IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 79 of 2012**

BETWEEN: SERU WILLIE
Claimant

AND: TOYOTA TUSHO (VANUATU) LIMITED
Defendant

Trial: ***Tuesday 30 September 2014***
Judgment: ***Tuesday 7 October 2014***
Before: ***Justice Stephen Harrop***
Appearances: ***Robin Kapapa for the Claimant***
Mark Hurley for the Defendant

RESERVED JUDGMENT OF JUSTICE SM HARROP

Introduction

1. On 13 April 2010 Seru Willie bought a new Toyota Landcruiser from the Defendant, which trades as Asco Motors. He obtained finance from Credit Corporation (Vanuatu) Ltd and took possession of the vehicle under a hire purchase contract. His arrangement with Credit Corporation was to repay the loan at Vt 150,000 per month.

2. In March 2011 he noticed a steering problem and on 15 April 2011 brought the vehicle in to Asco for inspection and assessment of necessary repairs. The vehicle was by then well outside the warranty period because it had travelled some 61,105 kilometers and the warranty only applied for the first 20,000 kilometres.

3. There were substantial unforeseen delays in obtaining the necessary parts from overseas. Asco says these delays resulted from the tsunami which struck Japan in March 2011 damaging Toyota's parts factory.

4. The vehicle was ultimately not repaired until 28 October 2011 by which time Mr Willie had fallen into substantial arrears under the hire purchase contract.

5. In this proceeding Mr Willie claims that Asco's long delay in repairing the vehicle was unreasonable and that he has suffered damages as a result. This judgment deals only with the question of whether Asco is liable for breach of contract. If it is, then damages will need to be particularised and a further trial held to determine the appropriate award.

The Issues

6. Asco accepts that it was an implied term of contract that it would carry out the repairs to Mr Willie's vehicle within a reasonable time. There is no doubt that it did not ultimately carry out the repairs within what both parties would have contemplated as reasonable on 15 April 2011.

7. The key issue to determine is whether having regard to all the circumstances and the developments during the relevant period Asco should be held liable for breach of that implied term.

8. If there was a breach of contract by Asco, there is a further question as to whether that breach caused any losses which Mr Willie may have suffered.

The Facts in more Detail

9. There is little dispute about the relevant facts. Asco was aware when the vehicle was purchased that Mr Willie had financed the purchase through Credit Corporation. He brought the vehicle back in on 19 April 2010 for its free 1,000 kilometre service and again on 24 May 2010 for its 5,000 kilometre service; for that he was required to pay some Vt 50,000.

10. Between 24 May 2010 and 15 April 2011, on a date Mr Willie could not remember, the vehicle was serviced only once by a person called Michael who works for a local engineer. He did not come back to Asco for servicing because of the cost.

11. In late March 2011 Mr Willie became concerned about an irregular noise emanating from the front of the vehicle, whenever he turned the steering wheel. On 15 April 2011 he brought it in to Asco for initial inspection and paid a fee of Vt 5,000. The complaint, as recorded on the invoice issued by Asco, was that there had been a noise in the front diff when turning the steering either way. The invoice noted in capital letters "front diff needs dismantling and give a total inspection on worn parts".

12. As result of the inspection, Mr Willie was issued with an invoice setting out the cost of parts which would be required to complete the repairs which then appeared necessary. This was for Vt 283,433 and Mr Willie paid that promptly, on 27 April 2011.

13. Asco has a policy for requiring payment in full for parts before they are ordered. It also exercises a repairer's lien so as to require a vehicle owner to pay the balance for labour costs before being allowed to uplift the vehicle.

14. The relevant parts arrived at Asco in about mid-May 2011. While the work was being carried out, towards the end of May 2011, Asco's service department staff noticed that the damage to the vehicle was more severe than had been anticipated in the April quotation. It issued a second quotation, for further necessary parts, around the end of May in the sum of Vt 587,355.

15. Mr Willie was not able to make payment of this amount, so as to allow those parts to be ordered, until 15 July 2011.

16. Mr Willie says that based on advice in the invoice, which said that some of the parts would need to be ordered from Australia and two-three weeks would be involved, he calculated that they would arrive at the latest by 5 August 2011 and that he would be able to collect the vehicle by 12 August 2011. He accepted in evidence that any claim he has can only relate the period after that date.

17. Asco was ultimately not able to obtain the parts until 27 October 2011. It says that the main reason for this was that the 11 March 2011 tsunami in Japan had disrupted the production of spare parts by Asco's parent company and that had led to the unavailability of parts both in Sydney and Japan. It says this was most unusual. Ultimately Asco tried to obtain the parts from other Toyota dealers in the Pacific Region. Eventually they were sourced from its Papua New Guinea branch on 14 October and arrived on 27 October with the repair work being carried out immediately so that the vehicle was available (subject to payment of labour costs) for Mr Willie to collect on 28 October 2011.

18. Mr Willie says that he was not told about the background to Asco's difficulty in obtaining the parts and that he was regularly asked to come back each week to check the position, from about 12 August onwards.

19. Mr Willie did not make any payment to Credit Corporation after 5 May 2011. On 7 October 2011, he received a letter from Credit Corporation informing him that David Natuman had been authorized by it to repossess both the vehicle and another one, a Toyota HiLux, which had been provided as further security for the amount outstanding under the hire purchase contract. The letter went on to say that unless Vt 634,842 was paid within the next 21 days the vehicle would be sold to recover the amount outstanding.

20. On 11 October 2011, Mr Joel, a solicitor acting for Mr Willie wrote to Asco, with the letter copied to Credit Corporation. He traversed the history and noted that in August 2011, Mr Willie had been asked by Asco to try to obtain locally at least some of the parts which were required and that he had done so at the cost of some Vt 42,000. Despite this, the vehicle had still not been fixed. Mr Joel

enquired when his client could expect to operate his vehicle again. Towards the end of the letter he said:

> *"May I ask for your explanation. My client is worried he needs reassurance that no further claim is necessary.*
> *This interruption has costed (sic) my client dearly by way of loss of income, costs and delay and faithfully honouring his obligations with Credit Corporation."*

21. On 20 October 2011, Asco's service Manager Mr Fontaine wrote to Mr Joel explaining the "unforeseen extraordinary circumstances" which had led to the delay. Apart from the tsunami he referred to some recent industrial action at the company's warehouse in Sydney. He said that the last parts were expected to arrive in the course of the next week.

22. Mr Fontaine explain that the final invoice would include the labour costs and that this would leave Mr Willie with a difference of Vt 507,605 to pay taking into account the two earlier payments he had made for parts. Because of the unusual circumstances which had been experienced, Mr Fontaine offered what he described as a generous discount to the invoice (a reduction of Vt 296,871) leaving a balance of Vt 210,734 which would need to be paid before the vehicle could be released.

23. Mr Joel did not reply to that letter. On 28 October 2011, Mr Fontaine wrote again to him advising that the vehicle had been repaired and that Asco was now waiting the final payment of Vt 210,734 before it could be released. Again Mr Joel did not reply.

24. In his evidence at trial Mr Willie said that he was in a position to pay the Vt 210,734 as at the end of October, and indeed earlier, but he chose not to do so because he knew or at least thought that the vehicle would be immediately repossessed by Credit Corporation if he uplifted it. This is by contrast with his clear statement in paragraph 27 of his sworn statement where he says: *"Although a discount was given, by this time I was broke and Credit Corporation has given notice to repossess the vehicle."*

25. The fact that Mr Willie made no payment to Credit Corporation after 5 May 2011, nearly six months earlier, corroborates his own assessment that he was, at least by early October, "broke".

26. Further confirmation of Mr Willie's precarious financial position is his substantial delay in paying the Vt 587,355, between late May and 15 July 2011 and his decision, for reasons of cost, not to have the vehicle serviced by Asco again.

27. In addition I note his decision to have the vehicle serviced only once more while the vehicle travelled some 56,000 kms further on Efate's not very vehicle-friendly roads. Mr Willie himself said that his farm and other farms nearby at Teouma Bush could not be reached by bus or taxi due to bad road conditions which become "really bad" during rainy weather. His purchase of the vehicle was in

part to take commercial advantage of the opportunity to transport his produce and that of his fellow farmers to Port Vila hotels and the markets.

28. I therefore find that despite Mr Willie's claim in evidence that he could have paid the Vt 210,000 at any point between 12 August and 28 October, he did not in fact have the money do to so. Although he said in evidence that he could have used some of his wife's income for that purpose, I do not accept that, because otherwise he surely would have made at least some payments to Credit Corporation using her funds during that six-month period so as to avoid the growing risk of repossession.

29. It is clear from the evidence that in any event, at least after receipt of the 7 October letter, Mr Willie did not *want* to collect the vehicle once it was repaired because he thought it would immediately be repossessed by Credit Corporation.

30. This is confirmed by the fact that he accepts that he had a discussion with Mr Job Andy of Asco in approximately January 2012 where Mr Andy said that Asco was now prepared to allow him to uplift the vehicle without any further payment from him. Mr Willie accepted that he had declined that offer because of the risk of repossession.

31. Subsequently debt collectors acting on behalf of Credit Corporation approached Asco and asked how much was outstanding for the repair work. They were told Vt 210,734. On 23 March 2012, Credit Corporation paid this amount and removed the vehicle. It is understood to have been sold subsequently to recover the amount outstanding by Mr Willie.

Discussion and Decision

32. I have no doubt that if Mr Willie and Asco had been asked after the inspection on 15 April whether a period of six and a half months, until 28 October 2011, was a reasonable time to allow for Asco to carry out the repairs, both would have agreed that was totally unreasonable especially for a vehicle used for commercial purposes. However the assessment of what performance of the contract within a reasonable time means cannot be determined, or at least finally determined, at the date the contract is entered into.

33. The learned authors of *Contract Law in Australia* (Butterworths, Australia, 2002, fourth edition) , J W Carter and DJ Harland, say in paragraph [1804]:

> *"Generally, where a contract does not specify the time of performance, the obligation in question must be performed with a 'reasonable' time. What constitutes a reasonable time is a question of fact to be determined at the time when performance is alleged to be due rather than at the moment of contractual formation. For example, where a contract for the sale of goods states no time for delivery, a reasonable time expires when, in the actual*

circumstances, the seller has had sufficient time to make delivery. Because the period is not to be regarded as fixed at the moment the contract is agreed, matters such as the nature of the goods, weather conditions, and so on may be relevant."

34. Here, both Asco and Mr Willie thought, after the initial inspection that repairs could be completed shortly after the parts included in the Vt 283,433 invoice arrived, as they did in mid-May 2011. There would inevitably have been some further delay in the vehicle being returned to Mr Willie because he would have been invoiced for the labour costs and would have had to pay those. However at that point both parties would have expected that the vehicle might be available in say mid- June 2011

35. The first event which changed this timeframe was the work done in late May 2011. This led to Asco realising, and advising Mr Willie, that the problem was much more serious than had earlier been appreciated. The second invoice was for more than twice the amount of the first.

36. There can be no criticism of Asco for this development. It had made clear in its initial inspection invoice that because the problem was a noise in the front diff, that needed to be dismantled before a total inspection could be carried out. To be fair to Mr Willie and his case, it is not suggested that Asco acted unreasonably at this point.

37. Asco was not in a position to order the parts now understood to be required until 15 July 2011 because Mr Willie did not pay for them until then. The delay between late May and 15 July was therefore entirely Mr Willie's responsibility.

38. Mr Willie himself accepts that the time for performance of the contract by Asco was as a result deferred until around 12 August 2011, at least on his calculation. Asco denies that it did or would have given him any such date because it was dependent on obtaining the parts before it could give any date with confidence. In any event there would have been a further delay from 12 August because Mr Willie would then have had to pay the Vt 507,605 for labour costs. Given that it took him six weeks or so to pay the earlier sum of Vt 587,355, there is a strong inference available that he could not have paid this further sum for a similar period, if at all. His financial position must have been worsening as his time without the vehicle he used to earn income increased.

39. The critical period therefore is the delay in obtaining the parts from say early August to late October, a period of nearly 3 months. It is this period which Mr Willie says was unreasonably long (especially having regard to the earlier delays) whereas Asco says that the further delay was beyond its control and due to an unforeseen and extraordinary combination of circumstances.

40. The key question is: who, if anyone, is responsible for that delay?

41. Whenever there is a delay in performance of a contract, there are arguably four possibilities as to the responsible party: the defendant, the claimant, a third party (or parties) or nobody (in the sense of an Act of God).

42. Mr Willie's case is that Asco is responsible for the delay in this critical period but Asco says that it was in effect nobody's fault but rather primarily the consequence of an Act of God by way of the March tsunami which led to various problems in obtaining parts.

43. Mr Willie, as claimant, carries the onus of proving on the balance of probabilities, that Asco should be held responsible for the delay in performance, in short of proving that Asco acted unreasonably and should have done more than it did to obtain the parts.

44. I am not satisfied that Asco acted unreasonably. There is no indication in the evidence that it did not try its best, in unusual and unexpected circumstances, to obtain Mr Willie's parts as soon as it could. There has been no evidence put forward by Mr Willie from others in the industry, or elsewhere, to the effect that Asco could have obtained the parts earlier. There is no reason to think, especially in view of the earlier delays, that Asco was casual or unconcerned about the delay in obtaining Mr Willie's parts. Several of its customers were in a similar position. On the contrary it appears that various efforts were made but Asco was frustrated by the unusual inability to obtain the parts from either Sydney or Japan and then difficulty in obtaining them from elsewhere in the Pacific until they were located at Papua New Guinea.

45. In the end, while Mr Willie has proved the fact of the delay in Asco's performance of the contract, he has not proved that Asco should be held responsible for it.

46. While I accept that Mr Willie ought to have been kept better informed by Asco as to what was happening, or not happening, and clear choices given to him about what he wanted to do, there is evidence that Asco did discuss the frustrating delays with him. They suggested that he try to obtain some of the parts at least locally and he did that. Also the possibility of his having the vehicle returned to him partly repaired was obviously discussed; Mr Willie was told that the vehicle would continue to have problems if it were not fully repaired. Understandably in light of that advice he elected to leave it with Asco.

47. My assessment is that had it not been for Credit Corporation issuing the letter on 7 October 2011, Mr Willie would not have sought legal advice and would probably not have made this claim. He gives every indication of being willing to accept, or at least reluctantly tolerate, the delays even though frustrated by them because he really had little practical choice but to rely on the sole local Toyota dealer. These were not cosmetic repairs but related to the steering of the vehicle which is obviously fundamental as a matter of safety.

48. Even in Mr Joel's letter of 11 October, after Credit Corporation had issued its notice, Mr Joel did not seek to terminate the contract or to indicate that a claim would definitely be made. Rather the tone of his letter is by way of inquiry as to when the vehicle would be ready again and that reassurance was sought that no further claim would be necessary.

49. It was not long after Mr Joel's letter that there was a response by Asco and not long after that the vehicle was actually repaired.

50. I consider that had Mr Willie's financial position allowed him to continue with his payments to Credit Corporation and readily to pay the Vt 210,734 acquired to uplift the vehicle then he would not have suggested that the losses he suffered during the period he was without the vehicle were Asco's responsibility.

51. For these reasons I find that Asco did not breach the implied term that the vehicle would be repaired within a reasonable time. A defendant is only liable for breach of contract if it is *responsible for* that breach of contract. In other words while the defendant did not comply with the term requiring repair within a reasonable time, that does not mean it breached it in the sense that it must be held liable for any damages which can be shown to have resulted. This was a situation where through an unfortunate combination of events the repair took far longer than anyone expected and it was despite the reasonable efforts of Asco that the delay occurred rather than because it acted unreasonably.

52. This is sufficient to dispose of the claim but I add some further observations about causation.

53. Even if I had found that Asco was, at least as to part of the period, in breach of its obligations, the real cause of Mr Willie's inability to get the vehicle back duly repaired was, in my view, not Asco's failure to obtain the parts but rather his financial position.

54. I find that even if Asco had offered Mr Willie the vehicle back fully repaired on 12 August, he would not promptly have been able to pay the Vt 507,000 or even a reduced sum of Vt 210,000 if it had been offered at that stage. That is because he had had a primary and critical responsibility to pay Credit Corporation but he had failed to do so since 5 May, clearly exposing him to the risk of repossession regardless of whether the vehicle was repaired.

55. Although this was not canvassed in evidence, Mr Willie appears not to have taken out any form of insurance against the risk of difficulty or inability to maintain payments to Credit Corporation. A prudent person taking out a substantial loan ought to obtain insurance of this kind. By definition a purchaser under a hire purchase contract is not in a position to pay cash and so is likely to be in a difficult position if there is any unforeseen adverse change in his financial position.

56. Life's exigencies mean that a debtor may for all sorts of reasons be unable to keep up payments to a creditor. He might fall ill and be unable to work, his vehicle might be destroyed in a cyclone or

seriously damaged in an accident where the party at fault has no money and no insurance. Mr Willie appears to have taken a commercial risk that the sort of problem he had with Asco's obtaining of parts might end up causing him to lose his vehicle.

57. In a sense it might be said that the tsunami which hit Japan ultimately caused him to lose his vehicle just as it might have done if it had hit Port Vila directly and destroyed his vehicle. Mr Willie's apparent commercial choice not to protect himself against financial difficulty cannot be blamed on Asco, only on himself.

Result

58. The claim is dismissed. The defendant is entitled to costs which may be taxed if they cannot be agreed. As Mr Kapapa noted at the hearing, Asco is a well-established and reputable company. Recognising the unfortunate outcome for Mr Willie, Asco may think fit not to pursue him for costs even though entitled to do so. In early 2012 Asco was prepared to waive the balance of Vt 210,734 but ultimately Credit Corporation paid it that sum. I would hope Asco would take that into account in assessing its attitude to costs.

BY THE COURT