IN THE SUPREME COURT TURKS AND CAICOS ISLANDS

CL 21/2022

BETWEEN

JERMAINE JENNINGS — Plaintiff

AND

ADLIN PIERRE
(dba TCI AUTO SPOT)

Defendant

JUDGMENT on ASSESSMENT OF DAMAGES

Before: Registrar Narendra J Lalbeharry
Appearances: Mr. Thomas Chal Misick for the Plaintiff
Ms. Chloe McMillan for the Defendant
Hearing Date: 2nd November 2023
Venue: Court Room 5
Delivered: 19th January 2024

ASSESSMENT OF DAMAGES – SPECIAL DAMAGES – REPLACEMENT COST OF VEHICLE- GENERAL DAMAGES – NOMINAL DAMAGES- ACTUAL LOSS- SEIZURE

CASES

1. East Ham Borough Council v Bernard Sunley & Sons Ltd [1966] AC, [1965] 3 All ER 619 and Ruxley Electronics v Forysth [1996] A.C. 344.
2. Mattocks v Mann [1992] 6 WLUK 180
3. Quinn v O'Donavan [2003] 6 WLUK 793
4. Beechwood Birmingham Ltd v Hoyer Group UK Ltd [2010] EWCA CIV 647
5. In Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua [2011] 3 All ER 554
6. *Prehn v Royal Bank of Liverpool (1870) LR 5 Exch 92* at 99–100
7. Rolin v Steward [(1854) 14 CB 595 at 605
8. *Hall Brothers SS Co Ltd v Young [1939] 1 KB 748* at 756
9. *Whitfield v De Lauret & Co Ltd (1920) 29 CLR 71* at 77
10. The Mediana [1900] AC 113, 116
11. RBTT Merchant Bank Ltd and others v Reed Monza Ltd and others CV2010-03699
12. Persad v Persad-Maharaj CV2007-00923

BACKGROUND

1. By Writ and Statement of Claim filed on 16th March 2022 the Plaintiff claimed that on the 24th of May 2021 he took his motor vehicle namely a Chevy Cruz 1.4L DOHC Vin # 1G1P5SC7251200 to the Defendant premises located at TCI Auto Spot at Industrial Drive, Providenciales to be repaired by them.

2. The Plaintiff claimed there was an implied term of the agreement that the Defendant would repair his vehicle with due dispatch and with reasonable care and skill and return it to him. The Plaintiff also claimed that the said implied term was breached by the Defendant. He also claimed negligence against the

defendant their servants and or agents by failing to do the repairs on his vehicle as promised.

3. Particulars of Damage were set out in the sum of $17,500.00 for the replacement cost of the vehicle and loss of use for 20 months amounting to $10,000.00 and interest.

4. On the 25th of May 2022 the Defendant through his Attorneys requested Further and Better Particulars and also filed a summons to strike out the Plaintiff's Claim which was amended on the 21st of June 2022. On the 8th of July 2022 the Plaintiff filed a Summons to strike out the Defendant's Summons and also filed an application for Summary Judgment.

5. Hylton J (Ag) as he then was, ruled that the Plaintiff's claim for breach of contract and negligence were sufficiently clear and the statement of claim contained sufficient material facts and therefore the Defendants Summons to Strike out the Plaintiff's claim was dismissed. In respect of the Order 14 Summons filed by the Plaintiff for Summary Judgment the learned Judge ruled *"that the Defendant had not filed any evidence that discloses a good or even an arguable defence. In the circumstances there is no basis for the court to exercise its power under Order 14 rule 4 to give the Defendant leave to file a defence. The application for summary judgment on liability is therefore granted, with damages to be assessed.*

6. By virtue of the Notice of Appointment for the Assessment of Damages filed on the 5th September 2023, this matter was brought before me on the 2nd November 2023 and continued on the 6th November 2023 to assess the damages arising from the Plaintiff's claim that the Defendant is liable for the following:
    i. Replacement cost of the vehicle which has deteriorated beyond repairs while in the Defendant's possession in the sum of $17,500.00
    ii. Loss of use of the vehicle for 21 months as at 2nd November 2023 in the sum of $36,850.00
    iii. Interest in the sum of $3,669.00
7. Whilst there were no witness statements or affidavit evidence filed in support of the Assessment of Damages hearing, the parties were examined under oath in this matter.

8. As a preliminary point, the Defendant applied for the assessment of damages hearing to be stayed pending the outcome of another claim filed by the Defendant against the Plaintiff **CL 73/23 Adlin Pierre (dba. TCI Auto Spot) v Jermaine Jennings,** which arises out of the same facts as these proceedings, and is a claim for damages for breach of contract. The Defendant asserts that if it is successful in that claim the damages can work as a set off to any award that is made in this matter.

9. Counsel for the Plaintiff objected to this application. The application for a stay was refused, and the hearing for the Assessment of Damages proceeded.

EVIDENCE

10. In his evidence the Plaintiff stated he was a boat captain and that he rented a vehicle from Kendall Rentals and L Rentals for a Nissan March Compact and subsequently, a Suzuki Swift to allow him to get to and from work and that he paid cash for the rentals and paid them every month or every 2 weeks.

11. In support of the Plaintiff's claim, the Plaintiff submitted into evidence as exhibit **'J.J.1'** 3 receipts for car rentals as follows:
    i. Receipt 1 – dated 9th September 2022 for $1,984.00 for the Rental of Suzuki Swift White signed by 'Kimberly'
    ii. Receipt 2 – dated 9th September 2022 for $2,808.00 for the Rental of a Suzuki Swift White signed by 'Kimberly'
    iii. Receipt 3 – dated 4th September 2023 for $3,000.00 for the Rental of a Suzuki Swift from Kendall Car Rentals.

12. He also evidence that he was not sure what months the receipts in **'J.J.1'** covered and that he had no further receipts. He also stated that he purchased the said vehicle for $9,800.00 and that the figure of $16,150.00 on the insurance document annexed to his affidavit of the 8th July 2022, was what he gave to the insurance company. Under cross examination in conflict with his previous testimony he stated that he did not give that figure but rather that is what the insurance company valued the car for that amount. He also stated that that even though he purchased the car for $9,800.00 in 2012 the vehicle appreciated in value and was now worth $17,500.00. No evidence expert or otherwise were provided to support this allegation.

13. When asked why he did not collect the vehicle the Plaintiff stated because in February 2022 when he went to collect the vehicle it was not fixed as he was told it was smoking, he therefore told the Defendant to keep the vehicle and fix it. The Plaintiff further stated that when he called in February 2022 to collect after being shown a video that the car was in a drivable state, he refused to collect the vehicle because the matter was now in Court.

14. The Plaintiff's Attorney made several references to the Kelly Blue Book and asked the Court to take Judicial Notice of same without providing any extract of the said Kelly Blue Book at the trial. Plaintiff's Counsel stated "The Blue Book value is regularly used by the TCIG Customs Department in assessing value of importing vehicles".

15. During examination in chief, the Defendant gave evidence that the vehicle came in for inspection in May 2021, as the car was running hot and the water pump needed to be replaced. After replacing the water pump, it was discovered that the head gasket needed to be replaced. The Plaintiff was informed of this and gave the Defendant the go ahead to conduct the repairs.

16. Approximately 3 weeks later in June 2021, the Plaintiff came to the shop to collect the vehicle and upon examination, the Plaintiff noticed the vehicle started to smoke and the Defendant advised the Plaintiff that he needed more time with the vehicle.

17. A full check on the vehicle revealed that valve stems needed to be replaced and the entire engine needed to be rebuilt. The Defendant informed the Plaintiff of this and got the approval from the Plaintiff to rebuild the entire engine which involved ordering new parts valve stems, camshaft sensors, connecting rod bearing and crank shaft bearings.

18. The parts took between 2 weeks to 1 month to arrive. All parts were received by August 2021. Upon receipt of the parts, the Defendant testified that his mechanics began taking apart the engine which was time consuming and took approximately 2-3 weeks. The Defendant gave evidence that after the engine was removed, they began working on rebuilding the engine which was completed in February 2022.

19. The Defendant testified that upon receipt of a letter from the Plaintiff's Attorney, he communicated with the Plaintiff that the vehicle was driving by sending him a video of the Defendant driving the vehicle on the 23 February 2022 and informed him that the vehicle was ready for collection on 24th February 2022.

20. The Defendant with his history of selling cars and repairing same, testified that he believed the vehicle was valued $6,000.00 and had not deteriorated since in his possession on the contrary, it had been repaired and was drivable, the Defendant took further preventative steps to secure the vehicle from the weather by covering the vehicle.

21. Under cross examination, the Defendant gave evidence that pursuant to the Kelly Blue Book, the vehicle was valued approximately $1,800.00 when the vehicle came to his shop and that this figure is dependent on the year of the vehicle, miles driven and the condition of the vehicle. Furthermore, the Defendant testified that pursuant to the Kelly Blue Book, the vehicle would have been valued $6,000.00 based on the repairs made and the fact the vehicle was driveable or roadworthy.

22. The Defendant gave evidence that the type of vehicle was a factor as to why the rebuilding of the engine took as long as it did. He stated that he received instructions from the Plaintiff on the 23rd June 2021 to rebuild the engine and that it took approximately 6 months to rebuild the engine given that his mechanic had other jobs as well.

23. In analyzing the facts of this case I have identified the following time line of events -:

a. 8th May 2021 – The Plaintiff took his vehicle to the Defendant garage for water pump replacement and was advised this job would take two days to be replaced.
b. 11th May 2021 – The water pump was replaced. The Plaintiff was informed that head gasket needed replacing and the Plaintiff agreed to this.
c. 13th May 2021 - The head gasket was ordered and arrived in or around the 13th of May 2021.
d. The head gasket took about 11 days to be replaced
e. 24th May 2021 – The Plaintiff was contacted to collect the vehicle.
f. 21st June 2021 – The Plaintiff visited the Defendant's garage to collect the car, when the vehicle was started the evidence by both parties indicated that the vehicle was producing white smoke and the Plaintiff was advised not to collect the vehicle to which the Plaintiff agreed. Therefore, the vehicle remained at the Defendant's garage.
g. 23rd June 2021 - The Plaintiff was advised by the Defendant that the whole engine needed to be rebuilt. The Plaintiff agreed and instructed the Defendant to proceed.
h. 23rd August 2021 - Parts for the engine rebuild arrived and work began on the engine rebuild.
i. 16th February 2022 – Defendant's evidence is that the engine was fully rebuilt and that he called the Plaintiff on that day but got no answer.
j. 23rd February 2022 – The Defendant established contact with the Plaintiff and informed him that the car was ready for collection. On the same day a video was sent to the Plaintiff showing the vehicle working.
k. 24th February 2022 -– A video was sent by the Defendant to the Plaintiff showing the engine running.
l. 3rd March 2022 – A letter was sent from Plaintiff's lawyer to the Defendant (pre-action letter)

Issue 1 - Whether the Plaintiff is entitled to the replacement cost of the vehicle

24. Mr. Misick for the Plaintiff submitted that it is trite law that the Plaintiff ought to be placed in a position he would have been in had he not suffered the loss and damage. He also submitted that the trial shows a timeline of failure and that the time suggested for each aspect was unreasonable and shows a lack of professionalism and competence of the Defendant to carry out the works as expected of him.

25. Ms. McMillan for the Defendant submitted that the Plaintiff's claim is for the replacement cost of the vehicle, and submitted that it would be absolutely inequitable for the Court to make any such award given the facts of this case,

i.e. that the vehicle was ready for collection. She further submits that the Plaintiff was duly notified on the 24th February 2022 that the vehicle was ready for pick up and deliberately chose to leave the vehicle at the Defendant's property. She also submits that the Defendant cannot be held responsible for the replacement cost of the vehicle when all that existed between the parties was a contract to effect repairs, the repairs were done and the Plaintiff voluntarily chose to abandon his vehicle.

26. Ms. McMillan further submitted that the Plaintiff is also not entitled to the retained value of the vehicle as the vehicle was not retained by the Defendant as the Plaintiff was free at any time to collect his vehicle and carry it to another mechanic. Furthermore, the vehicle was valued significantly less at the time the vehicle was brought into the shop versus when the Plaintiff was notified that the vehicle was ready for collection.

27. Ms. McMillan also submitted that in the circumstances where defective performance affecting property is alleged, as in this case, the diminution in value (diminution in market value) or the cost of cure (in this case being the cost to effect the bargained for repairs) is the more appropriate measure of damages to be considered. - East Ham Borough Council v Bernard Sunley & Sons Ltd [1966] AC, [1965] 3 All ER 619 and Ruxley Electronics v Forysth [1996] A.C. 344. These cases also stand as authority for the principle that it would be unreasonable for a plaintiff to insist on the cost of repair/reinstatement value, where the same would be disproportionate to the diminution in value and vice versa.

28. This being a contract to effect repairs to a defective vehicle, Ms, McMillan submitted that the appropriate measure of damages, in the present circumstances, is the cost of repair as claiming the diminution in value is disproportionate, given the sums at hand and reliance on the same would be unreasonable in the circumstances.

29. On this issue Ms. McMillan submitted that the Plaintiff may only be entitled to the cost of repairs given that the vehicle was brought in for repairs and the repairs were performed, resulting in the vehicle's value significantly increasing. Refusing to accept the repairs, abandoning the vehicle and claiming the diminution in value/replacement cost would be unreasonable, inequitable

and an impressible act of increasing his loss contrary to the obligation to mitigate his loss.

Issue 2 - Loss of use entitlement

30. Mr. Misick further submitted that the Plaintiff is entitled to compensation for his loss of vehicle and for loss of use of the vehicle in furtherance of his business venture "as it was critical to his function as a charter boat captain business". No evidence was submitted to support this allegation, it therefore remains unsubstantiated.

31. Mr. Misick referred to the case of **Mattocks v Mann [1992] 6 WLUK 180** which held that a Plaintiff had not acted unreasonably in hiring a 4-door car while she was waiting for payment from the Defendant's insurers to effect repairs to her car. The Master allowed the claim for hire charges for the period after completion of repairs, but disallowed the extra cost of hiring a four-door car rather than a two-door car.

32. Mr. Misick also referred to the case of Quinn v O'Donavan [2003] 6 WLUK 793 which held that the Plaintiff who was without her vehicle for 62 weeks as a result of a road traffic accident was entitled to a sum of GBP 500 for travelling expenses including taxi fares and bus fares during the period of loss of use and GBP 70 per week for the 62 week period she was without the use of her vehicle.

35. Mr. Misick also referred to the case of **Beechwood Birmingham Ltd v Hoyer Group UK Ltd [2010] EWCA CIV 647** which stated that a motor dealer was entitled to receive damages for the loss of the use of one of its vehicles due to damage based on the interest and capital employed and any depreciation sustained over the period of repairs in respect of the damages to the vehicle and not on the costs of hiring an alternative vehicle. It is of note that this case involved loss of use of a vehicle used in the course of a business.

36. Ms. McMillan for the Defendant in response submitted that the Plaintiff has a duty to mitigate his losses and should not aggravate his losses by refusing to take delivery of the repaired vehicle and referred to the practitioner text McGregor on Damages 15th Edition para [275], the three rules on the mitigation of damages are:

    i. *"The first and most important rule is that the Plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the Defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction to avoid. Put shortly, the Plaintiff cannot recover for avoidable loss.*
    ii. *The second rule is the corollary of the first and is that where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the Defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the Plaintiff can recover for loss incurred in reasonable attempts to avoid loss.*
    iii. *The third rule is that where the Plaintiff does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss as lessened; this first rule from recovering the whole loss, which would have accrued in the absence of his successful mitigation steps, by reason of these steps not being ones which were required of him under the first rule. Put shortly, the Plaintiff cannot recover avoided loss."*

37. Ms. McMillan further submitted that if any claim of loss of use is to succeed, time can only begin to run on such a claim from the moment that it was unreasonable for the Defendant to still be working on the Plaintiff's vehicle. She therefore submitted that work to rebuild the engine commenced in August 2021 and was completed February 2022 being approximately 6 months and that this time period was not an unreasonable time period given the fact of the intricacies of rebuilding the engine which is a lengthy process and the Defendant was also responsible for the repairs of other vehicles at his auto shop.

38. Ms. McMillan also submitted that the Plaintiff was unable to prove his claim that he rented a vehicle for the entire period of time and cannot be expected to simply throw figures at the Court's head and expect to be awarded same without more. Therefore special damages accordingly cannot be proven and in any event such sum, from 24th February 2022 would have been incurred as a result of the Plaintiff's unreasonable failure to mitigate his losses by refusing to collect his vehicle and abandoning the same at the Defendant's premises.

39. Ms. McMillan quoted from McGregor on Damages the 18th Edition, on the loss of use of non-profit earning chattels:

" Chattels other than Ships

32-44B

A distinction is however drawn in Beechwood Birmingham between claims by a company for loss of use of a car employed in the course of the company's business and claims by an individual owner of a car used solely for convenience and not for profit. It had already been said in Alexander v Rolls Royce Motors, as noted at para.32-044, that private cars were different from lightships, dredgers and corporation buses; the principles first developed in The Greta Holme and The Mediana (at para.32-038 et seq.) do not apply to private cars so that, where no substitute car is hired by the owner, there can be no recovery by him of general damages of a financial nature. This is now confirmed by the Court of Appeal, admittedly obiter, in Beechwood Birmingham on the basis that with the individual car owner there is no business loss that calls for compensation …

Amount of such Damages

32-051A

None of the above on the amount of general damages applies to private cars not used for profit, for the reason indicated in Beechwood Birmingham Ltd v Hoyer Group UK Ltd [2011] Q.B. 357, CA (see at para.32-044B, above). Instead, as is also indicated in Beechwood Birmingham, the private car owner should be entitled, by way of general damages for non-pecuniary loss, for, as it is put by the Court of Appeal, "the lack of advantage and inconvenience caused by not

having the use of a car ready at hand and at all hours for personal and/or family use": ibid., para.48.

40. Ms. McMillan in closing submitted that, when taking the Plaintiff's case at its highest, the Plaintiff may only be entitled to the following:

a. The cost of the cure being the cost to repair his vehicle - $3,409.00. This sum however should be reduced to zero as there was no evidence provided by the Plaintiff that the contract in fact was paid. Otherwise, in the absence of evidence to the contrary, the Plaintiff would be unjustly enriched.

b. A nominal sum for the loss of use of his vehicle for a period of 3 months from November 2021 – February 2022 given that the Plaintiff is unable to provide any documentary evidence that he rented a vehicle. - $2,500.00.

41. On the facts and the time line above the Plaintiff's vehicle on the evidence was ready for collection as at 24th February 2022. The Court was informed that the Plaintiff's vehicle is currently still stored at the Defendant's garage. I accept the evidence that the vehicle was working as at 24th February and that the Plaintiff was informed as at 24th February 2024. The Plaintiff had a duty to mitigate loss by visiting the yard to verify if it was in good working order. He failed to do so.

42. On the facts this court is being asked to assess damages after summary judgment was granted in favour of the Plaintiff. Therefore, liability has already been established against the Defendant and has not been appealed.

43. The Plaintiff now seeks the replacement cost of his vehicle. In order for a court to grant the replacement cost of a vehicle, this form of damage is usually reserved for cases where the Defendant has unlawfully seized and/or taken possession of another's vehicle which then renders the vehicle unusable due to the effluxion of time and deterioration of the said vehicle. Additionally, this form of damage can be awarded where through an accident or negligence of the defendant, the plaintiff's vehicle was damaged beyond repair. However,

on the facts and evidence provided the Plaintiff's vehicle has not been rendered unusable. The Plaintiff at any time after 23rd February 2022 could have collected his vehicle from the Defendant's garage.

44. The Plaintiff also seeks loss of use in the form of special damages. As submitted by Ms. McMillan in order to claim special damages, this must be pleaded in the statement of claim. Special damages cover any loss incurred by the breach of contract because of exceptional occurrences or situations that are not ordinarily predictable. These are actual losses driven by the breach, but not directly and immediately. To obtain special damages, the non-breaching party must demonstrate that the breaching party knew of the particular circumstances or conditions when the contract was signed. Loss of use can be awarded in cases where the Defendant has through his actions caused damage to the Plaintiff's vehicle resulting in the Plaintiff not having use of his/her vehicle. In such a case both for commercial vehicles and private vehicles the court can award an amount for loss of use with the submission of bills proving the loss of use. In this case the Defendant's actions did not cause damage to the Plaintiff and it is the Defendant's submission that at all material times before the filing of this claim, the Plaintiff was free to collect his vehicle from the Defendant's garage. Loss of use is also directly linked to the actions of the Defendant. The Plaintiff did not plead special damages, instead an amount was pleaded for loss of use without any supporting receipts.

45. The Plaintiff's case seems to be based on the fact that after he gave instructions to the Defendant to rebuild the engine, he tried contacting the Defendant several times to no avail. He also seems to suggest that at times the Defendant completely ignored him refusing to give any update on the status of the vehicle after 23rd August 2021. Mr. Misick submitted that the period of six (6) months taken by the Defendant to rebuild an engine may be unreasonable, although in his evidence the Defendant stated that six (6) months to completely rebuild an engine of a Chevy Cruz is not unreasonable if factors such as complexity and his other jobs were taken into consideration. On this point I cannot make any findings, as no expert evidence was led by either party indicating what exactly amounts to a reasonable period of time for a complete engine rebuild of a Chevy Cruz.

46. It is also accepted that the vehicle is now working and ready for collection.

47. In order for the Plaintiff to succeed, he must be able to show there was actual total loss. **In Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua [2011] 3 All ER 554** The vessel Bunga Melati Dua was carrying the claimant's cargo of bio-diesel when she was captured in the Gulf of Aden by Somali pirates and taken with her crew into Somali waters. The defendant was the insurer of the cargo under a policy which covered both piracy and theft. The ship owner immediately commenced negotiations with the pirates. It was the usual practice of such pirates to release the vessel, the crew and the cargo on payment of a ransom. However, the claimant was still out of possession of its cargo a month later when it served a notice of abandonment on the defendant. The notice was rejected. The vessel, the crew and the cargo were released some 11 days later after payment of a ransom to the pirates of US$2m by the ship owner. The value of the vessel and her cargo amounted to $80 m. The claimant argued *inter alia* that on the capture of the vessel by the pirates and its removal into Somali waters, the cargo became an actual total loss in terms of s 57(1) a of the Marine Insurance Act 1906. In that regard, it was common ground that if the claimant had a good claim for a total loss as at the deemed date of the commencement of proceedings, the fact of the cargo's later recovery would not affect the position. The judge held *inter alia* that there was no actual total loss. The claimant appealed.

48. On appeal it was held that piratical seizure was not an actual loss, where there was not only a chance but a strong likelihood that payment of a ransom of a comparatively small sum relative to the value of the vessel and her cargo would secure the recovery of both. It was not an irretrievable deprivation of property. There was no rule of law that capture or seizure was an actual total loss. In the present case I am of the view that the Plaintiff has failed to show actual loss, neither did he show an irretrievable deprivation of property.

49. In ***Prehn v Royal Bank of Liverpool (1870) LR 5 Exch 92*** **at 99–100**, per Martin J it was stated that there are three kinds of damages *"First, nominal damages; which occur in cases where the judge is bound to tell the jury only to give such; as, for instance, where the seller brings an action for the non-acceptance of goods, the price of which has risen since the contract was made. The second kind is general damages, and their nature is clearly stated by Cresswell J in* **Rolin v Steward [(1854) 14 CB 595 at 605**]*. They are such as the jury may give when the judge cannot point out any measure by which they are to be assessed,*

except the opinion and judgment of a reasonable man. Thirdly, special damages are given in respect of any consequences reasonably or probably arising from the breach complained of"

50. In ***Hall Brothers SS Co Ltd v Young [1939] 1 KB 748*** at 756, CA, per Greene MR stated *"Damages to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or legislation"*. In ***Whitfield v De Lauret & Co Ltd (1920) 29 CLR 71*** at 77, per Knox CJ stated *'Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights.'* In the same case Isaccs J stated *'Damages are, in their fundamental character, compensatory. Whether the matter complained of be a breach of contract or a tort, the primary theoretical notion is to place the plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred.... This primary notion is controlled and limited by various considerations, but the central idea is compensation, or, as Blackstone (Vol 2, p 438, see supra) says — "compensation and satisfaction"*

51. It is normal when claiming damages and more specifically the replacement cost of a vehicle to prove not only the value of the vehicle but also the type of damage to the vehicle and the subsequent loss. The Plaintiff failed to plead and/or prove the type of damage actually suffered to the motor vehicle to warrant the total replacement of said vehicle. Due to the fact that the Plaintiff has failed to prove loss as claimed, he would also fail in his claim for damages as there is no loss which can be linked to a claim for damages.

52. Ms. McMillan submitted that there is a duty for the Plaintiff to mitigate his losses. In this case the Defendant is claiming the cost of renting a vehicle at $50.00 per day for 20 months however undated bills were only submitted during evidence in chief amounting to $7,792.00. On the facts it is difficult to ascertain why the Plaintiff claimed cost of rental for 20 months in his pleadings because from first visit in May 2021 to completion of the engine rebuild in February 2022, only nine (9) months had elapsed. On the facts the Plaintiff after he was told his vehicle was ready for collection, continued renting a

vehicle and continued to fail and or refuse to collect the said vehicle. This amounts to a flagrant breach of the Plaintiff's duty to mitigate his loss.

53. In the case of **The Mediana [1900] AC 113, 116**, the court was of the opinion that 'nominal damages' does not mean "small damages". In the words of Lord Halsbury LC: *"Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right, which though it gives you no right to any real damages at all, yet gives you the right to the verdict or judgment that your legal right has been infringed ...But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may also be represented as compensation for the use of something that belongs to him depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."*

54. This decision was applied in the Trinidad case **RBTT Merchant Bank Ltd and others v Reed Monza Ltd and others CV2010-03699**, where an award of $250,000 was made as nominal damages. Also, from Trinidad in the decision of **Persad v Persad-Maharaj CV2007-00923** a nominal award of $15,000 was made in the circumstances where the value of bottling equipment taken without permission by the Defendant and not returned, could not be ascertained.

55. On the facts and the evidence provided in this case the Plaintiff was unable to prove loss in relation to showing he is entitled to the replacement cost of his vehicle. He was also unsuccessful in proving that he is entitled to loss of use because the Defendant took an unreasonable amount of time to complete the engine rebuild. However, even though the Plaintiff has failed to prove his loss as mentioned above, the delay in rebuilding the said engine did cause the Plaintiff to be out of pocket in terms of rental payments. On the evidence, the Plaintiff was unable to provide rental bills for a specific period, however this does not mean that he did not accrue expenses for the period of delay in performance. With this in mind I intend to award the Plaintiff a sum as nominal damages equivalent to cover a reasonable period for which there was delay in performance and for which he should not have had to rent a vehicle.

56. The Defendant in evidence suggested that a fee of $50.00 is a reasonable daily rental fee for a compact sedan such as a Swift which is what the Defendant indicated he was renting. I therefore accept this figure and decide in the following terms.

DECISION

57. The Plaintiff is not entitled to damages for the replacement cost of the vehicle, as on the evidence it is in working order and is available for collection.

58. Although the Plaintiff has failed to establish what was a reasonable time to repair and have the vehicle returned to him. This court is of the view on the facts and evidence presented, that there was delay on the part of the Defendant and for this the Plaintiff must be compensated at a reasonable rate for the funds expended as a result of this delay. The Defendant is entitled to nominal damages in the sum of $4,500.00 amounting to $50.00 per day for a period of 3 months for loss of use arising from the payment of rental fees.

59. Interest runs at the rate of 6% from the date of Judgment to the date of payment in accordance with Section 20 of the Civil Procedure Ordinance CAP 4.01

60. The Defendant to pay the Plaintiff's costs to be taxed if not agreed.

Narendra J. Lalbeharry
Registrar
Supreme Court Turks and Caicos Islands