



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2017: No. 348

**BETWEEN:**

**STEVE M. FRANKS**

**Plaintiff**

**- and -**

**TROY BURGESS**

**Defendant**

**and**

## **JUDGMENT**

*Motorcar engine repair, Breach of contract on grounds of failure to exercise reasonable care and skill, Bailment for hire of work and labour, Bailee's duties to take reasonable care of the chattel during period of bailment, Conversion of motorcar parts and damages to the motorcar incurred during the period of bailment*

**Date of Hearing:** 7, 8 March 2023

**Date of Judgment:** 24 May 2023

**Appearances:** Steve Franks, Litigant in Person

Paul Harshaw, Canterbury Law Limited, for Defendant

**JUDGMENT of Mussenden J**

## Introduction

1. In Bermuda, reaching the age of 16 years brings the rite of passage of obtaining a driver's license for an auxiliary cycle (with a maximum engine capacity of 50cc) and hopefully owning an auxiliary cycle or moped. Similarly, at the age of 18 years, one could obtain a driver's license for a motorcycle (with a maximum engine capacity of 150cc). It was also an opportunity to learn about 2-stroke and 4-stroke engines as groups of teenagers up and down the neighborhoods and schools of Bermuda would dismantle and rebuild the cycle engines, learning about engine heads, blocks, manifolds, carburetors, pistons, piston rings, pins and timing mechanisms and in most cases making the cycles go faster. The popular cycle brands/models were Cyrus, Triumph, Mobyette, Peugeot 103, Suzuki RC100, Yamaha V50 and V80 and Honda Scoopy. Experiences with cycle engines have led many a person throughout Bermuda to go on to understand the concepts and mechanics of car engines. This case is about the repair of a car engine.
2. The Plaintiff Mr. Franks is the owner of a 2004 Rover MG TF Convertible motorcar (the "**Rover**"). He purchased it in 2004.
3. The Defendant Mr. Burgess offers services on a part-time basis as a motorcar mechanic. He is employed on a full-time basis elsewhere.

## Background and Pleadings

### The Writ and Statement of Claim

4. Mr. Franks caused a Generally Indorsed Writ of Summons to be issued on 27 September 2017 in respect of the repair of the Rover. He did not expressly set out what his cause of action was and he did not set out any precise terms of a legal relationship or duties.
5. The basis of Mr. Franks' claim is that he discovered that an engine warning light on the Rover dashboard (the "**Warning Light**") was flashing. Mr. Franks claimed that Mr. Burgess had his Rover for repairs in respect of the Warning Light for the period 2 June

2016 until 27 November 2016 during which Mr. Burgess changed and swapped parts and caused him to spend almost all his retirement money to fix his faults. Thus he was suing him for \$45,000 for 'parts and suffering'. In an affidavit sworn 11 October 2017 Mr. Franks claimed that Mr. Burgess overcharged him for repairs to the Rover (the "**Burgess Repairs**") and upon its return, he had to purchase a transmission, all new suspension, throttle body, alternator, cable, spark plugs, brakes and make other repairs to the body of the Car.

#### Pleadings and Particulars

6. Mr. Franks filed a document entitled "Pleadings and Particulars" (the "**P&P**") which supplemented the claims in the Writ. It set out that after some discussion with Mr. Burgess about the Warning Light, which was the only thing wrong with the Rover at that point, Mr. Franks took it to Mr. Burgess' house, for Mr. Burgess to work on it, on one or more weekends, as Mr. Burgess had a full-time job elsewhere, to fix the problem causing the Warning Light to come on. That was their verbal agreement. Mr. Franks claimed that the car body and engine were in good condition when he delivered it to Mr. Burgess.
7. Over the course of several months, there were various events involving the repair of the Rover including: (a) the discovery by Mr. Burgess of a cracked liner in the engine cylinder; (b) Mr. Franks purchased from Brown & Gammon of England ("**B&G**") various car parts as recommended by Mr. Burgess (the "**Burgess Repair Parts**") for Mr. Burgess to make repairs to the car engine; (c) various visits by Mr. Franks to Mr. Burgess to check on the status of the repairs; and (d) the eventual return of the purportedly repaired Rover to Mr. Franks.
8. Mr. Franks claimed that once the Rover was returned to him in November 2016, in order to start it, he had to lock and unlock the Rover, the engine sound was different and the Rover operated in a rough manner.
9. As a result of those circumstances, Mr. Franks took the Rover, first to E&B Trading ("**E&B**") then to Bermuda Motors and then to a third mechanic. None of those mechanics gave evidence in the case. At trial, I ruled that any verbal comments made by those

mechanics about the state of the Rover were inadmissible. Mr. Franks claimed that he had to purchase more car parts from B&G (“**E&B Repair Parts**”) for E&B to make repairs and eventually a new engine from B&G for E&B to install in the Rover (the “**E&B Repairs**”).

#### Statement of Claim

10. Mr. Franks did not file a usual statement of claim but instead filed his own version of a document entitled “Statement of Claim” (the “**SOC**”) with the P&P in which he set out the list of parts he had to purchase for the car which totaled \$40,502.90. The SOC listed the parts in two sections: (a) ‘Parts purchased to repair the Rover’; and (b) ‘Parts purchased for E&B Trading from B&G’ - I accept this section to be the E&B Repair Parts.

#### Relief Sought

11. Thus Mr. Franks sought :
  - a. In the Generally Indorsed Writ, \$45,000 for ‘parts and suffering’; and
  - b. In the Statement of Claim, \$40,502.90 for the car parts and repair services.

#### The Defence

12. Mr. Burgess filed a Defence 20 March 2018. His witness statement was along the same lines. He generally denied the claims as follows:
  - a. He denied that he had been negligent or that he caused damage to the Rover;
  - b. He denied that the Burgess Repairs he had done had to be redone and he denied that he damaged parts that Mr. Franks alleged he needed to replace;
  - c. He claimed that the Rover should not have been driven once the Warning Light had activated, noting that Mr. Franks had driven it to him;
  - d. The verbal agreement was for Mr. Franks to provide the required new car parts and Mr. Burgess would charge for time spent on weekends when he worked on the Rover. Neither of them knew what was the extent of the engine problem until the engine cylinder head was removed;
  - e. He admitted that after removing the cylinder head, he found that one cylinder had a cracked liner and the cooling pipes from the radiator were rusted and probably leaking;

- f. He recommended to Mr. Franks to replace the engine but Mr. Franks wanted to replace engine parts, which he then did provide to Mr. Burgess;
- g. Mr. Franks paid a deposit of \$3,000 followed by a payment of \$9,000 for further work done to rebuild the engine;
- h. When Mr. Franks took possession of the Rover after the Burgess Repairs had been completed, the engine was in proper working order and there was a full accord and satisfaction between the parties;
- i. He denied switching or swapping car parts;
- j. Mr. Franks purchased all the car parts listed in the claim after Mr. Burgess had no further dealings with the Rover;
- k. He claimed that the Rover was worth between \$10,000 and \$15,000 when it was brought to him in respect of the Warning Light issue. He claimed that any expenditure of more than \$15,000 would have been unwise and would amount to a failure by Mr. Franks to mitigate his repair expenses.

### **The Trial - Evidence**

- 13. The trial took place with evidence given by witnesses for the Plaintiff and Defendant.
- 14. For the Plaintiff's case, Mr. Franks gave evidence along with Plaintiff expert Mr. David Bellamy. Mr. Franks' P&P stood as his witness statement and evidence in chief. In my view, the P&P was not a detailed account of the evidence in chief that Mr. Franks could have likely given. This created issues for him during his cross-examination of Mr. Burgess as Mr. Franks had to be constantly reminded to ask questions for cross-examination rather than try to give further evidence himself of documents and pictures. Interestingly and perhaps unfortunately for Mr. Franks, there was no direct evidence from anyone at E&B who had conducted or was familiar with the E&B Repairs or the state of the Rover when it was brought to them or to the content of the documents from E&B. In any event, I found Mr. Franks to be a credible witness who was a passionate owner of his pride and joy Rover.

15. For the Defendant's case, Mr. Burgess gave evidence along with Shaun Lathan and Defence expert Mr. Robinson. I also found Mr. Burgess to be a credible witness equally passionate about his skills as a mechanic.

Evidence not in dispute

16. There was evidence that generally was not in dispute.

17. Mr. Franks discussed the Warning Light with Mr. Burgess after which he had possession of the Rover for the period 2 June 2016 until 27 November 2016. There was one point when Mr. Franks took the car from Mr. Burgess' house without Mr. Burgess' knowledge for a period of about a week but after some discussion returned it to Mr. Burgess to continue the repair work. Nothing arises from the period of time when Mr. Franks had briefly retaken possession of his Rover. It was also agreed that at some point during the period when Mr. Burgess had possession of the Rover, he advised Mr. Franks that he should purchase a new engine for the Rover.

18. Mr. Franks purchased the Burgess Repair Parts from B&G and gave them to Mr. Burgess. There are disputes as to whether the Burgess Repair Parts were actually the proper parts for the Rover and were the ones actually installed in the Rover. I will return to these issues later.

19. Mr. Franks paid Mr. Burgess \$3,000 upfront to work on the Rover and then in November 2016 Mr. Franks paid him another \$9,000 for fees incurred over the time Mr. Burgess worked on the Rover.

20. Mr. Burgess returned the Rover to Mr. Franks on or about 27 November 2016 after completing the Burgess Repairs. Mr. Franks conceded that he drove the Rover during the period after Mr. Burgess returned the Rover to him in November 2016 and 2019, noting that every time he drove the Rover it performed worse. Mr. Franks was unhappy with the performance of the car and the Burgess Repairs. Thereafter, he arranged for a mechanic at E&B Trading to make further repairs to the Rover having purchased the E&B Repair Parts,

again from B&G. At some point, a new engine was installed in the Rover and the old engine was sent to England for Mr. Bellamy to inspect and produce an expert report.

The Work performed by E&B

21. Mr. Franks produced invoices from E&B for work performed on the Rover (the “**E&B Invoices**”). The fact that this work was performed by E&B after Mr. Burgess had returned the Rover to Mr. Franks in November 2016, was not challenged. This was because the issue to be determined was whether Mr. Franks had proven his case that Mr. Burgess was liable for breach of contract and the damages as alleged by Mr. Franks, prior to the E&B Repairs.
  
22. Mr. Franks produced an E&B Invoice for an examination of the Rover that was conducted prior to the Burgess Repairs as set out below. The invoice described the Rover as a Model MGTF of the year 2004.
  - a. Invoice No. 80902, 31 May 2016 for \$90
    - i. The invoice description is “Check and scan engine light is on”. I note here that I refer to this information on each invoice as the ‘description’ which appears to be bullet points of the reason/complaint why the Rover was being brought in for service and in some cases, bullet points of the actual work done for that invoice. There was no evidence from E&B on this point.
    - ii. The work performed is “Scan vehicle, found codes PO170 fuel trim bank. PO300 random/multiple cylinder misfire detected.” I note here that I refer to this information on each invoice as the ‘work performed’ which appears to be the work performed for that invoice, but again, there was no evidence from E&B on this point.
  
23. Mr. Franks produced a number of E&B invoices to show the work that E&B performed on the Rover after Mr. Burgess returned the Rover to him. It is useful to set out the details of the work performed according to those invoices as follows:
  - a. Invoice No. 88052, 9 December 2016 for \$3,272.35
    - i. The description included that the Engine Light was on and the Engine was making a humming noise when driving.

- ii. The work performed included “scanned and checked the engine light staying on and the following fault codes registered; PO300 random multiple cylinder misfiring detected and PO313 misfiring detected, possible fuel system.” After various checks noise was found from the engine and wheel area.
  - iii. The soft top engine cover was removed. Repairs were made to the some engine parts including welding a leaking by-pass pipe.
  - iv. All the tyres were removed and repairs were made to all the tyre areas including fitting new brake pads, brake discs, bearings and bearing tensioner. The humming noise had disappeared after those repairs.
  - v. The Rover was tested for misfiring. New spark plugs were fitted. No mechanical problems were found.
  - vi. Further repairs included fitting a new fuel filter and ignition coil. The test drive showed the vehicle was OK but the next morning another test drive showed that the Rover was misfiring slightly, but performing better than before. A recheck found no problems. When the wire was disconnected from the throttle sensor the engine ran OK. The diagnosis was that it could possibly be an ECM or Computer Box fault. The recommendation was that the customer could take the vehicle and drive it for a while, if the engine light comes back on, the vehicle should be brought back in.
- b. Invoice No. 88054, 9 December 2016 for \$205.80
- i. The description is “Check and repair speedometer not working. A new battery was fitted but is being drained. The vehicle must be locked and locked to start it.” I note Mr. Franks’ claim set out that the vehicle must be ‘locked and unlocked’ to start it. Thus, this entry of ‘locked and locked’ on the invoice is most likely a minor typographical error.
  - ii. The work performed included a faulty speedometer, alternator and a steering wheel switch were replaced, all supplied by the owner.
- c. Invoice No. 88491, 17 December 2016 for \$789.60
- i. The description is “Fit a new throttle body and cable to vehicle, parts supplied by the owner. Checked and repaired muffler rattling”.



- ii. The work performed included removing the engine cover and replacing a faulty throttle body assembly and an accelerator cable, all supplied by the customer. After those repairs the RPM was Ok but not high and the engine light was staying on. The engine was scanned for the light staying on and the new code PO170 indicated fuel trim-bank 1. The possible causes of this code were checked and there were no mechanical faults found. It was noted that the possible causes of the fault code were intake leak, air system, fuel pressure/pump, injectors, EVAP canister purge valve.
- d. Invoice No. 89056, 6 January 2017 for \$1,085.70
- i. The description is “Fit oxygen sensor and fuel sensor injector sensors supplied by customer. Rear right wheel is touching when turning corners, check left side suspension - feels lots of bump, tighten up handbrake, fit bracket supplied by customer”.
  - ii. The work performed included removing various parts including faulty oxygen sensors, intake manifold assemblies, canisters, hoses and injector assembly. Then the Rover was fitted with four new injector assemblies and an oxygen sensor. The handbrake could not be adjusted as it was built into the brake caliper. During three long test drives the engine light did not come on. It was noted that the Rover was jerking when it was put into drive and reverse gear; the transmission needed to be checked and when taking the dip stick out, fluid blew out like pressure was built up.
- e. Invoice No. 95568, 11 July 2017 for \$4,817.00
- i. The description is “Change vehicle’s transmission and suspension parts which were all supplied by the owner”.
  - ii. The work performed included removing many parts including tyres, muffler, exhaust manifold assembly soft top, engine cover, intake air cleaner assembly and alternator assembly. The engine and transmission mounts were removed. A new damper and transmission assembly were fitted, part supplied by the owner. The suspension, stabilizer bars and associated parts were replaced. After a long test drive, the Rover performed

OK, the suspension was OK and no noises were found. The transmission fluid was not blowing out of the dipstick.

- f. Invoice No. 96656, 26 July 2017 for \$394.80
  - i. The description is “Replace engine mount and transmission mount, parts supplied by the owner”.
  - ii. The work performed included the engine cover was removed and the rear wheels were removed. The front engine cover was removed and the new engine mount was fitted. A new transmission mount was fitted. The engine mount and the transmission mount were OK.
- g. Invoice No.112361, 13 October 2018 for \$3,180.20
  - i. The description is “Change the engine supplied by the customer. Do not start the engine until the oil pressure is up. See instruction provided. Wind the passenger door down before you open the door. Transmission cover and air filter is in seat to be changed. Flush out and pack old engine and parts in box to send overseas. Check suspension when test driving the vehicle”.
  - ii. The work performed included removing all the parts necessary to remove the engine, removing the engine, separating the transmission and removing all the parts needed from the old engine. Packing the old engine and giving it to the owner.
  - iii. Assembling and fitting the new engine and transmission. It was noted that the instructions from the engine dealer were followed, oil pressure was in the engine and the engine started OK. The engine was run a long time and was OK. The front suspension was a bit bumpy although all suspension was almost new and OK.

#### Evidence in dispute

24. There were various main areas of evidence that were in dispute as set out below.

- a. Nature of the Parts - Whether the Burgess Repair Parts purchased by Mr. Franks and installed by Mr. Burgess were fit for the Rover. Mr. Franks’ case is that the parts he purchased were the parts requested by Mr. Burgess. Shaun Lathan’s

evidence for the Defence is that the car was full of “after-market” parts, which are parts made by someone other than the original equipment manufacturer. On cross-examination as to what were the after-market parts, he stated that the manifold was an after-market part. When challenged that the manifold was made for an MG car, he reiterated that it was an after-market part and that it was a high-performance part because it was bigger. He did not list any other parts that were after-market parts.

- b. Whether Mr. Burgess performed the repairs to the required standard. Mr. Franks’ claim is that Mr. Burgess did not effect the repairs to the Rover to the proper standard. Further, the Assembly Errors as identified by the expert evidence of Mr. Bellamy (defined below) were the result of his poor workmanship. He relied extensively on the E&B invoices to prove that further work was required on the Rover by E&B to get it in proper working condition, ultimately having to purchase a new engine. Mr. Burgess denied those claims and in any event, asserts that because of the repair work by E&B, it is not possible for the Court to be satisfied that he was the cause of the damage to the Engine.
- c. Whether Mr. Burgess swapped the Burgess Repair parts with other parts. Mr. Franks claims that Mr. Burgess swapped the Burgess Repair Parts that he purchased from B&G for other parts, using the Burgess Repair Parts in Mr. Burgess’ own vehicle. Mr. Burgess denied that claim.
- d. Whether Mr. Burgess damaged other parts of the Rover. Mr. Franks claims that Mr. Burgess caused other damage separate and apart from the repairs required to address the Warning Light. Mr. Burgess denied those claims.

### The Expert Evidence

#### Mr. Bellamy – Expert for Plaintiff - Evidence in Chief

25. Mr. Bellamy inspected the Rover engine on 23 July 2019. He had been asked to ascertain the reason for a lower power output. His conclusions were as follows:

- a. The low power output was due to incorrect valve timing. This was an assembly error (There were a number of assembly errors identified by Mr. Bellamy which I now collectively define as the “**Assembly Error(s)**”).

- b. The Engine long bolts had not been finished tightened the final 180°. This was an Assembly Error.
- c. The cylinder head revealed score marks in the liner surfaces which were quite deep. Measurements showed the four liners were set too low and there was no sealant applied to the liner shelves in the parent bore.
- d. The little ends of the connecting rods had been overheated and this led to the piston pins having an incorrect shrink fit. Thus, when the engine was rotating, the piston pins scored a groove in three of the four liners. This was an Assembly Error.
- e. His opinion was that the engine was not assembled using reasonable care and skill and the work carried out was not of satisfactory quality and the engine was not fit for purpose.

Mr. Bellamy – Expert for Plaintiff - Cross-Examination

26. Mr. Bellamy was cross-examined by Mr. Harshaw. His evidence was as set out below.
- a. He could not state who worked on the engine between November 2016 and July 2019, that is, after Mr. Burgess had returned the Rover to Mr. Franks.
  - b. He would not have assembled the engine like it had been assembled.
  - c. He could not identify when the Assembly Errors took place.
  - d. He could not say when the Assembly Error involving the long bolt took place.
  - e. He could not give a date or approximate date when the Assembly Errors occurred.
  - f. He could not say who was responsible for the Assembly Errors.
  - g. He was not aware that when he inspected the engine, that the Plaintiff had been driving the Car between 2016 when he first noticed issues with the engine and 2019 when the Engine was sent to him for inspection.

Mr. Shannon Robinson – Expert for Defendant - Evidence in Chief

27. Mr. Robinson stated that he had been asked to give his opinion as to why the transmission mount in the Rover had fractured. His conclusions were as follows:
- a. The engine appeared to have been rebuilt with non-standard parts.
  - b. There was a change in the type of inlet manifold used. That inlet manifold increased the power output of the engine beyond that recommended by the manufacturer.

- c. There was a change in rear wheel tyre size. This increased the torsional stress and oscillations to the standard transmission mount, likely causing it to fracture.
- d. The weakest section of the transmission mount is where the two metals are joined at the weld. The function of the transmission mount is to control the torque and vibration through the drive line, of the engine crankshaft through the transmission to the driving wheels of the vehicle.

Mr. Robinson – Expert for Defendant - Cross-Examination

28. Mr. Robinson was cross-examined by Mr. Franks. His evidence was as set out below.
- a. The transmission mount showed that it was damaged;
  - b. He could only assume what faults happened to damage a mount; There were extreme tortious forces on that mount to cause it to fracture. He did not know what caused the tortious stress.
  - c. The manifold that came with the car was changed to another manifold. Thus it was a non-standard part. Those types of parts are known to increase the horse-power of the motor.

**The Issues**

29. There are several main issues in this case, namely:
- a. What are the causes of action.
  - b. Whether the B&G Repair Parts were the proper parts for the Rover.
  - c. Whether there was breach of contract, namely whether Mr. Burgess installed the Burgess Car Parts improperly thus causing the engine to be not fit for purpose.
  - d. Whether there was damage to the Rover during the period of the bailment and whether Mr. Burgess is liable for any such damage.
30. I will deal with those issues in turn noting that my assessment was not focused on credibility of the witnesses as much as it was focused on the sufficiency and reliability of the documentary evidence.

## Issue 1 – The cause of action

### Contract & Express terms

31. As stated above, Mr. Franks did not plead a particular cause of action as he set out his claims. In my view, there was a valid and binding contract between Mr. Franks and Mr. Burgess by way of a verbal agreement with an express term for Mr. Burgess to identify and repair the issues of the flashing Warning Light. The agreement was that Mr. Burgess would work on the Rover on weekends as he had other full-time employment. They agreed that Mr. Burgess would charge for the time spent working on the Rover. Such payments were made in the sums of \$3,000 and \$9,000.
32. I am also satisfied that there another other express term of the contract was that as Mr. Burgess worked on the Rover, and identified further issues to Mr. Franks, Mr. Franks would consider the issue, and if appropriate, would give his agreement for relevant repairs to be made. He would also procure any required parts for Mr. Burgess to install them in the Rover.

### Implied terms

33. Also, in my view, section 3 of the Supply of Services (Implied Terms) Act 2002 applies which states that *“In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.”*
34. Thus, Mr. Frank’s claim is for breach of contract to repair the problems that caused the Warning Light to flash on.

### Bailment

35. Mr. Franks claims for various heads of damages for the Rover separate and apart from the damages he seeks for breach of contract. In my view, when Mr. Franks delivered the Rover to Mr. Burgess for repair work to be carried out, the legal relationship of a bailment for hire of work and labour was created between them with Mr. Franks as the bailor and Mr.

Burgess as the bailee. Thus, Mr. Burgess would have possession and control of the Rover but once the repairs were complete then Mr. Burgess was always obliged to return the Rover to Mr. Franks – and in no worse condition than when Mr. Franks delivered the Rover to him.

36. Under the bailment, there is a requirement to take reasonable care of the goods. Thus, Mr. Franks is claiming for the breach of the bailment as a result of the Rover being returned to him with damage he asserts was incurred while it was in the possession and control of Mr. Burgess.

37. In *Antonio Pimentel Da Costa v Christopher Carter & BF&M General Insurance Company Limited* [2017] Bda LR 122 Hellman J cited the classic definition of a bailee given by *Pollock and Wright in Possession in the Common Law* (1888) at 163<sup>1</sup>:

*“Any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an understanding with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person.”*

38. Chitty on Contracts Volume II, Thirty-Third Edition (2018) also provides as follows:

a. [33-014] *“In addition to his obligation to return the goods, the bailee is under a duty to his bailor not to convert the chattel, i.e., no to do intentionally in relation to the chattel an act inconsistent with the bailor’s right of property in it and which excludes him from use and possession of the chattel, citing Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd [1939] A.C. 178, 202 and Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716, 732.*

b. [33-050] *“The loss of, or injury to the chattel while in the bailee’s possession places the onus of proof on the bailee to show that it was not caused by any failure on his part to take reasonable care, citing Brook’s Wharf and Bull Wharf Ltd v*

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<sup>1</sup>The classic definition in Pollock and Wright is also cited in Chitty on Contracts Volume II, Thirty-Third Edition (2018) at 33-003.

*Goodman Bros [1937] 1 K.B. 534, 538-539; but he need not show exactly how the loss or injury occurred.*

- c. [33-091] *“Where a chattel is bailed to the bailee in order that he may perform work upon it for reward, it is a bailment for hire of work and labour, citing Palmer at Ch. 15”*
- d. [33-092] *“... Since the worker is to be remunerated, the common law required him to perform the work in an efficient manner, showing reasonable competence in any art or craft which he publicly professes; it also required him to take reasonable care of the chattel bailed to him, citing Morris v CW Martin & Sons Ltd, and to return it to the bailor at the expiration of the period. This duty of care may require the bailee to take precautionary measures once the chattel is found to be in unexpected danger, If the chattel is lost or injured during the bailment, the onus is on the bailee to show that the loss or injury was due to inevitable accident, inherent vice in the chattel, or some other cause not involving any failure on the part of himself or his employees to take reasonable care, citing Sheehy v Faughan [1991] 1 I.R. 425. ...”*

## **Issue 2 – Whether the B&G Repair Parts were the proper parts**

39. Mr. Franks’ evidence is that he purchased the Burgess Repair Parts that Mr. Burgess requested. Mr. Bellamy makes no comments about whether the Burgess Repair Parts were not proper parts for the Engine. Mr. Robinson opined that the Burgess Repair Parts were after-market parts that caused various effects on the performance and structure, that is, the transmission mount of the car.

40. Mr. Burgess’ evidence was that he received after-market parts from Mr. Franks, including an inlet manifold, cylinder head and gasket. He stated that the engine position could not accommodate the size after-market parts so he had to modify the shape of the opening in order to fit the after-market cylinder head with the after-market inlet manifold. Later on, Mr. Franks provided him with more after-market parts namely cylinder liners, piston rings



and a set of 6 shell bearings. He installed these after-market parts also. Later on, he installed a new piston.

41. Although, Mr. Burgess stated the parts were after-market parts, at no point did Mr. Burgess assert that the after-market parts were not proper parts to install in the car. On the basis that there is no evidence that the Burgess Repair Parts were not proper parts to be installed, I am satisfied that they were proper parts to be installed in the Rover.

**Issue 3 – Whether the B&G Car parts were by Mr. Burgess with reasonable care and skill thus causing the engine to be not fit for purpose**

42. Mr. Burgess' evidence was that he installed the Burgess Repair Parts correctly and to the required standard of exercising reasonable care and skill. In respect of the repairs he made to the cylinder head, liners, pistons, piston rings and heating pins to the correct temperature, he maintained that he exercised reasonable care and skill. Mr. Bellamy's evidence was that there were Assembly Errors. Mr. Franks' case is that the Assembly Errors were the fault of Mr. Burgess. However, I am not satisfied that Mr. Burgess installed the parts incorrectly or without reasonable care and skill for several reasons.
43. First, Mr. Burgess' evidence is that he performed the repairs according to the proper standards and using the proper equipment. He states that Mr. Franks took possession of the car in November 2016 once he had completed the range of tests he considered necessary and the Warning Light was no longer an issue. In respect of this evidence by Mr. Burgess, in my view, there is no clear and direct evidence to rebut it. Thus, I was inclined as a first step to accept Mr. Burgess' evidence unless and until it could be undermined by some other reliable evidence. To this point, I am not satisfied on Mr. Franks' evidence alone that Mr. Burgess breached the terms of the contract to repair the Rover by failing to exercise reasonable care and skill.
44. Second, Mr. Burgess' stated in his witness statement "*I had to "trick the brain of the engine" which meant I had to configure the Engine's system to enable the sensors to read*

*the after-market parts as those parts were larger in size than the Engine's original parts."* My initial consideration of this admission seemed to point to Mr. Burgess not exercising reasonable care and skill in repairing the Rover as I doubted whether 'tricking the brain of an engine' was part of the duties of a highly skilled mechanic and whether the manufacturer of the car intended for the 'brain of the engine' to be tricked. I also considered if 'tricking the brain' had anything to do with the alleged need to lock and unlock the car in order for the engine to start. However, there is no evidence that 'tricking the brain' of the Rover was the cause of any of the identified issues including the issue of locking and unlocking the door to start the engine.

45. Third, I have reviewed the E&B Invoices as set out above in detail. Mr. Franks' case is that the Court can rely on those invoices to determine what work was carried out by E&B and what parts were used by E&B to determine the liability of Mr. Burgess and where he failed to exercise reasonable care and skill. Mr. Franks aptly cross-examined Mr. Burgess on whether he had seen the Rover Engine completely stripped at E&B with Mr. Burgess maintaining that he had. Mr. Franks also cross-examined Mr. Burgess on the content of the E&B Invoices, pointing out that none of the E&B Invoices showed that the engine was stripped completely. However Mr. Burgess replied generally that he is not sure what E&B write on their invoices and there was no clarity on their invoices. I find that I must reject Mr. Franks' submissions on the reliance on the E&B Invoices although they do purportedly show a description of work performed by E&B and parts used by E&B. In my view, I am not satisfied that the E&B Invoices reveal the whole story of the Burgess Repairs and the E&B Repairs in the absence of direct evidence from the mechanics of E&B.

46. Fourth, Mr. Franks' evidence is that after Mr. Burgess worked on the Rover and returned it to him, he discovered lingering issues with the Engine, so he eventually took it to E&B where a mechanic carried out further repairs on the Rover engine. Despite Mr. Franks providing the E&B Invoices and a list of car parts that were purchased for the E&B Repairs, there was no direct evidence from E&B as to how they found the state of the engine and what repairs they performed. As stated above, the E&B Invoices fail to tell the whole story of the Burgess Repairs and the E&B Repairs. I do note that Mr. Franks makes no claim

against E&B and of course I am keen to stress that I make no findings or criticism against E&B, which in any event, is not a party to these proceedings. However, in my view, the intervention of E&B in making repairs without there being evidence from E&B about such repairs causes significant difficulty to Mr. Franks establishing his claim solely against Mr. Burgess.

47. Fifth, I find Mr. Bellamy's evidence significant in that he stated that he cannot say who worked on the Rover between 2016 after Mr. Burgess worked on it and 2019, he could not identify when the Assembly Errors took place and he could not say who was responsible for the Assembly Errors. In my view, I find that E&B's repairs of the Rover over the period of time since December 2016 were interventions in the sense that it is not clear who caused the Assembly Errors. In other words, on the evidence, I have serious doubt as to who did what work on the engine by the time it was inspected by Mr. Bellamy several years later. In light of these reasons, I cannot be satisfied to the required standard that Mr. Burgess installed the parts incorrectly and without reasonable care and skill thus causing the Assembly Errors.

48. Sixth, it is without question that Mr. Franks bears the burden of proving his case. However, in light of the above reasons, in my view, I am not satisfied that Mr. Burgess breached the terms of the contract and failed to repair the car to the required standard such that it was not fit for purpose. Thus, I would dismiss Mr. Frank's claim for breach of contract for failing to repair the Engine. It follows that I do not need to consider any damages arising out of the claim for breach of contract for failing to repair the Engine.

**Issue 4 – Whether there was damage to the car during the period of the bailment and whether Mr. Burgess is liable for any such damage**

49. Mr. Franks appears to make various claims against Mr. Burgess in respect of theft or swapping of the Burgess Repair Parts and damage to his car during the period of bailment.

Damaged Rear Window and Body Work

50. As will be seen below, there are various categories of damage which I do not accept as there is an absence of evidence from the mechanics of E&B and experts. However, there is some direct evidence from Mr. Franks of what he saw that does satisfy me to the required standard. To that point, I am satisfied on the evidence that Mr. Burgess is liable for the damaged body work and damaged rear window which occurred when the Rover was in his possession and control. I find that Mr. Burgess failed to show that such damage was not caused by his failure to take reasonable care, relying on *Chitty on Contracts* [33-050] and the cases of *Brooks Wharf* and *Morris*.

51. In my view, I grant the claims as set out in the SOC as follows:

- a. Body damage repair (Scratches and dents) \$2,325.00.
- b. Back Window - \$250.00.

#### Parts Swap

52. In *Re H* Lord Nicholls of Birkenhead stated:

*“The general principle is that he who asserts must prove. Generally, although there are exceptions, a plaintiff or applicant must establish the existence of all the pre-conditions and other facts entitling him to the order he seeks.*

...

*The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungood-Thomas J. expressed this neatly in *In re Dellow’s Will Trusts* [1964] 1 W.L.R. 451, 455:*

*“The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.”*

53. I am not satisfied on the evidence of Mr. Franks that Mr. Burgess took the Burgess Repair Parts and/or used them in his own motorcar during the period of the bailment. Mr. Franks maintained that various parts he gave to Mr. Burgess were not used to repair the Rover, various parts removed from the Rover were not returned to him or that some parts returned

to him did not come from the Rover. In some cases, he relied on levels of rust and box packaging to support his allegations. Mr. Burgess denied these allegations.

54. I find Mr. Franks' evidence to be bare assertions on this point amounting to speculation including when Mr. Franks said that Mr. Burgess' similar car was now in tiptop condition causing him to suspect that Mr. Burgess was switching the Burgess Repair Parts with his rusty parts. I am unable to convert his suspicion to the standard required to find Mr. Burgess liable on this point. Mr. Franks also states that a computer does not recognise the car parts in his Rover but he fails to bring any such evidence on this point. Further, there is no evidence that the Burgess Repair Parts were actually in Mr. Burgess' car or any other car. I prefer Mr. Burgess' evidence where he denied that he interfered or switched the parts. In my view, following *Re H*, the cogency of the evidence fails to support the seriousness of the allegation of the alleged fraud or theft of the Burgess Repair Parts.

#### Damaged Suspension

55. Mr. Franks claims that Mr. Burgess caused damage to the suspension of the Rover. There was no evidence that Mr. Burgess was instructed to work on the suspension, thus that aspect was never a part of the contract. Mr. Burgess denied that he changed the suspension.

56. The first sign of any issue with the suspension is on the 6 January 2017 invoice when the left side suspension was checked, approximately two months after the Rover was returned to Mr. Franks. The 11 July 2017 invoice showed that the suspension was replaced then, approximately eight months after the Rover was returned to Mr. Franks. However, in my view, there is no evidence to connect any of the work performed by Mr. Burgess with the issues about the suspension. Accordingly, I am not satisfied on the evidence that Mr. Burgess damaged the suspension during the period of the bailment.

#### Damaged Transmission and Transmission Mount

57. Mr. Franks claims that Mr. Burgess caused damage to the transmission of the Rover. There was no evidence that Mr. Burgess was instructed to work on the transmission, thus that aspect was never a part of the contract. On cross-examination, Mr. Burgess denied that he

had ever worked on the transmission or took it out of the car or that he changed the transmission mount.

58. The first sign of any issue with the transmission is on the 11 July 2017 invoice which showed that the transmission was replaced then, approximately eight months after the Rover was returned to Mr. Franks. However, in my view, as a start point, there is no evidence to connect any of the work performed by Mr. Burgess with the issues about the transmission. Thus, I am not satisfied on the evidence that Mr. Burgess damaged the transmission and transmission mount during the period of the bailment.

59. Again, this claim about the transmission amounts to a bare assertion by Mr. Franks in that first he stated that he did not know what a transmission cover was until some others in the UK showed him pictures of the transmission cover that had been trimmed and subsequently damaged. I find this evidence to be inadmissible and unreliable as those individuals who inspected the transmission did not give evidence. Even if I did accept that evidence, the similar problem arise as set out above in that E&B also worked on the transmission before the individuals in England saw the transmission. Further, Mr. Bellamy gives no evidence about the transmission. Mr. Franks then asserted that he surprised Mr. Burgess one night when he saw him trimming something which Mr. Burgess tried to hide. I find this evidence to be speculation and unreliable in respect of whether it was the transmission.

60. Mr. Robinson gave unchallenged expert evidence about the damage to the transmission mount. I am satisfied by his evidence that the damage to the transmission mount was likely caused by the effect of the after-market parts on the transmission once the Rover was being driven. However, I do temper this evidence somewhat as there is no expert evidence as to how much driving was necessary for the transmission mounts to be damaged once the after-market parts were installed. Also, as Mr. Frank's procured the parts for Mr. Burgess to install, then on this basis, I am not satisfied that Mr. Burgess was responsible for the damage to the transmission.

61. I do accept Mr. Franks' evidence that E&B worked on his transmission after he got the Rover back from Mr. Burgess and I also accept Mr. Burgess' evidence that he saw the Rover at E&B, completely stripped with the transmission on a bench. The E&B Invoices support these findings. However, as set out above in respect of the Engine repairs, I note that there is no direct evidence from E&B, about the state of the transmission once they examined the Rover, whether the transmission was faulty as a result of the Burgess Repairs and what repairs were necessary to fix such faulty work if any existed. Such evidence would have assisted the Court.

62. Upon careful consideration of these findings, I am not satisfied that Mr. Burgess caused the damage to the transmission or transmission mount during the period of the bailment.

Other Damage – including rusty parts, alarm system, wheels, spark plugs, filters, water hose, speedometer

63. I am not satisfied on the evidence that Mr. Burgess is responsible for the damage or the need to replace these parts of the car. Mr. Burgess was cross-examined extensively on pictures of parts, some in or on the Rover and some separate from the Rover alleging damage or other issues. He generally denied causing any damage to the parts during the time he had the Rover in 2016. The E&B Invoices show that there were various problems identified and repairs made. However, there has been little to no evidence linking Mr. Burgess to these issues or otherwise causing damage to them. In any event, it appears that these are the kinds of things that happen with cars as they age and which have to be addressed by most car owners.

### **Conclusion**

64. In summary I have made the following findings of liability of damage against Mr. Burgess for a total of \$2,575.00:

- a. Body damage repair (scratches and dents) \$2,325.00.
- b. Back Window - \$250.00.

65. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated 24 May 2023



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**HON. MR. JUSTICE LARRY MUSSENDEN**  
**PUISNE JUDGE OF THE SUPREME COURT**