be assessed chiefly in the context of time not distance. For the reasons given above, I find that, notwithstanding that his purported rejection of the vehicle was ineffective, Mr Tuzo did purport to reject it within a reasonable time.

Mr Tuzo can recover damages for breach of the sales contract

168. I find that Mr Tuzo's remedy for breach of contract lies in damages. The 1978 Act provides that damages for breach of condition are to be calculated as if they were damages for breach of warranty. The relevant provisions are contained in sections 53 and 54.

169. Section 53 of the 1978 Act provides in material part:

> "*(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may—*
>
> . . . . .
>
> *(b) maintain an action against the seller for damages for the breach of warranty.*
>
> *(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.*
>
> *(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.*"

170. Section 54 of the 1978 Act provides:

"*Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.*"

171. Section 53(3) of the 1978 Act provides only a prima facie means of calculating loss for the purposes of section 53(2). It is not applicable in the present case as the vehicle would have had the same value at time of delivery if it had answered to the warranty. As noted above, the buyer could have simply removed the roof light.

172. Rather, the loss is to be calculated under the following heads.

Loss of use of motor vehicle

173. Mr Tuzo quantified damages for loss of use of the vehicle in his claim for breach of the service contracts. He claimed damages during the high season, which includes August through October, at a daily rate of $225.00; and damages for the low season, which includes November through January, at a daily rate of $125.00. In their letter of 1st February 2009 to Mr Davidge, Trott& Duncan described these rates as the insurance compensation rate.

174. In his reply of 12th February 2009, Mr Davidge took issue with these figures. He stated that renting a taxi cost $490.00 a week in the high season and $280.00 a week in the low season. He also asserted that, even if Mr Tuzo's daily rates were correct, he would not have driven the taxi all the time.

175. These competing rates were not explored in evidence. When cross-examined as to how often his taxi was on the road in the high season, Mr Tuzo stated that he worked eight hour shifts, and that sometimes one of his drivers would work another eight hour shift.

176. It is trite law that a plaintiff must take all reasonable steps to mitigate the loss flowing from the breach, and will be unable to claim any part of the damage which is due to his neglecting to take such steps. See the speech of Viscount Haldane in the decision of the House of Lords in British

Westinghouse Electric & Manufacturing Company Limited v Underground Electric Railways Company of London Limited [1912] AC 673 at 689. But, the plaintiff having made out a prima facie case of damages in a given amount, it is for the defendant to show how and to what extent that claim ought to be mitigated. See the judgments of Keating J at 178 and Grove J at 184 in the Court of Common Pleas in Roper v Johnson (1873) LR 8 CP 167. The case remains good law. See Chitty on Contracts, Twenty-Ninth Edition, at paragraph 26-094.

177. I find that Mr Tuzo's approach to damages under this head is reasonable. Eurocar did not lead evidence to show otherwise – for example, evidence that, as Mr Davidge stated in correspondence, Mr Tuzo could have rented a taxi while his own was unavailable. I shall therefore allow Mr Tuzo damages at the daily rates claimed for the periods when the taxi was unavailable due to latent defects that were present when it was bought.

178. As to those periods, I heard no evidence as to how long the taxi took to repair when it was brought in for electrical faults in August 2006, twice in August 2007, and November 2007. On the latter occasion, there was other work that needed to be done. In the premises, there is insufficient evidence for me to award damages with respect to the time taken to repair the vehicle on any of these occasions. For all I know, Mr Tuzo might have been able to drive it away on the same day.

179. Mr Tuzo was without use of a vehicle from 5th August 2008, when it was brought in to the Service Company for various repairs, including electrical repairs, and 5th January 2009, when he was supplied with a loaner vehicle. The company's records do not record what portion of this time relates to electrical repairs. However I think that it is reasonable to conclude from the totality of Mr Mellor's evidence that the first half of this period relates to repairing the engine and the second half to repairing electrical faults. I shall take the second half as starting on 21st October 2008.

180. I therefore reject the statements in the counterclaim that the electrical faults were repaired in August/September 2008, following repairs to the engine

that were carried out on 5th August 2008. This timeframe is not consistent with Mr Mellor's evidence that the repairs were not completed until January 2009 and the evidence of both parties that the vehicle was not ready for collection until sometime in that month.

181. Mr Tuzo can therefore recover damages against the Sales Company:

(1) For the period 21st October 2008 – 31st October 2008 inclusive (11 days) at the high season rate of $225.00 per day, amounting to $2,475.00.

(2) For the period 1st November 2008 – 4th January 2008 (65 days) at the low season rate of $125.00 per day, amounting to $8,125.00.

182. I have considered whether I should reduce this figure to reflect any time when Mr Tuzo was not working. But I have heard no evidence as to whether he took time off during this period, and he was not cross-examined on the point. I have therefore decided not to make any such deduction.

183. Mr Tuzo was also without use of the vehicle for the three days in January 2008 during which the transmission was replaced. I award damages for each of those days at the low season rate of $125.00, amounting to $375.00.

184. I therefore award Mr Tuzo damages against the Sales Company for loss of use of the vehicle in the sum of $10,975.00.

Cost of repairs

185. I find that Mr Tuzo can recover damages against the Sales Company for the cost of repairs to the indicator light and the UCH computer. It is implicit in his letter of 10th December 2008 to Mr Davidge, in which he stated that he did not wish to have the vehicle returned to him, that he did not wish to have any further work carried out. As I have insufficient evidence to assess the cost of the repairs that had been carried out to that date, I shall award damages for the full cost of the repairs in the sum of $3,573.56. As appears

below, I shall therefore award the Service Company the same amount in damages against Mr Tuzo with respect to these repairs.

Summary

186. I therefore award Mr Tuzo damages against the Sales Company for breach of the sales contract as follows:

(1)	Loss of use of motor vehicle:	$10,975.00
(2)	Cost of repairs:	$3,573.56
Total:		$14,548.56.

Findings on breach of service contracts

There was no breach of an express term of either service contract

187. I accept that, with respect to both service contracts, Mr Astley probably gave Mr Tuzo an estimate as to how long the repairs would take. However I find it implausible that he would have given anything more than an estimate. That estimate would have been for the repairs for which the vehicle was admitted to the Garage, and not for any other repairs that were later discovered to be necessary.

188. I therefore reject Mr Tuzo's claim that it was an express term of either service contract that the repairs would be completed within a specified time. There being no such term, it was not capable of being breached.

There was no breach of the implied term of the first service contract, but there was a breach of the implied term of the second service contract, that the repairs would be carried out within a reasonable time

189. I accept Mr Mellor's evidence that, with respect to both service contracts, additional faults were discovered after the vehicle arrived at the garage; parts had to be ordered from off-island; and the garage was very busy.

190. As to the first service contract, neither party did as much as they might have done to stay in contact. But I am not satisfied that any communication difficulties added materially to the time taken to carry out the repairs.

191. As to the second service contract, I accept Mr Mellor's evidence that there was a complicated diagnostic exercise to be carried out with respect to the electrical faults.

192. I also accept Mr Hind's evidence that it is not uncommon for a dealer to require three months to obtain the parts needed for a repair.

193. In the circumstances, I find that three months would have been a reasonable period for the completion of each service contract. In the case of the first service contract, there was therefore no breach of the implied term that the repairs would be carried out within a reasonable time. But there was a breach in the case of the second contract. Even allowing for all the points made by the Service Company, five months was unreasonably long.

194. In reaching that conclusion about the second service contract, I bear in mind Mr Davidge's admission in correspondence that the vehicle had "*fallen through the system*", but do not regard it as decisive. Mr Davidge was writing a customer care letter not a formal admission of liability. In any event, the reasonableness of the delay is a matter for the court to decide.

195. I therefore award damages to Mr Tuzo against the Service Company for loss of use of the vehicle for the two month period 5th November 2008 – 4th January 2008 (61 days) at the low season rate of $125.00 per day, amounting to $7,625.00.

196. These damages are co-extensive with the damages for loss of use over that period which I have awarded Mr Tuzo against the Sales Company. But he cannot recover for the same loss twice. Thus for that 61 day period he can recover damages against one or other of the Eurocar companies, but not both.

Findings on counterclaim

The Service Company can recover the cost of repairs to the vehicle

197. The Service Company is entitled to recover as damages for breach of contract the cost of the various repairs to the vehicle that have not yet been paid for.

(1) Repairs to the sunroof in the sum of $2,158.07.

(2) Repairs to the turbocharger in the sum of $4,604.84. I reject as implausible Mr Tuzo's evidence that Mr Astley told him that Renault would bear 70 per cent of the cost, although I accept that Mr Astley may have said that he would ask Renault to do so.

(3) Repairs to the indicator light and UCH computer in the sum of $3,573.56. Although these repairs were only necessary because of a latent defect in the vehicle, liability for the latent defect lies with the Sales Company. The Service Company and the Sales Company are of course separate legal persons. Thus I have awarded to Mr Tuzo against the Sales Company, and to the Service Company against Mr Tuzo, damages in the same amount for the cost of the same repairs.

198. I find that the Service Company can therefore recover in damages against Mr Tuzo the cost of repairs to the vehicle in the sum of $10,336.47.

The Service Company can recover the cost of repairs to the loaner vehicle

199. I find that the Service Company can recover $260.00 as the cost of repairs to the loaner vehicle as this claim is not disputed.

The Service Company cannot recover the cost of storage of the vehicle

200. An involuntary bailee may not charge for storing goods but only claim expenses. The Service Company could therefore only recover storage charges under a contract pursuant to which Mr Tuzo had agreed to pay them. For there to be any such agreement the Service Company had first to communicate to him its intention to charge for storing the vehicle.

201. I am not satisfied that Mr Tuzo was issued with any invoices purporting to levy a daily storage charge. This is because a storage charge was not mentioned on any of the invoices produced by Mr Tuzo but only on those produced by the Service Company at trial, which Mr Tuzo did not accept that he had received. I do not understand why a storage charge did not appear on all the invoices. The Service Company was unable to explain the reason for this discrepancy.

202. Therefore the earliest I can be satisfied that he was notified of such a charge was February or March 2009, when Mr Astley told him. That was when Mr Tuzo was in the process of removing the roof light from the vehicle. I am satisfied that by that action Mr Tuzo was indicating his intention to abandon the vehicle. As henceforth it no longer belonged to him, I find that he was not liable for any storage charges.

203. Although the Service Company has not disposed of the vehicle, my provisional view is that, were it to do so, it would have at the very least an arguable claim against Mr Tuzo for the cost involved.

Summary

204. I therefore award the Service Company damages against Mr Tuzo for breach of contracts of repair as follows:

(1)	Cost of repairs to vehicle:	$10,336.47
(2)	Cost of repairs to loaner vehicle:	$260.00
Total:		$10,596.47

Interest

205. I award interest at the statutory rate of seven per cent on the damages, save that I award no interest to either Mr Tuzo or the Service Company on the damages for the cost of repairs to the indicator light and UCH computer in the sum of $3,573.56.

206. Interest will run as follows:

(1) On the damages payable to Mr Tuzo for loss of use of the motor vehicle:

(a) On $375.00, from 31st January 2008. As there is no evidence as to what point in the month these repairs were carried out, I shall assume in the Sales Company's favour that they were carried out at the end of the month.

(b) On $2,475.00, from 31st October 2008.

(c) On $8,125.00, from 4th January 2009.

Thus interest will run from the end of each period of loss. I considered whether there should instead be a separate interest calculation for each day on which the vehicle was unavailable, but decided that this would be too unwieldy. However I will hear from the parties if they wish to persuade me otherwise.

(2) On the damages payable to the Service Company for the cost of repairs, from 12th February 2009. This is the date of the letter in which Mr Davidge informed Mr Tuzo of the amounts owed to the Service Company. It is the earliest date on which I can be satisfied that demand for payment in a liquidated sum was made to Mr Tuzo. Ordinarily, I would have awarded interest from the date of the relevant invoices. However, for the reasons that I expressed when dealing with storage fees, I am not satisfied that these were issued to him.

Summary

207. I award damages as follows:

(1) To Mr Tuzo against the Sales Company for breach of the sales contract: $14,548.56.

(2) To Mr Tuzo against the Service Company for breach of the second service contract: $7,625.00. However these damages are co-extensive with the damages awarded against the Sales Company. Thus the amount of damages that Mr Tuzo can recover is $14,548.56. Of this, he can recover $7,625.00 from either the Sales Company or the Service Company but not both.

(3) To the Service Company against Mr Tuzo for breach of contracts of repair, $10,596.47.

208. The net position is that the amount that Mr Tuzo has been awarded against Eurocar exceeds the amount that Eurocar has been awarded against Mr Tuzo by $3,592.09.

209. I shall hear the parties as to costs.

Dated this 17th day of January, 2013 _____

Hellman J