Judgment 1 Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1998/P041

BETWEEN	PROSPECTIVE CAR RENTALS	PLAINTIFF
AND	EXECUTIVE MOTORS LTD	DEFENDANT

Mr. Richard Reitzin for Plaintiff
Miss D. Gentles instructed by Livingston Alexander and Levy for Defendant

IN CHAMBERS
Application to set aside default judgment

Heard March 10, 11, 12, 19, 24 and 25, May 6, 1999

HARRISON J

The plaintiff is in the business of car rentals and has filed this suit claiming damages, interest and costs arising from the defendant's breaches of a contract of sale entered into in or about August, 1995 between the defendant and the plaintiff in respect of thirteen (13) new Mazda motor vehicles. It has been alleged that the motor vehicles were fitted with faulty air-conditioning systems which caused, and continues to cause the plaintiff loss and damage.

Interlocutory judgment was entered on the 26th March 1998 as no appearance and/or pleadings was filed or delivered by or on behalf of the defendant.

A summons was filed on the 13th October, 1998 to set aside the default judgment and it seeks the following orders:

1. That judgment in default of appearance or defence filed herein be set aside and the defendants given leave to file and serve defence within fourteen (14) days of the date hereof.

2. That if necessary, the time in which to set aside be extended.

3. That leave be granted to join Pike's Automotive as a third party to this action.

4. There be no order as to costs.

5. Further or other relief.

Affidavits in support and a draft defence were filed and I shall refer to them in detail at a later stage.

The plaintiff vigourously opposed this application and filed in support of its case, affidavits and several letters passed between the parties. These affidavits and exhibits will also be referred to in the course of this judgment.

I heard submissions, reserved judgment on the 25th March 1999 and promised to deliver judgment as early as possible. I now seek to fulfil that promise.

SERVICE OF THE WRIT OF SUMMONS AND STATEMENT OF CLAIM

At the very outset, a fundamental issue arose. It concerned service of the writ and statement of claim. Service was effected by registered post and the letter containing the documents was sent to 11 Oxford Road, Kingston 5.

Lorraine Brown, chief accountant employed to the defendant company swore to an affidavit on the 6th October, 1998 stating that these documents were never received. She states inter alia:

> "2. That the writ of summons and statement of claim in this action was not served upon the defendant company. That the writ of summons herein states the defendant's address as 1 Oxford Road. However, we do not carry on business at that address. That I am advised and do verily believe that the writ of summons was returned uncollected to the Plaintiff's Attorneys by postal service. The defendant company now carries on business at 8 Marescaux Road. The defendant was therefore unaware of this action and meant no disrespect by its failure to defend."

Mr. Reitzin objected to the words "That I am advised and do verily believe that the writ of summons was returned uncollected to the Plaintiff's Attorneys by postal service" used in the paragraph referred to above. He submitted that this allegation could not be relied upon as the source and grounds of the information were not stated in the affidavit, hence there was an infringement of section 408 of the Judicature (Civil Procedure Code) Law. This objection was upheld by the Court in view of the provisions set out in section 408. There was no other evidence to establish non-service and despite this ruling, Miss Gentles was of the view that the writ and statement of claim ought to be set aside ex debito justitiae as they were not properly served on the defendant.

Mr. Reitzin submitted that service was in order. In an affidavit sworn to on the 13th January, 1999, he depsoes that prior to the posting of these documents, his legal clerk had conducted a search at

the Office of the Registrar of Companies to ascertain the then current address of the registered office of the defendant company. He exhibited a Notice of Situation which was filed in the Registrar of Companies Office and which showed that the registered office of the defendant was 11 Oxford Road, Kingston 5. He also deposed in this affidavit that the annual return of the defendant company made up to the 13th January 1997 showed that the situation of the company had remained as 11 Oxford Road and there was no more recent notification of the address of the defendant's registered office. These allegations were never challenged .

Miss Gentles, realizing the predicament she faced, made an application to adduce fresh evidence with regards to service. There was new evidence set out in the affidavit of Vivienne Champaigne. She submitted that in the interest of justice, the court ought to allow her to adduce that evidence. Mr. Reitzin requested a further adjournment in order to respond to this application and upon resumption, he admitted to the Court that the envelope together with the writ of summons and statement of claim which were posted, were returned to his office as "un-collected". He contended however, that he had received the letter after the application for interlocutory judgment had been made and "well after the date of the judgment itself'. He submitted that although they were returned, the judgment would have been regularly entered as the plaintiff was unaware of the return at that time.

A perusal of the documents filed in the Registry of the Supreme Court, reveal:

1. That the summons to set aside the default judgment and affidavit in support were filed on the 13th October, 1998;

2. That an unconditional appearance was entered by the defendant's Attorneys at Law on the 14th October 1998.

It would seem therefore, that on the 13th October, 1998 the defendant had no locus standi at the time of filing the summons, hence the appearance was subsequently entered. The un-conditional appearance was pointed out to Miss Gentles and she agreed that in light of this appearance which was prepared by herself, the issue of non-service could not avail her. Having regards to this concession, it was therefore un-necessary for me to consider the submissions made by Mr. Reitzin that service was effected none-the-less, when one examines the time of entry of the judgment vis - a- vis the time when the documents were returned.

THE PLEADINGS

I now turn to the pleadings

The statement of claim

The plaintiff's claim is set out as follows:

"3. By an agreement made between the plaintiff and the defendant in or about August, 1994 the

defendant agreed to sell and deliver to the plaintiff, and the plaintiff agreed to purchase and accept from the defendant, 13 new Mazda 323 motor vehicles("the motor vehicles")

4. They (sic) were terms and/or conditions of the said agreement that -

(i) the motor vehicles would each be fitted with a locally installed air-conditioning system(i.e one installed in Jamaica as distinct from a factory-fitted air-conditioning system);

(ii) the installation of the air-conditioning systems would be carried out in a proper and workmanlike manner;

(iii) the installation of the air-conditioning systems would be carried out using all necessary parts to enable the air-conditioning system to work properly and/or without endangering other parts of the motor vehicles.

(iv) the air-conditioning systems would be installed using materials which were fit for the purpose and/or of merchantable quality;

5. In breach of the said agreement -
(i) the installation of the air-conditioning systems was not carried out in a proper and workmanlike manner.

(ii) the installation of the air-conditioning systems was not carried out using all the necessary parts to enable the air-conditioning systems to work properly and/or without endangering other parts of the motor vehicles.

(iii) the air-conditioning systems were not installed using materials which were fit for the purpose and/or of merchantable quality;

(iv) the air-conditioning systems themselves were not of merchantable quality;

(v) the motor vehicles were not free from defects in the air-conditioning systems and elsewhere which would render the motor vehicles and/or air-conditioning systems inoperable.

Particulars
(a) the air-conditioning systems were installed without condenser fans

(b) when the condenser fans were fitted, they were placed too closely to the radiators and/or without brackets, thereby allowing the condensers to rupture the radiators resulting in loss of coolant and overheating of the engines.

© the condenser fans cut our prematurely at certain engine revolutions resulting in the engines overheating.

(d) air from the evaporator coils did not flow through the vents properly because the ducting around the evaporator coils and/or glove compartments were not properly sealed or not sealed at all..."

The draft defence
The draft defence states inter alia:

"3. The defendant denies that the said agreement contained the alleged or any terms stated in paragraph 4 of the statement of claim or at all.

4. The defendant denies that it acted in breach of the said agreement as alleged in paragraph 5 or at all.

5. The defendant says that subsequent to the sale to the plaintiff of the said cars the plaintiff complained that some of the cars were overheating. The plaintiff attributed this overheating to the faulty installation of air-conditioning units.

6. The defendant upon receipt of the said complaints contacted the independent contractor whom it had retained to install the air-conditioning units prior to delivery to the plaintiff. The said independent contractor visited the plaintiff's place of business and examined and corrected those air-conditioning units in which fault was identified.

7. The defendant denies that the alleged or any faulty air-conditioning units caused the alleged or any loss claimed by the plaintiff.

8. Further or in the alternative the defendant claims to be indemnified by the said independent contractor against the alleged or any loss suffered by the plaintiff in consequence thereof.

...."

THE AFFIDAVIT EVIDENCE

Evidence on behalf of the defendant/applicant

What is the evidence which the defendant has adduced in the affidavits in order to demonstrate that it has a defence on the merits? Three affidavits were filed and relied upon. Let me deal firstly, with the affidavit of Lorraine Brown referred to above. She has deposed inter alia:

> "3. That the claim arises out of the sale by the defendant to the plaintiff of several motor vehicles. That in suit C.L E060 of 1996 the defendant claimed and obtained judgment against the plaintiff in the sum of $3,894,199.00 being the balance purchase price of the said motor vehicles. That the defendant in that suit has since

paid most of the judgment debt aforesaid.

4. That the defendant says that the air-conditioning systems were installed by an independent contractor. Further, when complaints were made they were corrected and the vehicles satisfactorily operated.

5. The defendant denies that the alleged or any damage was caused by the installation of the air-conditioning equipment as aforesaid and says further that it claims to be indemnified by its independent contractor against the alleged or any loss. Attached hereto as Exhibit "LB 1" is a draft defence."

There is the affidavit of Leroy Tavares sworn to on the 28th January, 1999. It states inter alia:

"3. I have been a mechanic for the past fifteen (15) years and prior to 1989, I actually owned my own garage "Motor Tech" and I dealt with all makes of vehicles and a variety of problems affecting same.

4. That in my professional opinion, an air-conditioning unit which has not been installed properly, whether by the factory or ex-factory, cannot cause any damage to an engine of a vehicle. In particular, the fact that an air-conditioning condenser may be installed too close to the radiator cannot damage the radiator or the engine unless there is a collision with the vehicle which causes the brackets to be pushed back.

5. That all motor vehicle engines including the Mazdas supplied to the plaintiff being the subject matter of this suit are and were fitted with temperature gauges which indicates when the vehicle is overheating by way of a warning light or overheating signal. Thus, if which is not admitted that the engines overheated thereby damaging the cylinder head and gasket, this was a consequence of the drivers of the said vehicles not heeding the warning light or overheating signal and parking the said vehicles once this light or signal appeared but continuing to drive same."

Finally, Desmond Panton, Managing Director of the defendant company, in an affidavit sworn to on the 3rd February 1999 states inter alia:

"2. That of the vehicles that were sold to the plaintiff company only two (2) experienced blown cylinder head gaskets which was caused not by the lack of air-conditioning fans, but by the engine overheating and the respective drivers continuing to drive the vehicles in this state in the face of the temperature gauges and warning lights which would have indicated that the vehicles were overheating, and therefore, ought not to have been driven.

3. That all of the vehicles which the plaintiff complained of were fixed and the defendant company was not advised of any further problems until the defendant began to make demands on the plaintiff to pay for the said vehicles.

4. That Mr. Christopher Callen was in 1996 the Sales Administration Manager of the defendant company and had no technical knowledge to give an opinion on the problems which the plaintiff's vehicles had experienced. Consequently, the letter written by Mr. Callen on the 24th day of May, 1996 to Prospective Car Rentals Limited was written by him with a view to maintaining good customer relations and was by no means an admission of liability on the part of the defendant."

Affidavits on behalf of the plaintiff in response

Wynsomme Lewin, General Manager of the plaintiff company, has deposed in an affidavit sworn to on the 8th January 1999 that numerous complaints concerning the air-conditioning systems were made to the defendant company. She contended that the defendant had arranged for the vehicles' air-conditioning systems to be repaired. This was done but it was short-lived as the problems re-surfaced shortly thereafter resulting in substantial loss and damages to the plaintiff. She further deposed that there was an instance when one of the cars' cylinder head was blown due to a defective radiator resulting from the problems associated with the faulty air-conditioning system.

At paragraph 9 of the said affidavit, she states:

"9. That in the defendant's letter to the plaintiff dated 11th March 1995, (Exhibit WL - 3) the defendant acknowledged that it was aware of the major problem with the vehicles it had sold to the plaintiff and expressed its "sincere" sympathy for the inconvenience caused to the plaintiff. The defendant acknowledged that the problem resulted from the negligence of its sub-contractor, Pike's Garage, in the installation of the air-conditioning units which resulted in a "chain reaction" of problems. It offered to replace the blown cylinder head and any other parts damaged as a result of Pike's Garage negligence."

Exhibit "W.L - 3" which is the letter dated March 11, 1995 states as follows:

"Our offices duly received your letter dated March 2, 1995. In answering your question, a warranty is extended for all new cars purchased from our dealer.

I am definitely aware of this major problem as it has been discussed many times between the tri party, Prospective, Executive Mootors Ltd (EML) and Pike's Garage. EML expresses it's sincere sympathy as to the inconvenience this mishap has caused Prospective Car Rentals.

After discussing this problem with our Chairman, Mr. Desmond Panton, the fact is clear that this problem resulted due to the negligence of Pikes in the installation of the air-conditioner which resulted in a chain reaction of problems.

EML would be more than happy to replace the blown cylinder head and any other parts resulting in this negligence.

However, this is not a factory fault which can be resulted in claims against the warranty. Therefore, Pike's Garage will be held responsible for all costs resulting from this negligence.

Please be advised that EML would like to assist in getting your vehicle to operable conditions. We are asking that you contact our offices and speak directly to Mr Evans, Service Manager. Mr. Evans and Prospective can decide as to the time and place as to the repairs of the said vehicle.

Our offices will immediately contact Pike's Garage as to the payment and terms of such negligence...."

Executive Motors Limited
Sgd. Marilyn Dibsi
Co-Manager

Paragraphs 10 of Mrs Lewin's affidavit further states:

> "10. ...on 27th March 1995 Mr. Laurel Evans, the defendant's then service manager, wrote to Pike's Garage pointing out that on 22 March 1995 he had visited the plaintiff's premises and inspected a Mazda about which the plaintiff had complained. He stated that he had observed that the installation of the air-conditioning condenser had not been done properly. He stated that the air-conditioning condenser had been fitted without brackets which had caused the condenser to rupture the radiator leading to a loss of coolant, the engine overheating and damage to the cylinder head gasket. He pointed out that Pike's Garage was at fault."

The affidavit evidence of Mrs. Lewin also reveals that on the 24th May, 1996, Mr. Christopher Callen, the defendant's then Sales and Administration Manager, wrote to her expressing shock and dismay at the way in which the defendant's previous management team had treated the plaintiff. That letter, exhibit "W.L - 8" states as follows:

> " On Wednesday, May 22, 1995, I was enlightened of the issues surrounding your

last vehicle purchase by Miss Jacqueline Kennedy, our new Sales Co-ordinator.

I must hasten to let you know how shocked I was to have found out how poorly you were treated by the previous management team. Surely, I do understand how disgruntled and dishearted (sic) the situation would have left you.

While I cannot erase the damage that this has already done, I will make every effort to ensure that a similar situation does not recur. For our customers really come first.

I am pleased to inform you that I am heading the new management team now in place at Executive Motors Limited. As a result, you can be assured of first class pre and post sales service. I am a firm believer that every customer must be a satisfied customer.

Therefore, in the name of good customer relations, I am prepared to make amends in the following ways:

1. To pay to Prospective Car Rentals the sum of Eighteen Thousand ($18,000.00) for repairs done to 12 of the units (@ $1,500) as your letter of March 2, 1995 stated. This will be in the form of a 'contra-entry' on your existing balance;

2. In addition, I would appreciate you sending to us the disabled Mazda 323, so we can replace the blown cylinder head and necessitate the associated repairs.

Again I sincerely apologize for the embarrassment, humiliation and loss of income you have suffered. I am confident that as soon as we have put the past behind us, we can anticipate a relationship which is mutually beneficial.

Consequently, I urge you to make current your Platinum Plus account with us as soon as possible in order to facilitate prompt processing of your next vehicle order.

I look forward to your urgent response and trust that as we attempt to cement a new and more rewarding relationship, we will receive your understanding and co-operation."

Sincerely yours
Executive Motors Limited
Sgd. Christopher Callen
Sales and Admin. Manager

The plaintiff also relied upon the affidavit of Leo Bernard sworn to on the 2nd March 1999. He is the

mechanical supervisor of the plaintiff company and has been a motor mechanic for the past thirteen years with the plaintiff. He has joined issue with Mr. Tavares and asserts that the damages he saw in respect of the engines for the vehicles were in his opinion, due to improper installation of the air-conditioning systems. He is further of the view that it is not necessary that a collision should take place in order for the radiator or engine or both to be damaged. Having seen all thirteen vehicles that are in dispute, he has concluded that damage resulted as a result of the air-conditioning condensers being fitted too closely to the radiators and without the use of brackets at the tops and sides. According to him, there would have been constant friction resulting in puncture to the radiators leading to overheating of the engines.

SUBMISSIONS

Miss Gentles submitted that when a court has not adjudicated upon a case, it ought to allow a judgment entered in default to be set aside if the defendant can show that he has an arguable defence or that there are triable issues. She further submitted that a defendant need not show that he has a good defence and he need only show issues that a court would allow him to proceed to trial. She argued that Mr. Tavares' evidence would be relevant and helpful to the trial judge having regard to his expertise. Furthermore, she argued that his affidavit supports paragraph 7 of the draft defence.

Mr. Reitzin had objected to the contents of paragraphs 2 and 4 respectively of Desmond Panton's affidavit. The court ruled that the defendant could not rely upon the allegations in paragraph 2 and from the words "and had no technical knowledge .....company" in paragraph 4, as they were in breach also of section 408 of the Judicature(Civil Procedure Code) Law.

The following is a summary of Mr. Reitzin's submissions:

1. For a defendant to show a defence on the merits he must demonstrate more than that he has an arguable defence in the sense of being able to raise triable issues. He must demonstrate that he has a real prospect of success and the defence shown must carry some "real degree of conviction". For these submissions, he relied upon the case of Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc, The Saudi Eagle [1986] 2 Lloyd's Rep. 221.

2. The evidence adduced by the defendant did not support the draft defence. Although the draft defence potentially denies that the contract was breached, the evidence presented on its behalf tend strongly to show that there was a breach of contract. The only proper inference to draw from paragraph 4 of Lorraine Brown's affidavit is that the contract was breached. She had stated:

(i) the air-conditioning units were installed by an independent contractor.

(ii) the defendant attempted to correct the problems.

3. The affidavit of Wynsomme Lewin dated 13th January, 1999 demonstrate through the defendant's own letters that the defendant itself regarded its sub-contractor as negligent in the installation of the air-conditioning systems.

4. The defendant's Service manager, Laurel Evans having personally examined one of the cars in question had stated that the installation was not done properly, that Pike's was at fault and will have to stand the cost of the damaged cylinder head .....The defendant had also apologized to the plaintiff in writing for the embarrassment, humiliation and loss of income the plaintiff had suffered.

5. The defendant's denial of loss was untenable.

6. The defendant's assertion that a faulty installation cannot cause damage was untenable. The evidence contained in the affidavit of Leroy Tavares was diametrically opposed to the defendant's own letter signed by Laurel Evans, the defendant's then service manager.

7. The defendant's assertion that certain loss was caused by the plaintiff's customers was also untenable.

8. The defendant had admitted liability.

FINDINGS AND CONCLUSION

The authorities show that even where a judgment is regular the court will set it aside if there has been no adjudication on the merits and judgment is due only to a failure to comply with the rules of procedure. However, in support of his summons the defendant must file an affidavit of merits showing that he has an arguable defence. As Lord Atkin pointed out in **Evans v Bartlam** [1937] A. C 473 at p. 480, "there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence".

Other relevant considerations to setting aside the judgment include, whether there has been any undue delay by the defendant in making the application, whether any prejudice to the plaintiff can be cured by an appropriate order for costs and whether the defendant has an arguable case which has a real prospect of success.

I have read all the affidavits along with the exhibits in the matter and have given due consideration to the submissions and arguments put forward on behalf of the parties. The issue for me to resolve now is whether I should allow the defendant to file its defence to defend the action and to join a third party.

I do agree with Mr. Reitzin when he submitted that the evidence adduced by the defendant does not support the draft defence. The cause of action sounds in contract and it is contended that the breach has resulted in loss and damages to the plaintiff.

refunds and to apologize for the embarrassment and humiliation the plaintiff had undergone, but he had also admitted that there was a loss of income to the plaintiff. It is quite clear from the evidence presented by the defendant that there was no denial of Mr. Callen's authority. What has been challenged by Mr. Panton, is Mr. Callen's ability to give an opinion on the problems of the plaintiff's vehicles.

It is therefore my considered opinion that when all the matters are taken into consideration that the defendant has no arguable case which has a real prospect of success. The summons is therefore dismissed with costs to the plaintiff to be taxed if not agreed.

Paragraph 4 of the statement of claim alleges the terms and/or conditions in the contract of sale which were breached. These terms include inter alia, the necessity for merchantable quality which is implied in the Sale of Goods Act. In its draft defence the defendant denies that the agreement between the parties contained the alleged or any terms stated in paragraph 4 (supra) of the statement of claim or at all. The inference to be drawn therefore, is that there was a written contract but it has not been put in evidence for the court to examine same. There is no evidence therefore, that the terms pleaded were excluded or that there were other terms inconsistent with them.

I also accept the submission that through the defendant's own letters (Exhibits W.L - 3, W. L -4 and W. L - 8) the defendant regarded its subcontractor as negligent in the installation of the air-conditioning systems. These letters to my mind, seem to indicate that the defendant has breached the contract. Here is what each exhibit states:

> 1. Exhibit "W.L -3" (letter from the Co-Manager of the defendant Company) - "the fact is clear that this problem resulted due to the negligence of Pike's in the installation of the air-conditioner which resulted in a chain reaction of problems.
>
> E.M.L would be more than happy to replace the blown cylinder head and any other parts resulting in negligence...."
>
> 2. Exhibit "W.L - 4" (letter from service manager of the defendant company) states inter alia: "....on inspection of the vehicle it was observed that the installation of the air-condition condenser was not done properly. The condenser was put in place without the used(sic) of brackets for same, hence causing the said condenser to rupture the radiator and causing it to leak. This meant that the radiator was loosing coolant which is the basic cooling source for the engine. With the engine not cooling it will overheat and cause damage to the cylinder head and gasket. Therefore Pike's garage is at fault and will have to stand cost for the damaged cylinder head, a new over-haul kit and be held responsible for any other claims made by Prospective Car Rentals Ltd."

The evidence at 2 (supra) is in my view contrary to the opinion expressed by Leroy Tavares that no matter how an air-conditioning system is installed, it cannot cause damage to the radiator or engine unless there is a collision with the vehicle which causes the brackets to be pushed back.

> 3. Exhibit "W.L - 4" (letter from the Sales and Administration Manager) in which he states that the defendant company was prepared to make amends by the repayment of cash to the plaintiff in respect of repairs to twelve (12) of the units and for the disabled vehicle to be returned so that the blown cylinder head to be replaced and to necessitate the associated repairs.

It is my considered view also, that the letter from Mr. Callen (Ex. "W.L - 8") is a clear indication on the part of the defendant that liability was no longer an issue. Mr. Callen did not only seek to make