[2019] **JMSC Civ 66**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. N0 2014 HCV 03089

BETWEEN	**FRANKLYN TAYLOR (Attorney for Mark Jackson)**	**CLAIMANT**
AND	**SYMAR SMITH**	**DEFENDANT**

IN OPEN COURT

Racquel Willis Instructed by Oraine Nelson & Company for the Claimant.

Hugh Wildman Instructed by Hugh Wildman & Co for the Defendant.

Locus standi - Whether the action is brought as a relator's claim - Whether the claimant has the locus standi to bring the claim (Rule 8.12). Breach of Contract - Whether there is a valid contact between the parties - Whether the contract is void for illegality. Negligence - Bailor - Bailee - Whether the defendant/bailee owed a duty of care to the claimant/bailor - Whether the defendant breached his duty of care - Damage to property.

HEARD: 16th January 2019 and 21st March, 2019

THOMAS, J.

Introduction

[1] In amended claim form filed December 8, 2017 the claimant Mr. Franklyn Taylor attorney for Mr. Mark Jackson claims against the defendant Symar Smith damages

for loss arising out of a motor vehicle accident which occurred on the 1st of March 2014 on the Bull Bay Main Road in the parish of Hanover and in the alternative he claims the said damages on the basis of a breach of contract by the defendant by his failure or refusal to compensate the Claimant for the damage to the Motor vehicle arising from the accident.

THE PLEADINGS

The Claim

[2] In the amended Particulars of Claim filed on the 8th of December 2017 the claimant pleads the following:

> On the 1st of March 2014 he entered into a written agreement for the rental of 2008 green Toyota Axio motor car registered 4164GM with the Defendant. The Defendant took possession about 8pm the said day. Subsequently the Defendant called him to inform him that the said motor car was involved in a single vehicle accident. Checks at a Hanover Police Station revealed that the motor car was extensively damaged. The Defendant refused or failed to entertain any settlement discussions.

PARTICULARS *OF NEGLIGENCE AND BREACH OF CONTRACT*

[3] The particulars of negligence and breach of contract are stated as follows:

Negligence

(i) The Defendant failed to manage or control the 2008 green Toyota Axio motor car so as to avoid the accident.

(ii) The Defendant drove at an excessive or improper speed which caused him to lose control of the motor vehicle.

Breach of contract

[4] (i) The rental agreement constituted a contract.

(ii) It was a term of the rental agreement that any damage to the motor car during the term of the rental period save for fault or defect of the motor car would be the responsibility of the Defendant.

(iii) The Defendant by reason of his failure or refusal to repair the motor car is in breach of contract of the rental agreement.

(iv) The Claimant claims Special Damage for loss of earning and expenses in relation to the repairs of the motor vehicle.

The Defence

[5] The Defendant in his amended defence pleaded the following:

(i) He denies that any document written was intended to contain a rental contract of the motor vehicle. The Claimant instructed him to tell the investigating police officer that he borrowed the car from the Claimant and that the contract he had signed was intended to show his authority to be in possession of the vehicle at the relevant time. The rental agreement that the Claimant had him sign had no legal authority and is in breach of the insurance policy as at the time of the accident the Defendant's driver's license was under 1 year old, thus he was not eligible to drive the car as stipulated by the Claimant's insurance policy.

(ii) The Claimant has not stated that he had the permission of Mr. Mark Jackson to bring the claim and that the Claimant does not have a licensed rental car company; therefore, the contract that he gave the Defendant to sign is illegal and the

Claimant cannot claim under an illegal contract as the Claimant himself advised the police that the Defendant was in possession of the car not on a rental basis but as a loan.

(iii) Further he denies that he has refused to entertain any notion of a settlement or compensation. It is the Claimant who was unreasonably demanding an exorbitant amount. He denies the allegations of negligence. The Defendant further states that he was driving along the road way when after he came across a ditch in the road, he applied the brakes but there was no brake, the impact tore the steering wheel out of his hand, the car began swerving to the right and then to the left, he kept pressing on the brake to stop the car from swerving, the brake was not working so the car ran off the road and went over to the embankment and then turned over. The accident was therefore inevitable due to the defective brake.

The Evidence of the Claimant

[6] The Claimant Mr. Franklyn Taylor, states that he brings the suit on behalf of his friend Mark Johnson, from whom he holds a Power of Attorney. Mark is a Jamaican who lives and works in America. He however visits Jamaica from time to time. When he is not in Jamaica he relies on Mr. Taylor to manage business for him. In March of 2014, Mr. Johnson left him, Mr. Taylor, in control of his 2008 Toyota Axio motor vehicle. Although he was left in total control of the car, Mr. Taylor stated that he did not drive it. He stated that he did not want the car to remain parked as that would cause it to deteriorate. As a result, he decided to rent the car. He said he explained his plan to Mr. Johnson and it was agreed. The car was rented to the Defendant Mr. Smith on March 1st, 2014 and a rental agreement was signed. Mr. Smith took possession of the car on that night at around 8:00 p.m. and he was required to return it to Mr. Taylor the following morning, March 2nd, 2014, at about 8:00 a.m.

[7] Mr. Taylor stated that at the time of renting the car to Mr. Smith it was in good working condition and good physical repair. He further stated that based on the rental agreement, any damage done to the car once rented was the responsibility of the person renting the car. This, he said was brought to Mr. Smith's attention when he rented the car. He stated also that Mr. Smith was allowed to read the rental agreement before signing.

[8] He further testifies that sometime after the car was rented to Mr. Smith during the course of the said date March 1st, 2014, Mr. Smith called him saying there was an accident with the car. He then made enquiries and it was revealed that the car was towed to the Hanover Divisional Police Headquarters, where he saw the car and noted that it was badly damaged. He complains that Mr. Smith refused to pay for the car to be repaired. Neither did he agree to engage someone to do repair work on his behalf. Mr. Taylor continued that he and Mr. Jackson took the car to be examined when Mr. Jackson came to Jamaica sometime in May 2014 and it was concluded that it would cost one million seven hundred and eighty-three thousand six hundred and ninety-four dollars ($1,783,694.00) to get it repaired. The estimate of repairs cost five thousand dollars ($5,000.00) and a police/accident report costing three thousand dollars ($3,000.00) was issued.

[9] He further states that at the date of filing the claim form and particulars of claim, June 12th, 2014, the car has not been fixed. Mr. Taylor claims that as at the said date, there has been a loss of income of four hundred and sixteen thousand dollars ($416,000). He also claims continuing loss of income. The rental agreement, the assessor mechanic's report, the receipt for the police report and the receipt for the mechanic's (assessor's) report were all admitted into evidence as exhibit 1-4 respectively.

[10] On cross-examination Mr. Taylor states that:

> This car he rented is a private car. He is neither a taxi operator nor a registered rental car company. He does not have a license from the

government to rent vehicles. He is not sure if he has to get it from Tax Administration Department, but he knows that he had to get something from the State. He never had anything from the State when he entered into the contract with Mr. Smith. He knew of the requirement to have six (6) motor vehicles in order be permitted to rent cars. He did not possess six (6) cars, he only had two (2). He did examine the motor vehicle to make sure it was road worthy. He is not a mechanic. He does not agree that he cannot say if the motor vehicle was in proper working order. He has a level of understanding. He knows the motor vehicle was road worthy. He did his checks. He did not examine the driver's licence of Mr. Smith. That was not a requirement of his. He knows he had a licence. He did not rent Mr. Smith a defective motor vehicle. He does not agree that the brakes were not in proper working order. It was not defective brake that caused the accident. He does not agree that Mr. Smith could not have avoided the accident.

[11] His friend permitted him to rent the motor vehicle. This was not the first time he was renting the motor vehicle. This was the third person he was renting this motor vehicle. The assessor is a registered assessor. Mr. Smith, he told him he had an accident he never told him the brake gave way. He has a Power of Attorney from his friend. It expired in 2018. When accident occurred it was not expired. It has not been renewed since the claim was filed, before the Power of Attorney expired. He has nothing else to continue the claim from his friend. He is not acting on his own. He does not agree that the contract he entered in with Mr. Smith is not valid. He agrees that he was not supposed to rent a motor vehicle to a person whose driver's licence is less than (one) 1 year. He admits that he never examined Mr. Smith's driver's licence before he rented the car to him. He does not agree that the accident

was caused by defective motor vehicle which gave way while being driven by the Defendant.

[12] In answer to questions by the court he states that based on the assessor's report the left brake hose was removed and replaced. This is an indication that it was damaged.

[13] The Defendant Mr. Symar Smith gave the following evidence in chief:

> On March 1, 2014 he made an agreement to rent a green Toyota Axio motor car from Mr. Franklyn Taylor, for 1 day, for $4,000.00. Mr. Taylor handed him the keys without checking his driver's licence, which should be older than a year according to the terms of the rental agreement. On March 1, 2014, he was travelling on the Bulls Bay main road in Hanover, when he came across a ditch in the road. He applied the brakes but there were no brakes. He tried, again unsuccessfully, to apply the brakes. The impact tore the steering wheel out of his hand. The car swerved along the road way. He continued pressing the brakes to stop it. However, the brakes were not working and as a result the car went over an embankment and turned over. The accident was inevitable due to the defective brakes.

[14] On cross-examination he states that:

He did enter into agreement with Mr. Taylor to rent the motor car. He signed the agreement. He read it. The agreement he signed required that his driver's licence be older than one year. At the time of signing the agreement, he did not have a licence older than 1 year. He did not indicate that to Mr. Taylor. He did not mislead Mr. Taylor. He was not aware that his driver's licence was less than 1 year. It would have been 1 year in that same month. Upon receiving the key, he did not inspect the documents to see whether the certificate of fitness was up to date. He did not inspect the motor vehicle prior to taking the motor vehicle to ascertain whether it was road worthy. He did not take it for a test drive. He had a lawyer before Mr.

Wildman. That is Ms. Kerry Gaye Russel. He did file a previous Defence which he did sign. Having changed his attorney to Mr. Wildman, he filed an application and

an Affidavit in Support of it. He did indicate that his attorney did not carry out my instructions. In his Defence filed October 23, 2014 he did say he was driving along the road way, he fell into a ditch. It tore the steering wheel from his grasp and the motor vehicle left the road there by causing the collision. The accident was inevitable. He agrees that he subsequently filed an amended defence on May 9, 2016. He agrees that this was two (2) years later.

[15] In the amended defence he did state that he was he driving along the road way when after he came across a ditch in the road he applied the brake but there was no brake. The impact tore the steering wheel out of his hand and the car began swerving to the right and then to the left. He kept pressing on the brake to stop the car from swerving and the brake was not working so the car ran off the road and went over the embankment and then turned over. The accident was inevitable due to the defective brake.

[16] It did not take him two (2) years to realize that the brake failed. The brake did fail on that day. The accident took place about in the night. He saw the ditch split seconds before he tried to apply the brake. There was no swerving from it. It ran across the road. The minute he saw it he hit the brake. There was no street light above the road. Apart from the car light, the road would have been dark. He does recall what speed he was travelling at. There was no barrier along the road way. He was driving along the road way from the time he got the car. He went home, took a shower, saw a friend. It would have been about to (2) hours. He would have applied the brakes on several occasions before. There was no need then to aggressively step on the brake. At the time of the accident he tried to aggressively step on the brake. At the time of the accident he was not coming at a relatively high speed.

[17] In entering into the rent agreement for the car, he did not enquire whether Mr. Taylor was duly registered to rent a motor vehicle. He was not aware what the law required for Mr. Taylor to rent the motor vehicle. He does not agree that he did not have a proper look out when he fell into the ditch. He did take evasive action to

avoid running into the ditch. He did step on the brake. He was not negligently in driving at a high speed, and caused the accident. He did not seek to have the motor vehicle examined by an expert.

THE ISSUES

[18] The issues which arise in this case are:

(i) Whether the action is brought as a relator claim; whether the Claimant has the locus standi to bring the claim.

(ii) Whether there is a valid contract between the parties/Whether the contract is void for illegality.

In the alternative

(iii) Whether the Defendant owed a duty of care to the Claimant;

(iv) Whether the Defendant breached his duty of care to the Claimant resulting in damage to property.

THE LAW

Relator Claim

[19] The Supreme Court of Jamaica Civil Procedure Rules (herein after refer to as the Rules) outline the procedure for bringing a relator claim. **Rule 8.12** states:

> *"No person's name may be used in any claim as a relator unless that person has given written authority for that person's name to be used and the authority is filed at the registry before the claim is issued."*

Illegality of a Contract

[20] In the case of ***Holman v Johnson (1775) 1 Cowp 341***, Lord Mansfield CJ at page 343 explained the principle on which the doctrine of illegality of contract was founded. He states:

> *"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; ex dolo malo non oritur action ["no action arises from deceit"]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa ["from an immoral cause"], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both were equally in fault, potior est condition defendentis ["more important is the* condition of the defendant".

Negligence

[21] According to Lord Atkin in ***Donoghue v Stevenson Donoghue v Stevenson*** [1932] AC 562:

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*

Whether the action is brought as a relator claim as a consequence; whether the claimant possesses the locus standi to bring the claim.

Submissions by Mr. Wildman for the Defendant

[22] Mr Wildman made the following submissions in relation to this issue:

> The Claimant admitted in cross-examination that he did not have the permission of the owner of the motor vehicle, Mr. Mark Jackson, to bring this claim. Nonetheless, he sought to maintain the claim on the basis that he was acting as the agent of Mr. Mark Jackson. ***Part 8.12 of the Civil Procedure Rules 2002***, under the Rubric; Relator claims states: "*no person's name may be used in any claim as a relator unless that person has given written authority for that person's name to be used and the authority is filed at the registry before the claim is issued*." This rule in the ***Civil Procedure Rules*** is fatal to the Claimant's case. Mr. Taylor, as the claim states, files this claim on behalf of Mr. Mark Jackson, from whom he was required to have had written permission to file the said claim. That permission had to have been filed in the registry prior to the filing of the claim. There is absolutely nothing in the evidence coming from the Claimant to establish this requirement under the ***Civil Procedure Rules***, which is mandatory. Mr. Taylor was clear in his answer under crossexamination that he did not get the permission of Mr. Jackson to bring this claim. This is so fatal to the Claimant's case that one

does not need to go any further. The point is unanswerable and should result in this court entering judgment for Mr. Symar Smith, the Defendant. The claim is incurably bad.

By Ms. Willis for the Claimant

[23] Ms. Wills has made the following submissions on the issue:

> ***Rule 8.12*** does not apply to the instant case. The claim is not a realtor claim. The claim is brought in private law for negligence and or breach of contract between individuals. It is purely a private law claim in respect of obligation and remedies between citizens. A relator claim is one in which The Attorney General on the relation of an individual or a company brings an action to assert a public right. The attorney general is the nominal plaintiff. In reality the action is brought by the Claimant. Once the consent of the Attorney General is obtained the actual conduct of the proceedings is in the hands of the relator who is responsible for the cost of the action. (She refers to ***Gouriet v. UPW*** [1978 AC345). The Claimant had permission to bring the Claim. The power of attorney was listed in his list of documents. The Defendant had a right to inspect the document. He did not do so. It is not in good faith for the Defendant to submit that the Claimant does not have permission to bring the action. The Claimant's evidence on the validity of the power of attorney should be considered in the light that the Claimant is not a sophisticated witness.

ANALYSIS

[24] On an examination of the rules it is apparent that the rules do not define who a relator is, or what a relator action is. However, the relevant case law indicates that a relator claim arises where the Claimant has no locus standi to bring an action in his own right and there is necessity to act through or with the permission of the

person or body vested with that right. Such as situation generally occurs where a Claimant is seeking to obtain a private law remedy in respect of a public wrong from which the Claimant cannot demonstrate that any right infringed or damaged suffered is over and above that which is suffered by the general public. (See. Lord Wilberforce in ***Gouriet v. Union of Post Office Workers*** [1978] AC 435, 477., *also* ***Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd****.* [1981] 2 WLR 722).

[25] The historical background to this concept lies in the role attributed to the AttorneyGeneral as the guardian of public rights and interests. Consequently exclusive right was vested in Attorney-General to protect the rights and interest of the public. Therefore any person claiming a private remedy for a public wrong, as a private individual, would have to seek the authority of Attorney-General in order to commence such an action. Where the Attorney General gives such an authority, the action would be brought primarily in the name of the Attorney General, the individual being named as the relator*. (See* ***Gouriet v Union of Post Office Workers Supra****)*

[26] As it relates to the instant case the Claimant Mr. Taylor filed the claim as attorney for Mr. Mark Jackson. He indicates that he did in fact have a Power of Attorney from Mr. Jackson which expired in 2018. It has not been renewed since. The original claim was filed in 2014 and the amended claim was filed on December 8th, 2017. Therefore, it is not correct to say that Mr. Taylor's evidence is that at the time of filing the claim he did not have written authority to bring the claim on behalf of his friend Mr. Mark Jackson. However, whereas his evidence is that he did have the written authority to commence the claim and to file the amended claim form, Mr. Taylor's evidence is that the Power of Attorney has since expired.

[27] Therefore the issue I must determine at this juncture is whether this in fact defeats Mr. Taylor's claim. In order for me to decide this issue I must first examine the true essence of the claim and whether as between himself and the Defendant, the

Claimant Mr. Taylor has any locus standi to bring an action in his own right against the defendant.

[28] The claim is predicated on two different causes of action which are pleaded in the alternative. Therefore where the Claimant fails to prove or establish one it does not mean the automatic failure of his claim. I must then examine the evidence in light of the alternative cause of action. The Defendant in his evidence has not denied that he entered an agreement with Mr. Taylor for the rental of the motor car the subject of this claim. He has not denied that there was an agreed consideration, that is a price of $4000. He also admitted that he paid the $4000 and as a result of which possession of the motor car was delivered to him under the agreement. On this evidence a relationship in private law had been created between the Claimant and the Defendant. There is no evidence that Mr. Taylor is seeking to enforce a public right needing the authority of the Attorney General. Consequently, the right being claimed does not fall within the realm of public law. Therefore, it cannot be categorized as a relator's claim.

[29] It is the unchallenged evidence of the Claimant, Mr. Taylor that he was placed in possession of the motorcar by the owner Mr. Mark Jackson. Therefore the only right that could supersede Mr. Taylor's right in dealing with the motor car is that of Mr. Jackson. There is no evidence of Mr. Jackson challenging Mr. Taylor's dealing with the motorcar in the circumstances of the case before the court. Further, Mr. Taylor's evidence is that he got the permission of Mr. Jackson to rent the car. No evidence has been adduced to the contrary. Therefore in light of the fact that the claimant Mr. Taylor was the individual who entered into the agreement with Mr. Smith; and the principle of privity of contract playing a pivotal role in the enforcement of a contract; Mr. Taylor would have complete standing to bring an action to ask the court to pronounce on the validity of the contract and to enforce the contract.

[30] In fact, Mr. Jackson having vested Mr. Taylor with possession of his motor car without a transfer of title they both stand in a relationship of bailor and bailee to

each other. In the case of ***HSBC Rail (UK) Ltd v. Network Rail Infrastructure Ltd (formerly Railtrack plc*** [2005] EWCA Civ 1437 the court discussed the traditional position of the common law as it relates to issues concerning the interference of the goods in the possession of a bailee by a third party. Lord Justice Longmore, in delivering the judgment of the court, at paragraph 1 states:

> *English law has traditionally regarded both the tort of wrongful interference with goods (whether by way of trespass or conversion to use now old-fashioned terms) and the tort of negligent damage to goods as being torts which infringe the possession or right to possession of goods .Thus in* ***Gordon v Harper*** *(1796) 7 TR 9, where the claimants had let a house and furniture to a tenant and the furniture had been taken by the sheriff in execution before the lease had expired, it was held that the claimant could not sue because during the lease he had no possession or right to possession of the furniture. The corollary of the rule was that since the bailee of goods was the only person with the right to sue, he was under an obligation to account to the true owner. In* **The Winkfield** *[1902] P 42, which decided that the bailee could recover the full value of the goods (but was obliged to account for that value to his bailor) even though he was not contractually liable to his bailor for loss or damage to the goods, Sir Richard Henn Collins MR referred to the fact that originally only the bailee could sue but added (page 58): 'though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also.'*

[31] In light of the above mentioned authority, it is clear that traditionally the common law only recognized the right of the bailee or the person lawfully in possession to sue in relation to goods. However, this right was later extended to the bailor.

Therefore as between Mr. Taylor and Mr. Jackson Mr. Taylor's right to sue a third party in relation to the motor car which came into his possession as a baillee has been long recognized by the law. I must also indicate that the law also recognizes the fact and concept of sub bailment (see ***Morris v CW Martin & Sons Ltd*** 4 [1966] 1 QB 716, at pp 729-730 and the Privy Council decision of ***Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd.*** 27; [1970] 1 WLR 1262 and Owners ***of cargo lately laden on board K H Enterprise v. Owners of Pioneer Container*** [1994] TLR 4) The cases clearly indicate that bailment can arise under a contract or gratuitously. The fact is, Mr. Taylor having vested Mr. Smith with the possession of the motor car has created a sub-bailment, he being the sub-bailor and Mr. Smith being the Sub-Bailee. This is so irrespective of whether or not there is a valid contract.

[32] Therefore in light of the foregoing discussion it is clear that whether by virtue of the contract or at common law as it relates to bailment, Mr. Taylor would have a proper standing in bringing this action against Mr. Smith. That is, he has the right to bring and sustain the action without the permission of Mr. Mark Jackson. In fact, if he did not have the permission of Mr. Mark Jackson to rent the motor vehicle, Mr. Jackson could file a claim against him for the damages and he in turn could bring an ancillary claim against Mr. Smith without obtaining the permission of Mr. Jackson.

[33] Consequently Mr. Taylor could have filed the claim in his own name as the only Claimant. Equally he can file the claim as Attorney or agent for Mr. Jackson. This is in light of the fact that in either situation whatever judgment he receives is for the benefit of Mr. Jackson, the owner of the motor car. That is, whether Mr. Taylor brought the action in his own name or as an attorney or agent for Mr. Jackson, Mr. Jackson could not file a subsequent claim against Mr. Smith. (See ***HSBC Rail (UK) Ltd v. Network Rail Infrastructure Ltd (formerly Railtrack plc*** Supra, paragraph 26). In the event that Mr. Taylor refuses to hand over any benefit from the Judgment Mr. Jackson, remedy would lie in an action against Mr. Taylor.

[34] I will now examine the Amended Claim as it is filed with a view of deciding whether the Amended Claim in the form that it is filed is fatal to the claim. I examine this issue in light of ***Rule 8.4*** (1) which states:

> *" The general rule is that a claim will not fail because -*
>
> *(a) a person was added as a party to the proceedings who should not have been added; or*
>
> *(b) a person who should have been made a party was not made a party to the proceedings".*

[35] I find that Mr. Taylor is a proper party to the proceedings and is able to maintain the proceedings in his own right. He does not have to rely on Mr. Jackson's knowledge and information to bring the claim. He would have been seized of personal knowledge and information in relation to the claim. Therefore there was no need for Mr. Jackson's name to be added to the proceedings. Additionally, there was no need for Mr. Jackson's permission to file the claim. Essentially I find that the inclusion of Mr. Jackson's name without filing the evidence of written authority is not fatal to the claim. I make this decision in light of ***Rule 1.1*** which states:

> *"These Rules are a new Procedural code with the overriding objective of enabling the court to deal with cases justly."*

[36] One of the consideration that is involved in dealing with the case justly is stated in **Rule1.2 (d),** That is (d) ensuring that the cases are dealt with "fairly" ***Rule 1.2*** clearly states:

> *"The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules"*

[37] As I previously indicated, Mr. Jackson could properly sustain an action against Mr. Taylor if he did not give him permission to rent the motor vehicle. Whereas Mr. Taylor could in turn file an ancillary claim against the Defendant, he would incur additional cost of both Defending the claim and sustaining the ancillary claim. In accordance with Rule 1.2 (b) dealing with cases justly includes saving expenses. Therefore in light of the fact that:

(i) Mr. Taylor is a proper claimant in his own right to these proceedings

(ii) Whatever Judgment he receives will be for the benefit of Mr. Jackson; and in view *of* ***Rule 26.9.3-4*** which read:

(1) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

[38] I find that the claim as filed does not fail. Mr. Taylor has the authority to bring the claim in his own right. I therefore by order, treat the claim as being filed by Mr. Taylor for the benefit of Mr. Jackson.

Whether there is a valid contract between the parties/Whether the claim fails by virtue of illegality of contract

Submissions by Ms. Willis on behalf of the claimant

[39] The rental agreement, signed by the Defendant, was in fact a contract. There was consideration passing from the Claimant in the nature of possession of the motor car being given to the Defendant; and from the Defendant in the nature of payment being made for the use of the motor car. There was an intention to create legal relations evidenced by the signing of the document and the passing the consideration. There was also an invitation to treat culminating with an offer to rent and acceptance of the terms of the rent - same being the consideration, the duration of possession, the parties to the agreement, the identification of the motor car, and the other terms and conditions in agreement as noted.

[40] On this issue, the illegality, Ms Willis made the following submissions:

The Claimant never purported to engage in a taxi service; nor did the Defendant provide any evidence that the agreement between the Claimant and himself was in the context of a taxi service. There is no legislation mandating that an individual must register a company if he is desirous of renting a car. An individual may register a company for this purpose; but it is not a requirement under law. There is no license requirement for an individual to rent a car. While the claimant maintains that there is no illegality in renting his car, even if the court is not in agreement with this submission the “illegality” would not be fatal to recovery for the damage to the car. On a contract tainted by illegality, the reliance rule ought no longer to be followed. The court is to consider the underlining purpose of the prohibition which had been transgressed and whether that purpose will be enhanced by denial of the claim, (b) The court should consider whether the denial of the claim would be a proportionate response to the illegality bearing in mind that punishment is a matter for the criminal courts”. (She relies on ***Patel v Mirza*** [2016] UKSC 42). **[41]**

With regards to the law prohibiting the act of renting the car without first establishing a registered company she submits that:

(a) The purpose of the prohibition transgressed would be to identify business so that tax revenue can be secured and also to allow for transparency between members of the public and the businesses with which they deal. Denying the claim herein would not enhance the collection of tax revenue. Neither would it enhance the transparency of the business between persons seeking to rent the car from the Claimant since the rental process is already done in an open manner with the Claimant preparing a contract detailing the terms and conditions of the business.

(b) The denial of the claim may have an adverse impact on the public policy of the defendant being responsible in law (common law and contract) to make compensatory damages to the claimant for loss caused to him by the defendant. Such compensation has its aim of placing the claimant in the position he would have been in if the wrong had not been committed – not enriching the Claimant but rather putting him back in the position which he was already in law entitled to be in.

(c) The denial of the claim would not be proportionate to the illegality bearing in mind that the Claimant's evidence is that the car was rented for three times only and the rent sums is the rather nominal figure of $4,000. The tax revenue lost from those three occasions when compared to the loss suffered by the Claimant in the damage to the vehicle and the cost for its repair, that being approximately $1,783,694.00, would be wholly disproportionate. The Claimant would be denied the

repair costs of the vehicle, which is substantial, as a punishment for non-payment of what would be nominal figured in tax revenue; if even any tax revenue could be declared payable therefrom when properly assessed as to profit/loss and the proximity to the tax threshold.

(d) The authority made it clear as well that even if the court denies relief on the basis of contract because of the issue of illegality; the court can still grant relief on any other cause of action that is pleaded and proved by the claimant. The cause of action of negligence was pleaded; and it is submitted that it was proven and therefore the Claimant can recover hereunder. **By Mr. Wildman on behalf of the defendant**

[42] Mr Wildman submits that:

(i) A reading of the purported rental agreement, on which the claimant relies, will show that it did not satisfy the requirements of a contract. There is nothing in the document to show that both the defendant and the claimant had agreed on the terms and conditions of the proposed rental. The document was only signed by the defendant.

(ii) The Claimant sought to place heavy reliance on this document to establish his case that there was a contract; however, the document fails to establish the ingredients of a contract. The court is therefore left in a state where it cannot place any reliance on the purported rental agreement to establish any terms and conditions surrounding the purported rental agreement between the parties. The document under the heading “rental agreement” is therefore valueless and cannot assist this court in its determination of the issues.

(iii) That being the state of the evidence, the court need not concern itself with the other issues concerning illegality and recoverability for alleged breach of contract.

ANALYSIS

[43] In the case of ***Reveille Independent LLC v Anotech International (UK) Ltd*** [2015] EWHC 726, (Comm), the court found that the parties had accepted the terms of a contract by conduct, even though it had been signed by only one party contrary to the agreed requirement for both signatures in the agreement. In that case the claim surrounded an agreement for the claimant to furnish licence to the defendant in relation to certain intellectual property rights and that would provide for the integration and promotion of the defendant's products into three episodes of a television series. In that claim one of the contentions of the defendant before the court was that the contract was not valid. The defendant further argued that to be binding it had to be signed by both parties and it had not been signed by the claimant. However, the court found that the contract was valid and binding on the parties as there was acceptance by conduct evidence by some performance under the contract. I find that the afore-mentioned case is quite relevant to the case at Bar.

[44] On Mr. Smith's own evidence, he states that on March 1, 2014 he made an agreement to rent a green Toyota Axio motor car from Mr. Franklyn Taylor, for 1 day, for $4,000.00. He further states that Mr. Taylor handed him the keys. The information in relation to the age of his driver's licence was within his own knowledge. This he failed to pass on or withheld from the claimant, therefore he cannot rely on this information to avoid the contract. The fact that he signed the contract without disclosing that information to the claimant it was reasonably for Claimant to infer that Mr. Smith's licence was not less than 1 year old. Additionally where the court find, which I so find that the condition was for the benefit of the

claimant and the claimant entered into the contract without insisting on that condition the court can hold that the claimant waived the condition and still hold the contract valid (see ***Reveille Independent LLC v Anotech International*** (UK) Ltd. Supra).

[45] Additionally, I find that by his performance under the contract, that is handing over the motor car without verifying the age of the defendant's drivers licence the claimant Mr. Taylor waived the condition that the defendant's drivers licence should not be less than I year old. By their conduct both parties have accepted, the contract. That is the car was handed over to the defendant in accordance with the terms of the agreement and the defendant has paid the agreed price. Therefore the failure of the claimant to sign the contract does not render it invalid.

[46] Mr. Wildman has indicated in his submissions that the court need not concern itself with the issue of the illegality of the contract. However, the issue was raised on the evidence of the defendant and the cross examination of the claimant so I feel constrained to make a few comments on the issue. In the case of ***Saunden v Edwards*** *[*1987] 1WLR1116, 1134 at paragraph 57 the court stated that*:*

> *"It is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct. Further at paragraph 58 the court stated that: "The case law has already identified that the principle that the plaintiff may not profit from his or her own wrong is properly of limited application."*

[47] In the case of ***Shipping Corporation v Joseph Rank Ltd*** [1957] 1 QB 267, Devlin J. found that the purpose of the statute on overloading ships did not prevent enforceability of a carriage contract. In the case of ***Tinsley v Milligan [1994]*** 1 AC

340, House of Lords (UK), property was bought in the sole name of Ms. Tinsley so as to claim more in social security. Miss Milligan had been living there and had contributed to the purchase price. After the relationship between the plaintiff and defendant ended, Tinsley moved out and brought an action for recovery of possession of the house, claiming that she was solely entitled. Miss Milligan's defence was that it was the common intention that the property should belong to both of them without the need to rely on the illegality, that is the benefit fraud. The House of Lords held that because Miss Milligan could invoke the presumption of a resulting trust without relying on the illegal purpose, she did have a share in the house. Miss Tinsley would have to rely on her intention to defraud the social security system to rebut the presumption of a resulting trust and get the property in her own name.

[48] However, the court took a different approach in the case of ***Patel v. Mirza*** [2016] UKSC 42. In that case the *Supreme* Court allowed a claimant to recover sums he had paid to the defendant, despite the illegal purpose of the contract. The parties had agreed that Mr. Mirza would place bets on the price of shares using advance insider information, which he expected to obtain from contacts regarding an upcoming government announcement. Mr Patel transferred to him £620,000 for these bets. The agreement between Mr. Patel and Mr. Mirza amounted to a conspiracy to commit an offence of insider dealing under ***section 52*** of the ***Criminal Justice Act 1993***. The illegal bets were never placed, but Mr Mirza did not repay the money to Mr Patel, who sued for its recovery on various grounds including contract and unjust enrichment. In order to establish his claim to the return of his money, it was necessary for Mr Patel to explain the nature of the agreement. The court found that the claimant was able to satisfy the ordinary requirements for unjust enrichment and was therefore be entitled to the return of his money. At paragraph 13 of the Judgment Lord Toulson who delivered the main judgment made the following pronouncements:

> *"A defendant's enrichment is prima facie unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not)."*

[49] At paragraph 110 he states:

> *I agree with the criticisms made in **Nelson v Nelson** and by academic commentators of the reliance rule as laid down in **Bowmakers and Tinsley v Milligan**, and I would hold that it should no longer be followed. Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract: **Singh v Ali** [1960] AC 167, 176, and **Sharma v Simposh Ltd** [2013] Ch. 23, paras 27-44. There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question".*

[50] At paragraph 120 he further states:

> *"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is*

necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate".

[51] Therefore the cases indicate that:

(i) The courts will not automatically dismiss a claim because the contract is deemed to be illegal.

(ii) The courts have gone beyond the principle of reliance to an examination of the purpose of the prohibition.

(iii) If the prohibition is founded on statute the court will examine the provisions of the statute to determine the purpose for the relevant provision and whether the enforcement of the contract will the defeat the purpose. It will also seek to avoid a decision that fosters any unjust enrichment. I note that in his evidence the defendant has intimated that the rental agreement was in breach of the claimant's contract of

> insurance with his insurers. It was also suggested to the claimant that he needed a licence in order to rent motor vehicles. However the defence has not pointed the court to any specific statute or provisions in law that has been breached.

[52] In any event when one examines the substance of the claim in the instant case, the Claimant is seeking to enforce a right that accrues to him at common law with or without the rental contract. That is one that he is entitled to enforce under the Law of Bailment (See ***Coggs v. Bernard*** 92 E.R. 107; and **Houghland *v R.R. Low (Luxury Coaches***) Ltd (1962) 1 QB 694. I pause at this juncture to indicate that in spite of their best effort and detailed written submissions for which this court has due regard both counsel have failed to identify and submit on this very important area of law arising on the evidence which is essential for me to make the correct and just determination of the claim. However in light its significance to the determination of the matter I am obliged to address it. In relation to bailment for a reward parties can in fact contract out of the common law with regards to certain liability including liability for damages to property. This kind of term in the contract normally inures to the benefit of the bailee as it normally restricts his or her liability, usually, covering it by the consideration under the contract. (See ***Gibaud v. Great Eastern Railway Company)*** [1921] 2 K.B. 426. However I have been pointed to no such clause in the contract.

[53] In any event the Defendant is asking the court not to rely on the contract. Consequently, even if there was such a clause for his benefit based on his pleadings he would not be invoking that clause. The fact, is whether under the contract or not both parties, as it relates to the motorcar, stand in the same position or relationship to each other that is, bailor and bailee. The Claimant has pleaded negligence in the alternative. Additionally, when I examine the substance of the claim, I find that he is not seeking to enforce an illegality as it relates to the contract. That is, he is not seeking to enforce performance under the contract such as

payment of the contract price or, for the Defendant to take possession of the vehicle. What he is seeking to enforce is a common law remedy, incorporated as a term of the contract that would have been available to him with or without the contract. That is, once he vested possession of the vehicle in the Defendant for the Defendant's own use the Defendant stands in the position of bailee with certain obligations at common law unless there is evidence that he contracted out of these obligations. Therefore I find that there is no necessity for me to pronounce on the legality of the contract.

The Claim in the Alternative, that is, Negligence

Whether the Defendant Owe a Duty of Care to the Claimant

Submissions

By Mr. Wildman for the Defendant

[54] Mr. Wildman submits that:

> There is nothing in the evidence of the Claimant, to establish negligence on the part of the defendant. The Claimant bears the burden of proof on a balance of probabilities to establish negligence on the part of the defendant. That burden can only be discharged when the Claimant produce evidence to convince the court that the defendant's driving of the motor vehicle was such that it was more probable than not that the accident was due to the fault of the defendant. The Claimant has failed to discharge the burden of establishing negligence. There is no presumption of negligence here. The Claimant must demonstrate and establish that the defendant drove the vehicle in such a manner that can be regarded as negligent. There is absolutely nothing in the evidence that can assist this court in coming to the conclusion that the defendant was negligent. The case for the claimant stands or falls on the witness statement of the claimant and the viva voce evidence given under cross-examination at the trial.

[55] The witness statement and viva voce evidence of the Claimant are woefully lacking in substance in establishing negligence. There is no one, other than the Claimant's assertion, to substantiate the Claimant's claim that the Defendant was speeding. The Claimant has embarked on a speculative course when he asserted that the Defendant was speeding. It is not grounded on evidence. Therefore, this court should reject the assertion of the Claimant that the Defendant was speeding at the time of the accident. There is nothing in the evidence to contradict the Defendant's assertion that he was not speeding; and that the braking system of the motor vehicle failed. The defendant was present at the scene of the accident while the claimant was not. This court is therefore left in a state where it cannot arrive at the conclusion that the defendant was negligent in driving the motor vehicle.

[56] The Defendant relies on the fact that he sought to control the vehicle on the impact with the ditch, and the vehicle started to swerve, which resulted in the accident. The attempt by the Claimant to rely on the Defendant's prior Defence before the amendment when he was represented by Junior Counsel is misplaced. The Defendant was clear in his evidence that it was for that reason; that is, being dissatisfied with the defence prepared by his former counsel, why he sought new counsel to represent him, and to have the defence amended to reflect what had truly occurred on the night of the accident. In these circumstances, the court should reject the attempt by counsel for the claimant to seek to impugn the credibility of the defendant, by reference to the previous defence prepared by Junior Counsel, which had omitted to mention that the accident was due to the failure of the braking system on the motor vehicle.

[57] The Claimant sought to rely on the purported state of the vehicle prior to the said vehicle being placed in the possession of the defendant, to ask this court to hold that the vehicle was in proper working condition before the accident occurred. This, ought to be rejected. Taking the Loss Adjuster's report on its face value, it does not establish that the motor car in question and the braking system, was in good working condition when it was rented to the Defendant on March 1, 2014. All it

established is that in November 2013, when examined by the Loss Adjuster, the braking system was good. It established nothing more. Between November 2013 and March 1, 2014, one does not know what the state of the braking system on the motor vehicle was.

[58] Since the Claimant was in the habit of renting the motor vehicle, it could have been rented to other persons, especially during the busy Christmas season, when the demand for rental would have been high. Other persons could have caused damage to the braking system. There was therefore a clear lacuna in the evidence presented by the Claimant to establish that the breaking system was in good working condition when the defendant took possession of the said motor car on the 1st of March 2014. The Claimant has failed to satisfy the court on this issue and as such, judgment should be entered for the defendant. On the totality of the evidence the Claimant has failed to establish on a balance of probabilities, the claim, as alleged.

By Ms. Willis on behalf of the Claimant

[59] Ms. Willis submits that:

> The averment of negligence was in fact proved on the balance of probabilities by the Claimant. In this regard paragraph 7 of the Defendant's
> Witness Statement indicated that he Defendant "... **came across a ditch in the road";** and further that the Defendant went into the ditch which resulted in "**the impact [of falling in the ditch] then tore the steering wheel out of my hand.** "The foregoing evidence, prima facie, leads to at least two inference - the first being that the defendant was speeding and thus was came upon the ditch and was not able to stop in sufficient time or at all. The second inference is that the Defendant did in fact lose control of the motor car, as pleaded by the claimant, and this is disclosed by the evidence that failed to maintain directional control of the car after his hands came off the steering wheel.

[60] Under cross-examination the Defendant testified he had the car "**for a few hours** "before the accident and that during these "*few hours'* "**[he] used the brakes".** His evidence went on to indicate that during these '*few hours"* when he "used the brakes" '**[the brakes] did not feel soft"** and that during these said "*few hours"* when "*used the brakes' "***[the brakes] did not fail".** The clear evidence then is that the defendant on renting the motor car drove it for some time, had the opportunity during that time to use the brakes and did in fact used the brakes. The clear evidence also is that the defendant in using the brakes during this period of time did not experience any brake failure or any "softness" or other abnormality in the brakes. This was the Defendant's evidence.

[61] Further prima facie evidence, of the Defendant's negligence is the defendant's testimony on cross examination that: He was able to see the road by the lights on the vehicle; the ditch runs right across the road**;** he did not see it until just before impact**;** he did not know how fast he was going**.** These aspects of the evidence allow for the inference that:

(i) He had unimpeded and unimpaired visual observation of the roadway;

(ii) He, not withstanding having this unimpeded and unimpaired observation, failed to see the ditch until he came upon it.

(iii) The ditch the Defendant failed to see was extensive since it "ran right across the road".

(iv) Given that the Defendant had unimpeded unimpaired visual observation and the ditch was extensive the defendant was in a position to and ought to have seen the ditch before coming upon it immediately before the accident.

(v) The defendant only seeing the ditch after having come upon it means he was either speeding or that he was not in keeping a proper look-out or both.

(vi) The Defendant not knowing his speed has failed to refute the claimant's claim of speeding.

[62] On the issue of credibility, the credibility of the Defendant on this issue of negligence was impugned by the evidence of his previous inconsistent statement in his pleadings. It was brought under cross-examination that the Defendant filed his defence in 2014 and failed to make reference to defective brake as a cause of the accident; but some two years later in 2016 the defendant filed an Amended Defence wherein he alleges that the brakes were defective and the cause of the accident. This, is most important since the Defendant in filing his first defence in 2014 signed the defence personally and in doing so doing certified, by the Certificate of Truth therein, that; all the facts set out in his defence are true to the best of his knowledge, information and belief". The defence filed in 2014 would have been fairly contemporaneous with the accident; at any consideration this defence was much closer in time to the accident than the defence filed in 2016. The defendant would have a better opportunity in 2014 to state correctly what caused the accident than he would in 2016 given that the information was fresher in his mind than some two years later.

[63] In his first Defence the Defendant pleaded that he indeed fell in a ditch. This remained in the amended defence and shows some consistency as to what is alleged to have occurred; it also shows that the defendant considered the fact of his falling into the ditch to have been of some import and therefore necessary to be pleaded. On the contrary the allegation of a defective brake in the defendant's amended defence was the central basis of the pleading and purported to explain why he drove into the ditch; yet it was never mentioned in his previous pleadings. It is also important on the issue of his credibility that no explanation was offered as to why the "defective brake" allegation was not made in the first pleading. It is

noteworthy that according to the report by Orion Loss Adjusters which was done on November 25, 2013; and t was stated: “Brakes (park) Good**”.** Under

Recommendations For Improvement to Ensure Roadworthiness it was stated: “None. This report was done approximately two (2) months and a day before the accident. This then is also evidence as to the car’s roadworthiness at the time of it being rented. A report by Toyonda Auto Repairs and Sales was also submitted as an exhibit. The motor car was examined by this company consequent on the damage sustained in the accident; not as a result of any latent damage. The findings therefore of the company as to what damage was found and what repair work needed to be done to once again make the car roadworthy must be confined to damage resulting from the collision.

[64] There is no evidence that any damage in that report was considered as latent damage or damage pre-existing the collision. Further, the Defendant never challenged that this report documented damage as a result of the collision and as such ought not to be allowed to rely on any such allegation. Indeed, the procedure would have been for the Defendant to submit questions, pursuant to **rule 32.8** of the **CPR**, to Toyonda Auto Repairs and sales as to whether any damage seen was latent damage or pre-existing damage; this the Defendant did not do. The Defendant then cannot rely on this report as establishing anything other than the damage noted by the company examiner after the collision in respect of which the vehicle was submitted for examination.

ANALYSIS

[65] As it relates to the duty of care of a bailee, in the case of ***Coggs v. Bernard*** 92 E.R. 107, at page 111 the court states:

> *“As to the third sort of bailment, scilicet location or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of hiring is expired”.*

A bailee is under a duty to deal with the goods with which he is entrusted with the due care and diligence which a careful person would exercise over their own chattels in similar circumstances. (See ***Coggs v Bernard Supra)***.

[66] In accordance with the foregoing legal principle outlined it is apparent that Mr. Smith owed a duty of care to Mr. Taylor with regards to the motor car. That is to take reasonable care of the motor car. The standard of care is the due care and diligence which a careful person would exercise over their own chattels in similar circumstances.

Therefore the burden that Mr Taylor as the bailor has to discharge, is to establish that the car was delivered into the possession of Mr. Smith under a bailment and that the car was damaged while in the possession of Mr. Smith. Once Mr. Taylor has discharged this burden the onus shifts to Mr. Smith, the bailee to show that the damage to the car was not as a result of him failing to exercise proper care. (See ***Joseph Travers & Sons Ltd v Cooper*** [1915] 1 K.B. 73 and ***British Road Services Ltd v Arthur v Crutchley & Co Ltd*** (No.1) [1968] 1 All E.R. 811). In the former case on page 89, the court quoting Lord Halsbury in the case of ***Pollexfen & Blair v. Walton***, decided on May 10, 1909 (unreported) stated:

> "*It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to shew that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."*

[67] In the case of **Gos*se Millard v Canadian Government Merchant Marine*** [1927] 2 KB 432, a decision of Wright J. At 435-436 he said:

> “It is, I think, the general rule applicable in English law to the position of bailees that the bailee is bound to restore the subject of the bailment in the same

> condition as that in which he received it, and it is for him to explain or to offer valid excuse if he has not done so. It is for him to prove that reasonable care had been exercised……it is wrong to say that the onus on the bailee to prove absence of negligence does not arise until the bailor has first shown some negligence on the part of the bailee".

[68] In the case of ***Houghland v R.R Low (Luxury Coaches) Ltd*** (1962) 1 QB 694 the court states that the onus rests on the person in possession of the goods to prove that the loss or damage was not caused by their actions or fault."

There is no denial on the evidence that the motor vehicle was damaged while in the possession of the bailee Mr. Smith. Therefore Mr. Taylor has successfully discharged his burden as Mr. Smith has in fact admitted that the motor car was damaged while it was in his possession. This fact having been established, it is for Mr. Smith to prove that the damage to the motor car in his possession was not caused by his own actions or fault.

[69] Therefore at this juncture I will examine his evidence to see whether he has discharged that burden. There are in fact two accounts given by the defendant as to how the damage to the motor vehicle occurred. The account given in his evidence in chief is consistent with the account given in his amended defence filed on the 9th of May 2016. Whereas I am cognizant of the fact that it is the amended defence that is accounted as the Defendant's defence before the court, where he is presented with a previous account which he accepts, the court must take that into consideration as part of his evidence. Therefore I will examine his evidence taking into account his previous inconsistent statement contained in his defence filed on October 23rd, 2014 with which he was confronted on cross examination.

[70] I take note of fact that apart from there being no mention of a brake failure which forms the gravamen of his defence, in this statement he states that he fell into a

ditch. To quote this part of that statement he said, "*I fell into a ditch. It tore the steering wheel from my grasp and the motor vehicle left the road there by causing the collision"*. Therefore on his first statement the operating cause of the accident and damage to the motor car was his falling into the ditch. In his amended defence the brake failure is introduced. Additionally, in relation to the ditch his statement indicates that he came across the ditch as opposed to falling into the ditch. I also quote this part of his amended defence. He states that "*I was driving along the road way when after I came across a ditch in the road, I applied the brakes but there was no brake, the impact tore the steering wheel out of my hand, the car began swerving to the right and then to the left, I kept pressing on the brake to stop the car from swerving, the brake was not working so the car ran off the road and went over to the embankment and then turned over".*

[71] Despite the fact that the first defence in the Defendant's pleadings may have been prepared by counsel the defendant, Mr. Taylor signed the statement. In light of this fact I will state that I am inclined towards the postulations of counsel for the claimant that the statement in the defence must be attributed to him; that is unless he has produced evidence to the contrary. Importantly, he states in both statements that as a result of him falling in the ditch the steering was torn from his hand and he was not able to control the vehicle. I form the view that if the brake failure was the cause the of the accident that would be such a significant feature that it would be foremost in the defendant's mine when instructing his Attorney-at-Law.

[72] The failure to mention anything at all about the brakes is a significant omission from his first defence and a serious contradiction on his case. I also bear in mind his evidence that his former counsel failed to comply with his instructions. Mr. Wildman's submits that this court should reject the attempt by counsel for the Claimant to seek to impugn the credibility of the Defendant, by reference to the previous defence prepared by Junior Counsel, which had omitted to mention that the accident was due to the failure of the braking system on the motor vehicle.

Essentially, alluding to incompetence on the part of counsel. However my view is that this ingredient of the Defendant's case is not simply a question of law but, a very significant as it relates to the facts. In fact, it would have been an absolute defence to the issue of negligence. Previous counsel would have had to be the most incompetent of counsel not to recognize this. Additionally, I note that despite the fact that the Defendant indicates that counsel did not carry out his instructions, he waited two years to address the issue with regards to the omission of this vital element of his defence. I find that this is very significant as it relates to his credibility. Even if previous counsel, having been so instructed, failed to include this vital element in his defence the Defendant has offered no explanation as to why it took him two years to recognize and correct this failure. He has offered no explanation as to why he did not immediately retain new counsel where previous counsel was not complying with his instructions with regards to placing material before the court that was so crucial to his defence.

[73] I also take note of the fact that the Defendant indicates that he drove the vehicle home and there was no issue with the brake. He admitted that he was driving along the road way from the time he got the car. He, having gone home to take a shower, would have had to apply the brakes when he parked at his home. The fact that he was able to park also suggest that in applying the brake the car was able to come to a complete stop. He admitted that he would have applied the brakes on several, occasion and found no problems with it. He denied travelling at a fast feed but has not given an indication as to the speed he was travelling. He has also fail to indicate what distance he was from the ditch when he applied the brakes. This is against the background of his evidence that he only saw the ditch a few second before he fell in the ditch, and that he applied the brakes the moment he saw the ditch. In his evidence he indicates that he had to apply the brake aggressively. That also suggests to me that he applied it suddenly. The only inference from this evidence is that he applied the brakes only a few seconds before falling into the ditch. Therefore, applying the brake at the time and point

that he said he did, would not necessarily have prevented the motor car being driven by the Defendant from falling in the ditch if he was already too close to the

ditch. I take note of the fact that in the assessor's report he replaced a brake hose and the evidence of the Claimant is that this meant it was damaged. However, I view this in light of the fact that Claimant's evidence is that he tested the car prior to handing it to the Defendant and the Defendant himself drove the motor car and found no issue with the brake prior to the accident. Incidentally, the Defendant has offered no explanation as to what prevented him from seeing the ditch up until a few seconds before he applied the brakes. I agree with counsel for the Claimant that the fact that the ditch ran across the entire road suggests that it was not small and obscure. Essentially, the fact that the Defendant states that the area had no street light is all the more reason why he should have been paying keen attention to the road.

[74] However, having assessed the demeanour and evidence of the Claimant and the Defendant, I find that the Defendant has not been forthright with regards to the cause of the collision and the damage to the motor car. I find that the reason he failed to mention the brakes in his first defence was because there was in fact no problems or defect with the brakes before the car fell in the ditch. I am not convinced of any incompetence on the part of previous counsel, by his mere say so, when he took no steps to address this alleged incompetence until approximately two years later. I find that the account given by the Defendant in his previous statement is more probable as to how the damages was caused to the motor vehicle. That is while driving he came upon a ditch and by the car falling in the ditch the steering wheel was torn from his hand causing the vehicle to get out of control resulting in the collision and damage to the vehicle. On that account of the Defendant I find that the car fell in the ditch because the Defendant Mr. Smith was not driving with due care and attention. I find that the damage to the motor vehicle was not as a result of any previous defect. I accept the evidence of the

Claimant that the damages as contained in the report of Toyonda Auto Repairs, that is Exhibit I, were as a result of the accident.

CONCLUSION

[75] I find that Mr. Smith has not demonstrated to this court that the damages to the vehicle to which he was entrusted as a bailee was not caused by his own fault. In that regard, he having failed to discharged the required burden, I find that he has breached his duty of care owed to the claimant. Therefore I find him liable in negligence for the damage to the 2008 green Toyota Axio motor car registered 4164GM. Consequently, Judgment is entered for the Claimant.

Assessment of damages

[76] Mr. Taylor ‘s evidence is that he and Mr. Jackson took the car to be examined when Mr. Jackson came to Jamaica sometime in May 2014 and it was concluded that it would cost one million seven hundred and eighty-three thousand six hundred and ninety-four dollars ($1,783,694.00) to get it repaired. In support of this claim he relies on the report Toyonda Auto Repairs. There has been no challenge to the cost of repairs. Therefore, I accept the evidence that the cost of repairs occasioned by the accident is ($1,783,694.00). His evidence also indicates that: the cost for the estimate of repairs is five thousand dollars ($5,000.00) and; the cost a police/accident report is three thousand dollars ($3,000.00). He has produced receipts, that is exhibits three (3) and four (4) in support of these claims. There has been no challenged to this evidence. Therefore, I accept the cost of the estimate of the repairs and the police accident report to be $5,000 and $3,000 respectively.

[77] Mr. Taylor also states that as at the date of the of the filing of Claim Form and Particulars of Claim, June 12th, 2014, the car has not been fixed. Mr. Taylor claims that as at the said date, there has been a loss of income of four hundred and sixteen thousand dollars ($416,000). He also claims continuing loss of income.

However he has produce no evidence documentary or other wise to support this aspect of his claim for special damages.

[78] It is trite law that special damages must be specifically prove. Only in special circumstances will the rules be relaxed, such as cases in relation to the informal

sector (see ***Desmond Walters v Carline Mitchell***, (1992) 29. JLR 173); ***Kamran Abbas v Sheron Carter*** [2016] JMCA Civ 4). However even in relation to these circumstances the court must at least be furnished with some basic evidence. The claimant cannot just throw figures at the court expecting the court to rely on them. There is no evidence with regards to the general use of the motor car. I cannot conclude that the general use of the car is for rental based on Mr. Taylor's admission that he knows he requires something from the state which he does not possess in order to engage in that kind of activity. In any event he has indicated that he only rented to two persons prior to renting to Mr. Smith. Additionally, he has presented no evidence that he had to resort to any alternate use, incurring expenses as a result of the motor vehicle not being in his possession as a sub bailor.

[79] Therefore I make no award for loss of use as there is no evidence to establish the normal use of the motor car or to substantiate any loss occasioned thereby.

ORDERS

Special Damages are awarded as follows:

Cost of Repairs to Motor Vehicle as proven	……	$1,783,694.00
Cost for the estimate of repairs	…….	$ 5,000.00
Cost of police/accident report	……	$ 3,000.00
	TOTAL	$1,791,694.00

Interest on the Special damages at rate of 3% from the date of the accident to the date of Judgment.

Cost to the Claimant to be agreed or taxed.