JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA Civil Appeal No 211 of 2017

SAULOS K CHILIMA APPELLANT

AND

MIKE APPEL AND

GATTO LIMITED 1ST RESPONDENT

AND

GUAVA INTERNATIONAL

LIMITED 2ND RESPONDENT

CORAM: E B Twea, JA

D F Mwaungulu, JA

A D Kamanga, JA

Silungwe, Dr, for the appellant

Masumbu, for the respondents

Minikwa, Recording Officer

JUDGMENT

Twea, JA

I read the judgment that Justice Mwaungulu is delivering shortly. I also would allow the appeal, with costs, for the reasons he gives.

Mwaungulu, JA

This is an appeal from the judgment of the Lilongwe High Court (Commercial Division). The trial was, curiously, split into before a Judge, on liability, and another by the Assistant Registrar, on assessment of damages. The appeal here is against the Registrar's order on assessment of damages; there is no appeal against the Judge's judgment. Equally, there is no cross-appeal against the Registrar's assessment.

These two aspects are important. That there is no appeal against judgment means that the judge in the court below determined that the appellant's purchase of a Prado was mitigation beyond which damages could not be assessed. That there is no cross-appeal against the Registrar's judgment renders inane the respondent's contention that the appellant was not entitled to anything on loss of use. The Judge ordered that the appellant was entitled to loss of use for the period of deprival, although he was equivocal about the duration. He was, however, unequivocal that this was a matter of assessment of damages. Consequently, the question on appeal is whether the Assistant Registrar's assessment that the appellant is entitled to rentals for hires for only weekends in the period accepted by the Assistant Registrar is correct.

There is not much to the facts. Around November, 2010, the appellant bought, purportedly new, a range rover from the respondent. By December, 2010 the car developed serious problems – the whole windscreen was, after a short time, removed – body and mechanical. The appellant was, despite many repair calls, using the motor vehicle until March, 2011 – the last time the vehicle went for repairs. In June, 2011, the appellant bought a new motor vehicle, a Toyota Land Cruiser, Prado, instead. He, therefore, rejected the Range Rover when, repaired, the respondent returned it.

The appellant sued the respondent for damages for breach of a contract and under the Sales Goods Act. The exact action, and pleadings, unfortunately, are not before this Court. This, perhaps, is because the record of appeal, for the most part, not in accordance with the Supreme Court of Appeal Rules. This Court, therefore, bases its judgment on the judgment in the Court below and the Registrar's assessment of damages order. The judgment of the judge in the Court below – on a motion for judgment on admission – makes two critical decisions bearing on this appeal. First, the Judge in the Court below held that the appellant was entitled to damages on the general principles of damages in breach of contract.

The common law restricts damages to losses suffered from breach of contract. Damages for breach of contract are not to penalize the wrongdoer. Damages, where money should, aim, in contract, just like in tort, for breach of duty of care, to compensate for all losses following breach of a contract. For breach of a contract, the injured party is, "so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed" (*Robinson v Harman* (1848) 1 Exch 850, 855. Losses from breach of contract can be innumerable. The concept of remoteness of damages excludes and includes losses recoverable (*Monarch Steamship v Karlshamns Oljefabriker* [1949] 1 All ER 1; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; *Kpohhraro v Woolwish Building Society* [1994] 4 All ER 119; *Jackson v Royal Bank Of Scotland* [2005] 1 WLR 377.). The common law follows *Hadley v Baxendale* (1854) 9 Exch 341 at p 354:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, the Court of Appeals held that, even under section 53(2) of the Sale of Goods Act, 1979, the principle presupposes circumstances known and communicated. In *The Golden Victory* [2007] 2 AC 353, the House of Lords established that, when assessing damages for breach of a contract, the court should regard the effect of subsequent events on the claimant's loss. Generally, damages are assessed as at the date of breach. In *Bunge SA v Nidera BV* [2015] UKSC 43, the United Kingdom Supreme Court of Appeal held it necessary and just, as long as they relevant and affect losses, to regard post-breach events if known to the parties:

> Lord Bingham accepted that the courts have been willing to depart from the general rule about the date of assessment if the court judged it necessary or just to do so in order to give effect to the compensatory principle.

The judge in the Court below determined that the appellant was entitled to the replacement by a new range rover or its market value. The judge proceeded on section 32 of the Consumer Protection Act. In this regard, based on *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* (No 2) [1990] 3 All ER 723; (*Johnson v Agnew* [1980] AC 367); *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 WLR 1053 *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683; *Hadley v Baxendale*; *Yeoman Credit Ltd v Odgers* [1962] 1 WLR 215: *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All ER 1102; *Jackson v Chrysler Acceptances* [1978] RTR 474;In *Yeoman Credit Co v Apps* [1962] QB 508; *Thompson (W.L.) Ltd v Robinson (Gunmakers) Ltd* [1955] 1 Ch 177; *Charter v Sullivan* [1957] 2 QB 117; *Lazenby Garages Ltd v Wright* [1976] 1 WLR 459; *Yeoman Credit Ltd v Waragowski* [1961] 1 WLR 1124; *Yeoman Credit Ltd v MacLean* [1962] 1 WLR 131; *Overstone v Shipway* [1962] 1 WLR 117; *Financings v Baldock* [1963] QB 104); and *Lombard North Central Plc v Butterworth* [1987] 1 QB 527), the Judge in the Court below was correct. The judge of the Court below concluded that the motor vehicle could not be repaired. The Judge in the Court below rejected the appellant's claim – and there is no appeal on it – that the respondent pay K75, 000, 000 paid for the Toyota Land Cruiser Prado as a replacement. The Judge in the Court below determined that the purchase of the Toyota Land Cruiser, Prado, was to mitigate the loss and that ordering the appellant to have the money and the car was unthinkable and unfair to the respondent. The Judge in the Court below also ordered damages for loss of use of the motor vehicle.

The Judge in the Court below did not specifically determine the period for which loss of use would be compensated for. The Judge in the Court below, given that evidence was not received on the matter, left the duration as a matter of evidence for the Registrar on assessment of damages. The Registrar determined that period to be between March and June 2011. The appellant had, in the course of giving evidence, suggested that, just by choice, he used the motor vehicle only over the weekend. The Court below then awarded damages based on rental of the car for only the weekend days in the period.

The appellant will be awarded damages for loss of use, based on the rentals proved, for the entire duration from 1 March 20 to 30 June 2011 – 124 days. The appellant cannot be awarded damages for loss

of use from 1 November, 2010 to 28 February, 2011. He had use of the car. The appellant has not proved the days in this period when he had no use of the car. If he had, those days would have been accounted for. Equally, the appellant cannot be compensated for the period after 30 June, 2011 when he, having repudiated the contract, he bought a replacement car.

Ordinarily, the appellant would have been entitled to loss of use up to the time of the breach – this is probably much earlier, when the appellant realised that the car was not reparable. As a general rule, on breach of contract, damages are recoverable at the time of the breach – a court, based on the circumstances of a case, can propose a different time.

In this case, the appropriate time would be at the time when the appellant bought the replacement vehicle. The judge of the Court below thought, correctly, in my judgment, as much. A party in breach of a contract cannot, on the need for certainty, be liable for the innocent party's losses indefinitely. There is a duty on the injured party to mitigate damages. The duty was properly explained in *Bunge SA v Nidera BV,* where the United Kingdom Supreme Court said:

> It is well recognised that the so-called duty to mitigate is not a duty in the sense that the innocent party owes an obligation to the guilty party to do so (*Darbishire v Warran* [1963] 1 WLR 1067, 1075, per Pearson LJ). Rather it is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided."

Up to the point when the appellant bought the motor vehicle, there was prospect of repairing the motor vehicle. That prospect faded completely when, in June, 2018, it was abundantly clear that the car could not be repaired. This was when the respondent was in breach of contract.

The appellant was immediately or within a reasonable time thereafter under a duty to mitigate damages. As at time, the appellant was supposed to enter into the market and enter into a replacement contract for a similar motor vehicle. In *Bunge SA v Nidera BV* the United Kingdom Supreme Court said:

> The answer to the first question … is that where there is an available market for the goods, the market price is determined as at the contractual date of delivery, unless the buyer should have mitigated by going into the market and entering into a substitute contract at some earlier stage: *Garnac Grain Co Inc v HMF Faure &Fairclough Ltd* [1968] AC 1130, 1168; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, 102. Normally, however, the injured party will be required to mitigate his loss by going into the market for a substitute contract as soon as is reasonable after the original contract was terminated. Damages will then be assessed by reference to the price which he obtained. If he chooses not to do so, damages will generally be determined not by the prima facie measure but by the principle of mitigation.

The Court below, therefore, concluded that the appellant recover its value or the motor vehicle be replaced under the Consumer Protection Act or the Sale of Goods Act. Both legislation, in material particular, codify the common law positions

Since the respondent was replacing the value or paying its value, there cannot, without overcompensation, be damages for the purchase price of the substitute car, the Prado. The question, however, is whether the appellant is entitled to more – loss of use for the motor vehicle. Courts, beyond

damages foreseeable from breach of a contract for purchase of a chattel, award damages for repairs to the chattel arising directly from breach of a contract, damages for personal injury, mental distress, disappointment and inconvenience (*Farley v Skinner* [2001] UKHL 49, [20002] AC 732), loss of amenities and more (*Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; *Watts v Morrow* [1991] 1 WLR 1421; *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220; *Clegg v Anderson (trading as Nordic Marine* [2003] EWCA Civ 320, [2003] 2 Lloyds Rep 32; *Gascoigne v British Credit Trust* [1978] CLY 711; *Jackson Chrysler Acceptance Ltd, Minories Garage Ltd* [1978] RTR 474; *Hobbs v London and South Western Railway Co* LR 10 QB; *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225; *Andrew v Hopkins* [1957] 1 QB 229; and *Herschtal v Stewart and Arden Ltd* [1940] 1 KB 155. 6.2 In *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95 the Court said:

> "Notwithstanding that no substitute vehicle has been hired, judges have awarded compensation for loss of use of a vehicle while it is being repaired where it has been shown that inconvenience has been caused or, for example, that the owner has had to use public transport, or walk or that a family have been deprived of the advantage of a family car where otherwise they would have used the car which had been damaged. In short … a sum is given which in the circumstances of the particular case would be regarded as compensation for the particular wrong suffered."

In *Birmingham Corporation v Sowsbery* [1970] RTR 84, Geoffrey Lane J said at p85:

> The vehicle was off the road for 69 days undergoing repairs. There was no necessity to hire another vehicle because the plaintiffs maintain … a spare fleet of omnibuses for such emergencies… Where the plaintiffs in a case such as this have had to hire a replacement vehicle, or where they are a profit making concern and can prove a financial detriment from the temporary loss of their vehicle, no difficulty arises. The precise figure can be claimed as special damage and will be recovered if proved. Here, however, by virtue of the fact that the plaintiffs are non-profit making and did not have to hire another vehicle, different considerations apply." The judge awarded "substantial general damages for loss of use of their vehicle" the sum of £4 11s a day. This was calculated on the standing charge cost of maintaining and operating the vehicle.

In *Lagden v O'Connor* [2003] UKHL 64 [2004] 1 AC 1067, Lord Hope of Craighead said at paragraph 27:

> "Mr Lagden's claim was, in essence, a claim for the loss of use of his vehicle while it was in the garage undergoing the repairs which needed to be done as a result of the accident. There was no evidence that he would have suffered financial loss as a result of being unable to use his car during this period. But inconvenience is another form of loss for which, in principle, damages are recoverable. So it was open to him, as it is to any other motorist, to avoid or mitigate that loss by hiring another vehicle while his own car was unavailable to

him. The expense of doing so will then become the measure of the loss which he has sustained under this head of his claim. It will be substituted for his claim for loss of use by way of general damages. But the principle is that he must take reasonable steps to mitigate his loss. The injured party cannot claim reimbursement for expenditure by way of mitigation that is unreasonable. So the motorist cannot claim for the cost of hiring another vehicle if he had no reason to use a car while his own car was being repaired … If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle. If the defendant can show that the cost that was incurred was more than was reasonable – if, for example, a larger or more powerful car was hired although vehicles equivalent to the damaged car were reasonably available at less cost – the amount expended on hire must be reduced to the amount that would have been needed to hire the equivalent."

6.5 In *Giles v Thompson* [1994] 1 AC 142, Lord Mustill said at p 167:

> The need for a replacement car is not self-proving. The motorist … may have been planning to go abroad for a holiday leaving his car behind… Thus, although … it is not hard to infer that a motorist who incurs considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as the result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might otherwise arise."

Courts, therefore, will, on breach of contract, award damages for loss of use.

There cannot be any doubt in this case on entitlement to loss of use. There is, however, doubt about the period, how to assess loss of use and whether the appellant is entitled to loss of use for the whole period. The Judge in the Court below awarded, correctly, in my judgment, damages for loss of use. Where an innocent party, in consequence of a breach of a contract, is put in some loss, the innocent party, on the compensatory principle, must recover. Such losses, on the compensatory principle, are a direct and foreseeable losses from the breach (*The Greta Holme* [1987] AC 596; *The Mediana* [1900] A C 113; *The SS Marpessa* [1907] 241.They are not, in that sense, losses in the knowledge of the parties. They are awarded on a broader principle stated in *The Mediana* (116):

> Lord Herschell in terms did lay a much broader principle, and I may say that I myself intend to lay it down, though I expressed myself imperfectly, namely, that where by the wrongful act of one man something belonging to another is either itself injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground of damage.

Damages recoverable, however, are at large. Awarded, however, they, if established, must be. Primarily, damages are a matter for the jury. In other words, a jury can award anything. All, therefore, depends on the facts. Where, therefore, they have not been proved, the jury could still award damages. In *The Mediana* the Lord Chancellor said(116):

> Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in the place of the jury, to consider what compensation in money shall be given for what is a wrongful act.

Damages are awarded for loss: loss is primordial to damages. Once loss is established, damages must be awarded. Where a party is deprived of use of a chattel, loss – of use – is almost automatic. A court must, therefore, award damages. Difficulties with assessment of damages do not disavow entitlement. Courts must do whatever is possible to assess the loss. Courts surmount the difficulties with practical approaches.

First, where the innocent party has not been able to establish actual loss or there are difficulties with assessment or proof, courts award nominal damages. Nominal damages vindicate the right, otherwise, the beneficiary can only be the wrong doer who, having caused injury or loss to another, escapes compensation for an obvious wrong merely because of difficulties of proof or assessment of damages. Nominal does not mean small, mean or minimal. The jury or, in the absence of a jury, a judge, could award any sum to vindicate the right, injury or loss. In *The Mediana* the House of Lords said:

> And, my Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages. "Nominal damages" is a technical phrase which means that you have negative anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgement because your legal right has been infringed. But the term "nominal damages' does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may also be represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily small.

Secondly, courts accept, on assessment of damages, costs or expenses incurred to contend with or contain the loss of use (*Hassen v SR Nicholas ltd* [1984-86] 11 MLR 505; and *Mariu Sambani* [1993] 16 (2) MLR 586. In *The Greta Holme* a dredger was injured by the ship, The Greta Holme so that the dredging of the dock was delayed for some time. The arguments against the dredger owner and the reasoning of the House of Lords are in this erudite statement by Halsbury. LC:

> The distinction between "tort" and "contract" … is immaterial … Such being the general law, it is difficult to see upon what ground the legal character filled by the appellants here can affect the question whether they are entitled to recover damages for being deprived of the use of their dredger during the period the dredger was being repaired. That the dredger was required for their use cannot be denied; that their operations in reducing the silting up were delayed by the loss of it cannot be denied. Both those facts are found adversely to the respondents: then why are not the appellants entitled to recover damages for the loss thus sustained? The answer given is that, although, their dredging operations were delayed, the appellants sustained no tangible pecuniary loss. I am not quite certain that I understand what is meant by the use of the word "tangible." If by that is meant that, in order to entitle a plaintiff to recover, you must be able to shew that during the period to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle, so affirmed, as it appears

> to me, go very far beyond the particular case now before your Lordships. But to my mind it is a principle for which there is no authority whatever. This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages or the loss occasioned by the negligence of the wrongdoer.

Lord Herschell said

> I take it to be clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect thereof, even though he cannot prove what has been called "tangible pecuniary loss," by which I understand is meant that he is a definite sum of money out of pocket owing to the wrong he has sustained … If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted the sums so paid could have been recovered. How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase.

In *The Mediana*, the ship, The Mediana, ruined a lightship. The owner of the lightship kept an extra lightship for emergency. It was deployed when repairs were made to the destroyed lightship. The owners, among other things, claimed damages based on what it cost to hire the emergency lightship. The House of Lords held they were entitled. The Lord Chancellor said (117):

> Now in the particular case before us, apart from a circumstance I will refer to immediately, the broad proposition seems to me to be that by the wrongful acts of the defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase "the use of a vehicle." What right has the wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example the owner of a horse, or of a chair. Suppose a person took out a chair out of my house and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room. The proposition so nakedly stated appears to me to be absurd; but a jury have very often a very difficult task to perform in ascertaining what should be the amount of damages.

The Lord Chancellor proceeded to state possibilities of assessing damages for loss of use:

> I know very well that as a matter of common sense what an arbitrator or jury very often do is to take a perfectly artificial hypothesis and say, "Well, if you wanted to hire a chair, what would you have to pay for it for the period"; and in that way they come to a rough sort of conclusion about what damages ought to be paid for the unjust and unlawful withdrawal from the owner. Here, as I say, the broad principle seems to be quite independent of the particular use the plaintiffs were going to make of a thing that was taken …

Thirdly, for non-commercial chattels where there is no equivalent alternative or rentals, courts have awarded interest based on the base rate on the value of the chattel (*The Hebridian Coast* [1961] AC 545; *Henry Broughton-Leigh v Geoffrey* QBD (Mercantile Court) 17 March 2010; *Mariwu v Sambani and another* [1993] 16 (2) MLR 586); *Chinema v World Vision International* (1991) Civil Cause No 1097 (MAHC) (Bt) (unreported); *Harawa v Wheels of Africa* (2001) Civil Cause No 405 (MAHC) (Bt)

(unreported); *Masonga v Sani Tyres Ltd* (200) Civil Cause No 1119 (MAHC) (Bt) (unreported); *Simika v Prime Insurance Co Ltd* (2007) Civil Cause No 4087 (MAHC) (Bt) (unreported)) .

In the period determined, the appellant cannot be compensated for only the weekends. The common law awards damages on the loss consequence from the breach and the innocent party must be taken for the loss actually realised. The value of an asset's use is its availability when in use and when not in use. Its (availability for) use is not truncated by its non-use or sporadic use. The loss of use discussed in tort and in contract refers to the chattel not being available at all for use when it is called on or necessary for its use. The loss cannot, therefore, be restricted to when it is actually used. If it is not used, the wrongdoer can only be a beneficiary; that is implausible. A wrongdoer who has deprived someone of a chattel cannot come to a court of law and suggest that there was no loss because the other was not going to use the asset or use it infrequently.

The appeal is, therefore, allowed only to the extent. There is no cross-appeal against the value of the car. The appellant will recover the replacement value – K75, 000, 000. The appellant is entitled to recover for loss of use only for the 124 days described. The appellant will have the costs of this appeal.

Kamanga, JA

I also, for the same reasons, allow the appeal with costs

Made this 13th Day of February 2019 in open Court

E B Twea

JUSTICE OF APPEAL

D F Mwaungulu

JUSTICE OF APPEAL

A M Kamanga

JUSTICE OF APPEAL