Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 26th May, 1979 (Action No. 2709/77) whereby she was adjudged to pay to the plaintiff the sum of £310.— damage caused to plaintiff's car, which was being driven by the defendant and which was involved in a traffic accident.

A. Georghiades, for the appellant.

Chr. Kitromelides, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment of the Court. At the beginning of September 1976, the appellant hired from the respondent a motor car under Reg. No. ZFC 557 for a month and at its expiration it hired it for a further month starting on the 23rd September 1979, as per the agreement which in so far as relevant to these proceedings reads as follows:

"2. The above mentioned Motor Car is the property of the owner and the tenant is bound to return it to the owner at the same good condition as it was when ceded to him.

3. The tenant declares also that he is responsible for any damage which may occur to the vehicle whilst in his hands or to the hands of a third duly authorised person. The tenant will be responsible for the first CY £500, plus CY £1 daily up to and including the day of the full repair of the vehicle".

On the 3rd October 1976, the appellant whilst driving on the Anthoupolis road to Nicosia, tried to overtake a tractor but she noticed coming from the opposite direction a car. She attempted to apply the brakes in order to reduce speed and avoid it, when she noticed that they did not respond and there occurred a collision as a result of which both the vehicle rented by the appellant and the oncoming vehicle were damaged.

The respondent instituted proceedings against the appellant claiming damages which were ultimately agreed in the

course of the hearing as being £310.—. To this claim the appellant raised the defence that "it was an express and/or implied term of the written agreement dated 23rd September, 1976, that the vehicle rented to her would be in perfect mechanical condition and that the system of steering and braking was functioning regularly" and that "in breach of the said agreement and/or its terms the plaintiff delivered to the defendant a vehicle which was defective and not in excellent condition, that is its braking system did not function property and/or for which the plaintiff did not exercise suitable supervision".

It was further contended that the accident described in the relevant paragraphs of the Statement of Claim, which were admitted, was due to the fact that she attempted to stop but its braking system did not function and the said collision occurred.

The learned trial Judge after dealing with the evidence at length arrived at certain conclusions as regards the brakes and their nonfunctioning and found that the appellant before the accident did not notice that the brakes were defective and that the fact that she did not notice that the brakes were defective did not amount to negligence on her part. He went on and considered the meaning and effect of Term 3 of the said agreement which is hereinabove set out and concluded as follows:

> "In my opinion this Term is so clear in its provisions that the Court must not have any doubt as to what it says and it says clearly that the defendant is liable for any damage which could be caused to the car whilst in her hands and that it further goes on and restricts such damage to £500.— plus £1.— per day until the repair of the car. No term or reservation exists for relief of the defendant on account of the nonproof of negligence. Consequently I find that in accordance with Term 3 of Exhibit 1, she is liable for the damage which was caused to the car".

In view of the above conclusion he adjudged her to pay £310.— and the costs of the action and dismissed her counterclaim by which she was claiming reimbursement from the plaintiff of the sum of £300.— which she paid

for the damage caused to the oncoming car. There is, however, no appeal by her as against the dismissal of her counterclaim.

It is clear from the aforesaid extract from the judgment of the learned trial Judge that he did not examine the question of the fitness of the car in question for the purpose for which the hirer was to use it.

The question for consideration by this Court is whether there can be read in the said agreement an implied undertaking that the motor-car in question which was hired was in a reasonably fit condition for the purpose for which it was let to the appellant.

It is the case for the appellant that in every hiring contract there exists an implied condition that the chattel which is hired is reasonably fit for the purpose for which it was to be used and that once it was found that the braking system at the time of the accident was defective, it was incumbent on the owner to show that he took reasonable care to make it suitably fit for the purpose of the hirer, a matter which the learned trial Judge did not examine and that the case might be a proper one to be sent back for retrial so that these issues which depend on the factual aspect of the case should be examined as they ought to by the trial Judge.

In support of the aforesaid proposition reference may be made to Chitty on Contracts Specific Contracts 25th Edition Vol. II, pp. 118-119 paragraph 2381 et seq:

> "Subject to any express contractual provisions, the normal rule is that the owner who lets out a chattel on hire must take reasonable care to see it is in a reasonably fit condition for the purpose for which the bailee is to use it. Thus, in an ordinary hiring contract, the owner impliedly assumes some contractual responsibility for the fitness of the chattel for the purpose for which the hirer requires it but the existence and extent of the obligation depends on the contractual intention of the parties, which is to be ascertained from the provisions of the particular contract and the circumstances in which the contract was

made. The implied undertaking, however, is only to the effect that the chattel is as fit for the purpose as reasonable care and skill on the part of the owner can make it, breach of the undertaking may lead to liability for consequential damage.

Although the undertaking implied at Common Law does not render the bailor liable where the immediate cause of the inquiry was a defect in the chattel not discoverable by reasonable care or skill, the onus of proving such a defence is on the bailor".

As regards illustrations of implied undertakings implied at Common Law at paragraph 2382, of Chitty (supra) it is stated:

"Where a motor car is let on hire, the owner (subject to the express terms of the contract) impliedly undertakes that it is a functioning car which could be used on the roads, as viable motor car, a road-worthy car. Such an implied undertaking depends on the existence of a bailment for hire it has been held, for instance, that the relationship of bailment may arise between a company owning taxi cabs and the drivers of the cabs where the company receives a proportion of the fares earned by the drivers. Many older cases on the undertaking as to fitness implied at Common Law concerned the hire of horses and carriages: e.g. the owner was liable if the horse was vicious, or if the horse was not fit for the particular purpose for which it was hired".

It is clear that the implied undertaking does not render the bailor liable where the immediate cause of the injury was a defect in the chattel not discoverable by reasonable care or skill the onus of proving such a defence is in the bailor. In support of this proposition one may refer to the case of *Hayman v. Nye* [1881 - 85] All E.R. Rep. p. 183, where at p. 185, Lindley J., said:

"A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not: he is not an insurer against all defects nor is he bound to take more care than coach proprietors or

railway companies who provide carriages for the public to travel in: but, in my opinion, he is bound to take as much care as they, and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it, and if while the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs* (1809)2 Camp., 79 N.P. and as the railways company did in *Readhead v. Midland Rail Co.* [1867] L.R. 2 Q.B. 412, he will not be liable, but no proof short of this will exonerate him. Nor does it appear to me to be all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defacts in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage, the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses".

As already stated the learned trial Judge did not examine the question of the fitness of the car relying on the context of Term 3, of the agreement which he construed as casting on the hirer an absolute liability limited only as regards the amount payable in respect of the damage caused to the vehicle. He considered in other words that the liability of the bailor for breach of an implied undertaking of fitness was excluded by Term 3, of the contract.

It is correct in law to say that the liability of the bailor for breach of the implied undertaking of fitness may be excluded by a special clause in the contract provided the terms of the clause are made known to the hirer. See

Asley Industrial Trust Ltd., v. *Grimley* [1963] W.L.R. 584.

Although in the case of *Charterhouse Gredit Company Ltd., v. Tolly* [1963] 2 Q.B. 683, it was held that an exemption clause could never avail the party in breach against a fundamental breach of contract, this can no longer be the law as that case was overruled by the House of Lords in *Photo Production Ltd.*, v. *Securicor Transport Ltd.*, [1980] 1 All E.R. 556 where it was held that:—

> "There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusion or modification of their obligation they chose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole of the contract, including any exception clauses, and because (per Lord Diplock) the parties were free to reject or modify by express words both their primary obligations to do that which they had promised and also any secondary obligations to pay damages arising on breach of a primary obligation".

That being the position as a sign of a determination to adhere firmly to principles of fredom of contract, particularly in commercial contracts between businessmen, one has to turn to the whole of the contract for its construction. In that respect the wording of Term 2 is most significant. It speaks clearly of the tenant being bound to return the vehicle to the owner "as the same good condition as it was when ceded to him". Reading clauses 2 and 3 together, one can safely arrive at the conclusion that Term 3 is not an exemption clause as regards the obligation of the bailor to supply a vehicle reasonably fit for the purpose for which it was hired by the hirer. On the contrary the car in question was presented as being in good condition, which to our mind implies not only external

appearance but also reasonable mechanical fitness and safety for road use, including, inter alia, safety of its braking system as reasonable care and skill, on the part of the owner can make it.

The relevant facts as found by the trial Judge on the evidence before him, relying mainly on the evidence of Neoklis Anastassiades, a qualified mechanic, Supervisor of Workshops of the Department of Electrical and Mechanical Services, who examined the vehicle in question was that the pump of the left rear wheel was defective, that there was a leakage of oil of such a nature that the brake of the left rear wheel could not function; that in both rear wheels the linings of the brakes had been worn to such an extent that the brakes could not give normal effectiveness. Furthermore this witness was of the opinion that in order that the driver of the car could realize that the brakes were not functioning properly he should have some experience in driving and that he could not specify when the problem in the braking system he described started, and he said that this is something that could happen at a given moment and that the wearing of the lining and the stoppers depended on the manner of driving as well as the quality of the linings and as regards the pump he was definite that the driver could not realise that there was defect or wear and tear.

It appears that the evidence adduced was not examined in the light of the obligations of the bailor as regards the fitness of the hired car, consequently the case can be determined on the sole ground that the learned trial Judge did not direct his mind to the principle as it was also the case in the *Hayman* v. *Nye* (supra), that it was incumbent on him who had let the car out to show that the breakdown was in the proper sense of the word an accident not preventable by any reasonable care or skill. If he can prove this, he will not be liable, but no proof short of this will exonerate him. Nor there does appear to us to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. The question whether Term 3, exempts the bailor from liability can only be answered if one looks at the totality of the written agreement in particular to Term 2, thereof

which as already pointed out speaks that the tenant is bound to return it to the owner at the same good condition as it was when ceded to him. This opens the door for an implied condition that the vehicle in question was reasonably fit for the purpose for which it was hired on which matter the learned trial Judge did not direct his mind.

Consequently the appeal is allowed and the case has to go back for retrial as the whole issue turns on the factual aspect of the case in respect of which no findings have been made. The costs of the first trial and of this appeal should abide the event.

Appeal allowed.
Re-trial ordered.