[2024] JMSC Civ 79

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02679

BETWEEN	**JASON SAMUELS**	**CLAIMANT**
AND	**ATL AUTOMOTIVE LIMITED**	**DEFENDANT**

Mr Kevin Williams and Mr Gordon McFarlane instructed by Grant, Stewart, Phillips & Co. for the claimant

Mr Charles E. Piper K.C and Mr Najeev Spence instructed by Charles E. Piper & Associates for the defendant

Heard: September 25, 26, 27, 2023 & July 19, 2024

Sale of Goods – New car – Implied condition as to fitness for purpose – Implied condition as to merchantable quality – Whether fraudulent misrepresentation – Repairs under manufacturer's warranty – Acceptance by buyer –Application of the provision – Specific article

Sales of Goods Act, sections 2, 12, 15, 35, 60

WINT-BLAIR, J

[1] The claimant purchased a new 2014 Volkswagen Jetta ("the VW") from the defendant company. The defendant, ATL Automotive ("ATL"), is a company registered under the Companies Act of Jamaica in the business of selling new motor vehicles as a dealer.

The Claim

[2] The claimant claims against the defendant:

1. *Damages for breach of contract - inclusive of damages regarding the loan from JMMB Merchant Bank Limited.*
2. *Damages for breach of the Sale of Goods Act*
3. *Damages for breach of the Consumer Protection Act*
4. *Interest at such rate and for such period as this Court shall think fit in the circumstances of the case.*
5. *Costs and Attorneys' costs*
6. *Such further and other relief and orders as the Court shall think fit.*

[3] On February 25, 2014, the claimant purchased a new 2014 VW from the defendant. The claimant obtained a loan from JMMB Merchant Bank ("JMMB") in order to do so. This is not in dispute, the defendant's position is that it has no knowledge of the terms of this loan.

[4] It is not in dispute that the selling price of the VW was $4,795,000.00, less a 20% duty concession of $3,590,000.00 to which the claimant as a public officer was entitled, nor that the claimant had not inspected the VW prior to purchasing and taking possession of it.

[5] The particulars of claim states that the defendant was aware that the VW was being purchased by the claimant for private use as well as to transport the claimant to and from his place of employment. This was denied by the defendant in its defence.

[6] The claimant alleged that the defendant sold the VW to the claimant in breach of the Consumer Protection Act and the Sale of Goods Act ("the Act"). Further, that the sale and purchase of the VW involved material misrepresentations which were either fraudulent and/or negligent on the part of the defendant as it knew or ought to have known, that since 2011 there were significant issues with the VW brand in general and the VW Jetta specifically. The claimant asserted that he was sold a new motor car which was defective, not fit for purpose, unmerchantable and that he had relied upon representations made by the defendant in the purchase of the new VW Jetta.

The claimant's evidence

[7] The claimant's case is that he paid the purchase price in full with the assistance of a loan of $3,410,500.00 from JMMB which he is still repaying. The terms of this loan included a rate of interest at 9.95% per annum repayable over 84 months. The proceeds of this loan were paid directly by JMMB to ATL Automotive.

[8] The claimant did not undertake an inspection of the said motor car before taking possession of it. He relied on the fact that he was purchasing a new high-end motor car from the defendant with the expectation that it would be reasonably fit for purpose and was of merchantable quality. He said that he relied on the aesthetics, service, driving, quality and performance of the new VW.

[9] Within a short period after purchasing and taking delivery of the VW from the defendant it developed a number of issues, chief among which was a persistent knocking sound at the front of the car and a stiffness/hardness of the brakes which sometimes resulted in the brakes being extremely difficult to apply. Other manifested problems with the said VW included, but were not limited to:

1. An inability to open the gas tank on several occasions; persistent shuddering in the car; a knocking sound at the front of the car; a loss of power while driving; sluggish or "lazy" movement of the car; a hard brake pedal/difficulty in applying the brake pedal; squeaking noises coming from the brakes; a continuous message on the dash-board which said: "CHECK SAFETY LOCK".

2. An intermittent light indicating that the coolant should be checked and a light saying the car was overheating when it was functioning at a regular temperature. He took the car to the defendant where it remained for 2 weeks. The defendant was not able to diagnose these problems. The claimant took the car to the defendant's Oxford Road branch on the 8th of July 2014 and was called by members of the defendant's service team to collect the vehicle on the 17th of July 2014. The problem had not been diagnosed and the car was returned to him.

3. On July 17, 2014, the hardness of the brakes returned when the claimant was driving the car. He had a discussion with Mr. Jadusingh, a member of the defendant's service team. The braking system was changed by the defendant, the claimant waited for approximately one (1) month for the parts to arrive in Jamaica whereupon, the entire braking system of the new VW was changed. Nevertheless, the braking issues remained. The defendant's service department worked on the braking and clutch system of the car several times after July 2014.

4. The squeaking sounds remained despite the disc pads being chamfered and the disc rotors skimmed.

5. In November 2015 the shuddering continued and the VW was returned to the defendant. The defendant on that occasion changed the clutch kit for a second time. The problems with the clutch kit persisted.

[10] All of these problems with the VW occurred within the first five (5) months of the claimant taking possession. By June 2014, the defendant had done major repairs to the car resulting from the claimant’s complaints.

[11] The claimant met with Mr. Jadusingh and Mr. Evans of ATL. During the meeting which lasted for approximately one (1) hour, Mr. DuQuesnay, Group After Sales Manager, appeared for a few minutes. At that time Mr. Jadusingh indicated to Mr. DuQuesnay in the claimant’s presence that they now believed that the "auto hold" function was the source of the problem with the car. The claimant asked Mr. DuQuesnay what was ATL's policy on returns. Mr. DuQuesnay advised him that

ATL did not have a buy-back policy and that each situation was dealt with separately. Mr. DuQuesnay then took a call on his cellular phone and did not return to the meeting.

[12] The claimant left the VW at ATL for another two (2) weeks and was provided with a loaner motor car. At the end of this period, he was advised to collect the VW. The claimant gave no dates over which he had this loaner vehicle.

[13] Thereafter, the claimant wrote directly to Mr. Adam Stewart of ATL and to his Executive Assistant. He also sent a series of emails to Mr. Sergio Ortiz of the Volkswagen headquarters in Mexico. Eventually, he was advised that ATL was not able to take the VW as the problems with the vehicle could not be identified. The claimant was offered a trade-in which he refused.

[14] He continued to drive the VW and testified that he almost had two (2) accidents as the brakes would not hold. On both occasions in order to stop the car, braking required a greater amount of pressure on the brake pedal. Mr Samuels returned the VW to ATL reporting the issue with the brakes but they were unable to identify the problem. The brake server in the car was replaced and the braking issue in the car subsided for a while. The shuddering in the car returned and the clutch kit was changed again.

[15] The claimant retained the services of Mr. Stuart Stimpson, attorney-at-Law of Hart Muirhead Fatta. On or about the 7th of November 2015, Mr. Stimpson wrote to ATL detailing the many problems the claimant was having with the new VW.

[16] Miss Khora East, attorney-at-Law, responded by attaching a copy of a document entitled Technical Product Information No. 2026473/2 released by Volkswagen on the 3rd of October 2011 which the claimant asserts, showed that since 2011 both ATL and Volkswagen had been aware that there were issues with the transmission on the VW and that there had been attempts to repair it.

[17] It is the claimant's evidence that when he was purchasing the car there was no communication by ATL's representatives that the VW would make a knocking sound in the transmission or that an error message: "CHECK SAFETY LOCK"

would remain on the dashboard.

[18] It is not in dispute that the service history of the VW shows that between May 2014 and December 2015, Mr Samuels returned it to the defendant for repairs, inspections and/or replacement parts on at least ten occasions.[1]

[19] Mr Samuels' evidence was that ATL knew from at least October 2011 that the Volkswagen Jetta model had major issues and had a duty to either test the car properly before sale and/or to advise customers like himself of the fact that they knew of problems with this particular model. He was never so advised and ATL knew or ought to have known that the Volkswagen Jetta was prone to and, in fact, did make a rattling noise in the front/gearbox that it was prone to selecting two gears at the same time and that it had a faulty or malfunctioning clutch and a faulty braking system.

[20] In or about July 2015, ATL offered to purchase the VW for $2,800,000.00, which was approximately 42% less than its original value in the sixteen months since purchase. The defendant relied on a valuation of $3,150,000.00 to make an offer of $2,800,000.00 which the claimant rejected.

[21] In January 2016, the VW was damaged in an accident which the claimant says was caused by the faulty braking system. Consequently, he averred that the defendant is liable for the damage and/or loss due to the accident.

[22] As a consequence of ATL's breaches and/or misrepresentations, Mr Samuels claims the sums he spent as a result of the repairs of the VW in the sum of

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[1]
1. Invoice No. 319713 dated 30th May 2014.
2. Invoice No. 320492 dated 8th July 2014.
3. Invoice No. 320594 dated 17th July 2014
4. Invoice No. 320986 dated 24th September 2014.
5. Invoice No. 322557 dated 4th November 2014.
6. Invoice No. 324138 dated 29th December 2014.
7. Invoice No. 326969 dated 3rd June 2015.
8. Invoice No. 329450 dated 19th August 2015.
9. Invoice No. 330248 dated 23rd September 2015.
10. Invoice No. 331909 dated 31st December 2015.
11. In addition to the invoices noted above, on or about the 17th August 2015, the claimant relies on a copy of a Maintenance List from the defendant showing works done to/or the car on that date.

$26,512.11. He further claims the sums spent for transportation from January 2016 at $15,000.00 per week and continuing.

[23] In cross-examination, Mr. Samuels agreed that the two-year warranty on the VW expired on February 24, 2016 and that he had received a manual which he had not read in its entirety. He first brought back the VW to ATL three months after taking delivery of it on February 25, 2014. Then, he complained about the vehicle shuddering and experiencing power loss with a lazy sensation. ATL diagnosed a faulty clutch kit and replaced the necessary parts at no charge.

[24] Although Mr. Samuels initially expressed uncertainty about whether the part had been replaced, he ultimately accepted this after reviewing the invoice. It was put to Mr. Samuels that ATL replaced vehicle parts without charge as a goodwill gesture. The claimant disagreed. He agreed that "N/C" on invoices, meant "No Charge" and that he had not been charged for any of the major repairs or replacement parts to the VW, he had only been charged for gas and oil.

[25] Subsequent visits to ATL included addressing complaints such as the stiff brake pedal, brake system issues, and recurrent squeaking noises. Services rendered ranged from bleeding brake lines to reprogramming the ABS system.

[26] The complaint log documented issues with the steering wheel, airbag error messages, and a squeaking sunroof, all of which were attended to by ATL. Mr. Samuels reported problems with the coolant and recurring squeaking noises, prompting further diagnostic and maintenance actions by ATL. Mr. Samuels brought the VW in for all scheduled maintenance services, including a 15,000 km service in December 2014, which he understood to be free of charge.

[27] In January 2016 there was a collision involving the VW which Mr Samuels said was caused by the faulty braking system. When cross-examined on this, Mr Samuels said that, at the time of the accident the VW was being driven by Mr Andre Satchell who returned it to him after the collision.

[28] The claimant agreed that it was his opinion that the accident was caused by the faulty braking system in the VW and that having formed such an opinion, he had not taken the vehicle to any sort of technical expert. It was not denied that what he had done was to take the VW back to ATL with a report about the braking system and that it was much later the VW was checked by his expert witness, Mr Sylbert Jacas.

[29] After the collision, the claimant agreed that he made a report and a claim on his insurers. The insurance company had retained an assessor but he did not recall seeing an assessor's report. He received $250,000.00 from the insurance company in excess of repairs, agreeing that his receipt of this sum had been omitted from his witness statement and statement of case, without giving a reason for this omission. He further agreed that he had made no mention to his insurer that the VW was defective when he made his claim.

[30] The claimant gave evidence that he had not completed his loan repayment to JMMB at the time of the accident but had reported the accident to them. The accident occurred while the VW was still under the two-year warranty.

[31] In paragraph 42 of his witness statement, the claimant spoke to the contents of the *Technical Product Information 2026473/2"* dated October 3, 2011[2]. He agreed that he relied upon it to support the assertion that ATL knew from 2011 that the Volkswagen Jetta had quality issues. When taxed by Mr Piper KC, he agreed that this document does not say that the Volkswagen Jetta 2014 was prone to rattling noises or had either a faulty clutch or braking system. The claimant admitted that the clutch issues were repaired and parts replaced.

[32] When ATL offered to purchase the said motor vehicle almost one year after the vehicle had been in his possession, Mr Samuels agreed that he had rejected it and admitted that he had not obtained his own valuation report.

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[2] Volume 3 Page 151

[33] The claimant said the VW was being operated continuously when not with ATL and agreed that the odometer reading was above average. He also stated that he had purchased a Toyota Fielder in 2018, he subsequently changed his answer to 2020. He agreed that when he filed his witness statement he had other transportation. Mr Samuels agreed that the only funds he actually expended were for gas and oil over the period of repairs.

Mr Andre Satchell

[34] Mr Andre Satchell, Digital Manager, gave evidence that he borrowed the VW and kept it for four days before the night of the accident on January 22, 2016. In his witness statement[3] he stated that at approximately midnight on January 22, 2016 while driving the VW at 50 kilometres per hour upon approaching a white car travelling in front and despite applying the brakes, the VW remained in motion. In order to avoid a collision with other vehicles as the VW would not stop, he manoeuvred it onto the sidewalk by Devon House. The VW collided with the fence and a signpost before coming to a halt.

[35] He called the claimant, removed the under-guard and drove the VW to the claimant's house. He reported the accident at the Half Way Tree police station at about 8:00 am on January 22, 2020. (The year 2020 appears in the witness statement and it was not changed by the witness during the trial despite the year of the accident being 2016.) His evidence was that he had borrowed the claimant's vehicle on multiple occasions before the accident. He knew that the VW had been serviced multiple times by the dealer regarding the braking system but not the dates of service. He was not familiar with the occasions on which the claimant took the vehicle to the dealer for service or repairs.

[36] In cross-examination when asked by King's Counsel if he had ever told the claimant that he thought there was a defect in the brakes or suggested to the claimant around 2016 to have the brakes tested, Mr Satchell said that he had not.

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[3] Filed January 17, 2020

Mr Satchell gave evidence that he gave a statement to the insurers about the accident but he did not state that the accident was caused by a defect in the brake.

Mr Sylbert Jacas

[37] This witness did not attend in person. He had been certified as an expert by order of the court and instructed to prepare a report. The court heard submissions from both counsel as to how his evidence ought to be treated, this Court ruled that his expert report could stand as his evidence in the trial.

[38] Mr Sylbert Jacas is a motor vehicle consultant at Everett Fenton's Garage, 65 Old Hope Road, Kingston 5, St Andrew. His expertise was in loss adjustment. He was not a motor vehicle mechanic nor an expert in Volkswagen models. His experience in the motor vehicle industry was derived as a loss adjuster.

[39] On November 2, 2020, Messrs. Grant, Stewart, Phillips & Co. instructed him to provide an assessment of the VW which was owned by Mr. Samuels. He conducted an inspection on December 4, 2020, and produced a report detailing his findings for the court[4].

[40] Mr Jacas had been instructed to assess the vehicle for faults with the braking system; to identify noises or scruffy sounds coming from the front of the engine when the vehicle was being driven at a low speed or in a lower gear and to report on the wrong check engine light signal being displayed on the dashboard, for example, a light for the temperature gauge which showed it was hot when the vehicle's engine was cool.

[41] Mr Jacas observed that a 2016 registration sticker was on the windshield of the VW. He gave no details of the condition of the VW or where the VW was situated at the address at which he did his inspection. He observed that under the bonnet some mechanical work had been done as the engine cover was not in place. The engine oil was clean and the brake fluid alright. A battery was supplied by the

[4] dated January 16th, 2021

claimant who mentioned that the vehicle had not been started nor driven for the past four (4) years.

[42] The car did not move on ignition when the reverse or drive gears were engaged. Two warning lights showed on the dashboard “Transmission Check” and a brake light and diagnostic tests were performed. Although the diagnostic scan of the vehicle's braking system indicated it was "OK," Mr Samuels reported a brake failure while driving which caused him to bank the car into a wall to stop it. It was Mr Jacas’ professional opinion that mechanical brake components can fail without triggering electronic notifications. Examples include brake line faults leading to air in the line or brake calliper seizure, resulting in brake failure.

[43] The examination of the VW revealed multiple issues including a faulty transmission, faulty electrical components, and faulty critical mechanical parts. He was not certain whether these faults were due to manufacturing defects or normal wear and tear.

[44] Diagnostic scans outlined the vehicle's issues, with error/trouble codes indicating problems. Research on these codes confirmed possible symptoms and effects which he said required further investigation such as test-driving over varying distances. Additionally, exterior inspection revealed visible body damage to the left-hand front section of the vehicle.

[45] The expert witness called by the claimant was unable to state whether the VW had manufacturer defects or defects owing to wear and tear. He could not detect the issues pointed out to him by the claimant as the VW was immobile. He opined that the transmission malfunction detected upon electronic diagnosis required the manufacturer’s expertise, and he could not pronounce upon it. He stated that some mechanical work could have been done to the vehicle but could not say what work was done. He did not establish any defect in the vehicle at the time of purchase or within a reasonable time thereafter. The evidence of this witness did

not indicate much that had not been diagnosed by ATL itself. His evidence was of little weight in determining the issues in the case at bar.

[46] The court is mindful of the statement of the law in **Caribbean Steel v Price Waterhouse Coopers**[5] regarding the role of the expert witness. Accordingly, this court cannot place any weight on the expert report given to the date on which the examination was done. Mr Jacas' assessment was also inconclusive and was found to be unhelpful to the determination of the issues before the court.

The defendant's evidence

Mr. Douglas Bruce DuQuesnay

[47] Mr. Douglas Bruce DuQuesnay is the Group After Sales Manager of the defendant company.[6] He gave evidence that Mr. Jason Samuels lodged complaints about the VW during meetings on July 8, and July 17, 2014. At a meeting attended by Mr. Samuels, Mr. DuQuesnay and Mr. Raj Jadusingh, Mr. Samuels voiced concerns about various issues with the car, including power loss, door lock malfunction, and brake stiffness during reversing. Following the meeting, ATL conducted checks on the vehicle, and found it showed no faults.

[48] Mr. Samuels returned with further complaints around July 10, 2015, expressing frustration and anger, claiming the vehicle still underperformed despite previous checks. He mentioned meeting with Mr. Brian Walsh, who offered a solution that Mr. Samuels found unsatisfactory. Mr. Walsh's report on the incident was later forwarded to Mr Samuels by the Group General Manager, Mr. Samuels having made a formal complaint[7] to the Executive Assistant of Mr. Adam Stewart.

[49] In cross-examination, the witness stated that a brand-new car was delivered to the claimant and that around May 2014 and Dec 2015, the claimant took the VW to ATL ten times. When asked whether it was unusual for a brand-new vehicle to be

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[5] [2013] UKPC 18
[6] Filed on May 27, 2019
[7] email dated July 10, 2015

at the dealer for some 6-10 weeks, Mr. DuQuesnay responded that it depended on the issue.

[50] Mr DuQuesnay added that manufacturers give warranty periods and in the event of manufacturers defects, the manufacturer will repair the vehicle at no charge to the customer. When taxed as to whether the replacement of the clutch kit of a new vehicle was unusual, Mr DuQuesnay admitted that it was unusual to replace the clutch kit twice within nineteen months of the delivery of a new vehicle. He disagreed that it was unusual to have the entire braking system on a brand-new car replaced twice in nineteen months but agreed that it was unusual to have to work on the braking system four to five times within nineteen months on a new vehicle.

[51] Mr DuQuesnay agreed that he had seen the invoices concerning the VW. He knew of the complaints made and the service done, and he considered it to be roadworthy. When asked about the ten service invoices, he agreed that he had formed the view that while the vehicle performed satisfactorily over the period, these issues were not normal for that model.

[52] Mr DuQuesnay agreed that the complaints were reported in July, four and a half months after delivery and that the vehicle had a faulty clutch and that the clutch kit affected the performance of the vehicle which could have caused the vehicle to feel sluggish. He admitted that the faulty clutch did not result from anything the claimant had done and that the vehicle was taken back to the dealer three times in July 2014, held for five days for clutch repair, eight days for an issue with air in the brake line and two months from July 26 to September 24, 2014, awaiting parts. He also admitted that seven months after delivery, the brake booster and certain hoses were all replaced. The brake booster is part of the brake system. He added that the ABS braking system was also reprogrammed as something had gone wrong.

[53] Mr DuQuesnay said that “N/C” on an invoice was not about goodwill, it meant no charge and this was included in the sales package. The length of time work had

to be done on the VW did not suggest to him that something was very wrong. He further disagreed that the defendant offered to buy the VW, saying that it was the claimant who wanted this as that was not company policy. The claimant had been entertaining a trade-in with the sales staff which was a different transaction. He saw an offer made to the claimant in the witness statement but could not speak to it as that was not his department.

Mr. Gladston Edwards

[54] Mr. Gladstone Edwards is a motor vehicle technician employed to the defendant since June 2014. In his witness statement[8] he stated that Mr Samuels' complaints began on May 30, 2014, during the vehicle's first service, when issues with the left tail light, gas tank, occasional shuddering, and rattling sounds in the front end were reported.

[55] On August 18, 2015, Mr. Samuels returned the VW for its 22,500 km service, complaining about a foul smell from the A/C, a knocking sound on uneven surfaces, squeaking brakes, and an airbag error message. After reviewing the job card, Mr Edwards went on a test drive with Mr. Samuels but couldn't identify the reported brake problem. He explained that the auto-hold feature of the car was functioning as designed. Despite performing another diagnostic test with no faults found, Mr. Samuels collected the car on August 19, 2015, only paying for the service. Mr Edwards stated that he had no further involvement with Mr. Samuels.

[56] In cross-examination, the witness said he did a test drive of the VW however, he did not check the braking system. He explained in re-examination that the major complaint was that the brake got hard during the test drive with the claimant. The witness said he could not find a problem.

[57] In an explanation to the Court, he said that the brake booster is used to modify the braking system to prevent it from getting hard. It gives proper braking and is

[8] Filed on June 06 2019

always in play on any driving surface. To chamfer means to cut away; to clean and chamfer relates to the brake pads which during wear and tear leaves edges that will cause squeaking, the edges are cut away to stop the squeaking, it is not the same as skimming the disc rotors.

[58] At ATL the disc rotors are resurfaced with sandpaper, in addition to cleaning and chamfering them to create a smooth edge. This process should last three months, it depends on driving conditions and may last longer as driving over longer distances means more braking which leads to disc pads wearing faster. The condition of the braking system depends on where the driver lives and how much driving is done. Someone living on a hill brakes more than someone who lives on a flat surface or someone who speeds.

[59] Quality control on each invoice is done after every inspection to see if the work was done and the vehicle was ready to be returned to the customer. Someone is hired to do quality control and that person is separate from the technician who worked on the vehicle.

Submissions of the claimant

[60] Mr Williams submitted that the defendant sold the VW to the claimant in breach of the Sale of Goods Act and Consumer Protection Act and the defendant is liable. He seeks damages under the statutes and relied on the case of **Appleton Hall Limited v T. Geddes Grant Distributors Limited**.[9] In interpreting and applying section 15 of the Sale of Goods Act, Harrison J writing for the Court of Appeal, noted that four conditions must be established to succeed in an action under section 15 of the Act and that these had all been satisfied by the claimant. Counsel cited **Ashington Piggeries Ltd v Christopher Hill**[10], and relied on Lord Diplock's review of section 14 of the English Act, which is the equivalent of section 15 of the Sale of Goods Act of Jamaica (as cited by the Court of Appeal in **Appleton Hall**.)

[9] [2011] JMCA Civ 30 – delivered on the 29th of July 2011
[10] [1972] AC 441

[61] It was argued that the VW, as supplied by the defendant to the claimant on February 25, 2014, was not reasonably fit for its intended purpose and/or did not meet the standard of merchantable quality. The evidence indicates that at the time of sale and of delivery to the claimant, the VW was marketed as a new vehicle. Between May 30, 2014, and December 31, 2015, the claimant returned the VW to the defendant with numerous complaints. Despite the defendant's acknowledgement of these complaints, none of the ten invoices issued by the defendant for various repairs indicated that any of the issues identified with the VW were attributed to the claimant.

[62] Counsel relied on the cases of **Stewart v Perth, Kinross Council**[11]**, Rogers v Parish (Scarborough) Ltd**[12] and **Cole's Farm Store Ltd v China Motor Ltd**[13] to submit that where there is an allegation of a breach of the Sale of Goods Act and the subject matter of the contract between the parties is a motor vehicle, the Court must consider the distinction between a new vehicle and a used/second-hand vehicle whenever the specific issues of merchantability and reasonably fit for purpose are raised.

[63] The fact that the defendant carried out multiple repairs to the VW and that it may have been sold with a warranty did not alter the requirements regarding merchantability and fitness for purpose as stipulated by the Sale of Goods Act. The presence of the warranty did not diminish the claimant's rights to raise complaints and initiate legal action regarding the several defects in a "new" vehicle purchased from the defendant. The defendant in the present case therefore cannot look to the warranty as a means to negate and/or restrict its liability to the claimant for having sold the claimant a new vehicle which was defective, unmerchantable, and unfit for its intended purpose. (See **Rogers v Parish (Scarborough) Ltd)**

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[11] [2004] UKHL 16
[12] [1987] 2 ALL E.R. 232
[13] [UNREPORTED] Decision of the Justice L. Campbell in CLAIM NO. 2007 HCV 03578 – Judgment delivered on the on 11th February 2011.

[64] Mr. Williams submitted that the case of **Crowther v Shannon Motor Co.**[14] was the authority for the proposition that the assessment of merchantability should be made at the moment of the car's delivery to the claimant[15].

[65] It was submitted that it is of no moment to suggest, as was done during cross-examination, that no charges or payments were demanded of the claimant for the repairs or that the repairs were carried out in good faith or to maintain positive customer relations as the implied warranties regarding quality, merchantability, and fitness for purpose are legal obligations imposed on the defendant.

[66] It was submitted that the defendant's witness, Mr. Douglas Bruce DuQuesnay, conceded that it was unusual to have to repair the clutch kit twice in nineteen months and to have the brake system repaired four to five times for a brand-new vehicle. The witness said that the issues on the VW were not normal for that particular model. It was admitted by the defendant that the new VW had been diagnosed with a faulty clutch four and one-half months after delivery and that this would affect the performance of the vehicle in that it could not reach the maximum speed.

[67] Mr Williams contended that regarding the evidence of Mr. Sylbert Jacas whose expert report stands as his evidence, as ordered by the court during the trial, the principal finding was that the vehicle exhibited a faulty transmission, faulty electrical components, and other critical mechanical faults. Based on Mr. Jacas' findings and recommendations, it is asserted that the vehicle, as received by the claimant, did not adhere to the standards outlined in section 15 of the Sale of Goods Act and/or the Consumer Protection Act.

[68] Numerous issues and error codes were identified by the expert witness on pages 2 and 3 of his report, and there is no evidence to suggest that the claimant was at fault. Consequently, it is argued that if the Court determines that the problems with the vehicle were not attributable to "wear and tear" but rather to manufacturer

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[14] [1975] 1 WLR 30
[15] Per Mustill LJ – *Rogers –v- Parish (Scarborough) Ltd* - @ P. 236 – Letter h

defects, the defendant must be held accountable as the seller or distributor of the car. Section 15(a) and (b) of the Sale of Goods Act imposes liability on the defendant regardless of whether it was the manufacturer of the vehicle or not.

[69] In 2015, a document known as "*Technical Product Information 2026473/2"*, was provided by the defendant to the claimant. It revealed that the defendant had been aware for some time of issues experienced by VW Jetta motor cars, along with associated customer complaints. The mere contention by the defendant that this document does not explicitly mention the VW Jetta 2014 model is insufficient, especially considering the unchallenged evidence indicating that the defendant supplied this document to the claimant in 2015 intending to demonstrate that VW Jetta motor vehicles had no issues.

[70] With regard to damages, in reliance upon Sections 52 and 53 of the Sale of Goods Act and the cases of **Surrey CC v Bredero Homes Ltd**[16], **Hadley -v- Baxendale**[17] and **Cole's Farm Store Ltd v China Motor Ltd**[18], counsel submitted that should the Court find in favour of the claimant. The question arises as to whether he should be compensated and/or awarded damages for the loan taken from JMMB. This inquiry hinges on a determination of whether it was reasonably foreseeable that if the defendant breached the contract (and violated the Sale of Goods Act) the claimant would still be obligated to satisfy the loan payment and whether he is entitled to recover said loan amount and/or the interest payments from the defendant.

[71] Mr Williams contended that the duty concession is a rightful entitlement of the claimant, which should be refunded by the defendant for its breach of contract in violation of the Sale of Goods Act. I will note here that the submission about a duty concession is not in line with the pleadings and will not be considered.

[72] Regarding special damages, the claimant claims: (i) Expenditure for repairs while the VW was with the defendant of $26,512.11 and (ii) Expenditure for

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[16] [1993] 1 WLR 1361 - @ page 1369
[17] (1854) 9 Ex. 341 - [1843-60] All ER 460
[18] [UNREPORTED] Decision of the Justice L. Campbell in CLAIM NO. 2007 HCV 03578 – Judgment delivered on the on 11th February 2011.

transportation since January 2016 at a rate of $15,000.00 per week and continuing. The total sum of $3,465,000.00 was spent on transportation during the relevant period before the acquisition of the alternate vehicle in late 2020.

Submissions of the defendant

[73] Mr Piper KC submitted that the claim is presented in a broad manner and lacks particularity as to alleged defects in terms of the breach of contract or the provisions of the Sale of Goods Act and the provisions of the Consumer Protection Act. There is nothing on the facts or under the Consumer Protection Act which substantiates the claim and, for this reason, this aspect of the claim ought properly to fail.

[74] In relying on the cases of **Hedley Byrne & Company Limited v Heller & Partners Limited**[19] and **Verona Robinson v Marcia Robinson**[20], King's Counsel submitted that there is no evidence that any representation was made to the claimant at the time of purchase. Furthermore, there is no evidence to suggest that the defendant possessed any specialized knowledge regarding any purported fault with the vehicle being sold, nor did the defendant provide any advice in this regard. Additionally, there is no indication that the claimant placed any reliance on such advice, which the evidence confirms was never given at the time of sale.

[75] The claimant did not inspect the vehicle at the time of purchase. He says that it was a new vehicle. However, he had a reasonable opportunity to do so. It is noted that the vehicle was not examined until December 4, 2020, nearly six years after delivery, despite the claimant having declared its defectiveness to the Consumer Affairs Commission ("the CAC") on or about July 14, 2014. The claimant's attorneys-at-law arranged for an inspection at the claimant's residence by Mr. Sylbert Jacas who, contrary to the recommendation of the CAC, is not a motor vehicle mechanic but a loss adjuster. Mr. Jacas' expertise was therefore not in

[19] [1963] 3 WLR 101
[20] [2014] JMSC Civ. 19

the mechanical field.

[76] In his report, Mr. Jacas mentioned that although the diagnostic scan indicated that the braking system was "OK," the owner reported brake failure while driving, necessitating a collision with a wall to stop. Mr. Jacas then offered speculative opinions on potential causes of the brake failure, albeit under prompting by the claimant that he was driving the vehicle when the alleged brake failure occurred, a claim that was untrue.

[77] King's Counsel submitted that Mr. Jacas acknowledges in his report that, "*Our conclusion as to whether the unit has manufactured faults or if the faults developed by 'normal wear and tear' has not been fully ascertained."* This statement was not surprising given the extensive delay in inspecting the vehicle, nearly six years after it was delivered to the claimant and almost four years after it was involved in a collision with a wall. Furthermore, in response to questions from the defendant, Mr. Jacas admitted that while some mechanical work might have been performed on the vehicle, he was unable to specify the nature of the work. His responses to the remaining questions failed to establish any defects in the vehicle at the time of purchase or within a reasonable timeframe thereafter.

[78] It was submitted that in reliance on the case of **Sisa Logos and Emblems v Quest Security Services Limited**[21], the present case comes within the proviso of section 15(a) of the Sale of Goods Act and that the implied condition as to fitness for purpose does not apply. The claimant, having used the vehicle for one year for the very purpose for which he claims to have purchased it, accepted that the said purpose had been fulfilled.

[79] Regarding merchantability, Mr. Piper KC argues that the claimant accepted the specific vehicle offered on specified terms of payment and utilized it until it was involved in a collision. He highlights that the vehicle was serviced and repaired within the terms of the two-year warranty, with no charges to the claimant for replacement parts or labour, except for minimal charges.

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[21] [2020] JMCA Civ 32

[80] Additionally, the claimant failed to disclose in his insurance claim the defects of which he now complains. He made a claim on his insurers for the damage to the vehicle and stated that he recovered from them the sum of $250,000.00 which he did not use to repair the VW. Neither the claimant nor his witness informed his insurers that the vehicle was, in any way, defective. Neither did the claimant disclose to the Court in these proceedings that he made a claim to his insurers, nor has he produced the documents relating to that claim.

[81] In conclusion, Mr. Piper KC contended that despite the submissions on liability, the claimant has not presented the Court with any evidence to assess general damages should compensation be warranted. The claimant also has failed to provide evidence to substantiate the transportation expenses claimed, in fact, the claimant did not disclose his acquisition of another vehicle until he was questioned in cross-examination. Furthermore, special damages must be explicitly pleaded and the claimant has failed to adequately prove this aspect of his claim.

[82] Issues

1. Whether the conditions under Section 15(a) of the Sale of Goods Act were fulfilled or whether the proviso applies

2. Whether the VW sold to the claimant was reasonably fit for its intended purpose

3. Whether the VW sold to the claimant met the standard of merchantable quality

4. Whether the breach of section 15(a) entitles the claimant to rescind the contract

5. Whether the defendant breached the Consumer Protection Act.

6. Whether the defendant made material misrepresentations in selling the VW to the claimant which were either fraudulent and/or negligent.

7. Whether the claimant is entitled to claim from the defendant all foreseeable consequential losses flowing from the defendant's conduct, such as the interest amounts payable to JMMB Merchant Bank over the life of the loan and the rate of interest.

Discussion

1. Whether the conditions under Section 15(a) of the Sale of Goods Act were fulfilled or whether the proviso applies

[83] Section 15 of the Act provides:

> *15. Subject to the provisions of, this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:*
>
> *(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.*
>
> *(b) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there*

shall be no implied condition as regards defects which such examination ought to have revealed.

[84] It is a requirement of section 15(a) of the Act that the buyer makes the particular purpose for which the product is required known to the seller. This is one of four conditions which must be established in order to succeed in an action under this section. These are as set out by Harrison, JA in **Appleton Hall Limited v T. Geddes Grant Ltd.**[22]:

(i) The appellant (as buyer) must expressly or impliedly make known to the respondent (as seller) the purpose for which the product was required.

(ii) The appellant must have relied on the respondent's skill.

(iii) The product is of a description which it is in the course of the respondent's business to supply.

(iv) The product was not reasonably fit for the purpose.

[85] The learned judge of appeal interpreted the section to mean:

"It seems to me that on a literal construction of this section, conditions (i) and (ii) above are interdependent in that reliance on the seller will be imputed to the buyer based on the manner in which the buyer makes known to the seller the particular purpose for which the product is required. Nothing further is needed to prove reliance."[23]

[86] I note that **Appleton Hall** concerned a case of a product purchased in reliance on the seller for a specific purpose which was made known at the time of purchase. The comments of Harrison, JA are viewed in that context as the proviso was held not to apply on the facts.

[87] In the instant case, the claimant is required as buyer to adduce evidence of the purpose for which he was purchasing the VW as well as how this was

[22] [2011] JMCA Civ 30
[23] para [12]

communicated to the defendant. While the claimant has pleaded that the defendant was aware that the VW was being purchased by him for his private use and for transportation to and from his place of employment,[24] this was not made known to the defendant as it stated in its defence. Neither is this assertion to be found anywhere in the witness statement or oral evidence of Mr Samuels.

[88] The court finds that an express statement of this particular purpose is not made out on the evidence. However, the particular purpose may be implied. The evidence in the claimant's unchallenged evidence at paragraph 9 of his Witness Statement is that he did not examine the VW. He relied on "…*the fact that I was purchasing a new high end motor car from the Defendant with an expectation that the said motor car would be fit for the purpose for which it was purchased and was of merchantable quality. Additionally, my expectation was that since I was purchasing a new Volkswagen motor car I was purchasing a motor car of repute in terms of aesthetics, service, driving, quality and performance."*

[89] This evidence in the witness statement of Mr Samuels looks forward to and relies on the contract, it does not deal expressly with purpose and communication at the time of purchase. I find that the claimant impliedly made his purpose known when he selected the defendant as his dealer of choice and contracted with the defendant for the purchase. There was no challenge to the business of the defendant as a dealer in new VW motorcars within the meaning of the Act. The first and third conditions have therefore been met by the claimant.

[90] In **Appleton Hall Limited**, Harrison, JA approved ***Ashington Piggeries Ltd v Christopher Hill:***[25] *"where Lord Diplock had this to say about section 14 of the English Act which is equivalent to section 15 of our Act:*

> *"So far as concerns the conduct of the buyer, the circumstances which give rise to the implied condition ... are first, that he should make known expressly or by implication to the seller what is the*

[24] Claim Form filed June 29, 2016 at paragraph [3]
[25] [1972] AC 441

particular purpose for which the goods are required and, secondly, that he should do so in such a way as to make the seller reasonably understand that he is relying on the seller to exercise sufficient skill or judgment to ensure that the goods are fit for that particular purpose. This he generally does by selecting a seller who makes it his business to supply goods which are used for purposes of that kind. It does not matter that the seller does not possess the necessary skill or judgment nor does it matter that in the then state of knowledge no one could by exercise of skill or judgment detect the particular characteristic of the goods which rendered them unfit for that purpose. This may seem harsh on the seller, but its harshness is mitigated by the requirement that the goods must be of a description which it is in the course of the seller's business to supply. By holding himself out to the buyer as a manufacturer or dealer in goods of that kind he leads the buyer reasonably to understand that he is capable of exercising sufficient skill or judgment to make or to select goods which will be fit for the particular purpose for which he knows the buyer wants them."

In fact it seems that Lord Diplock is suggesting that by the mere fact of the buyer indicating to the seller that he wishes to purchase a product and this product is within the seller's business to supply for purposes of the kind required by the buyer, the buyer is indicating that he is relying on the seller's judgment to provide him with a product that is fit for that purpose."

[91] **Appleton Hall Ltd.** was a case concerning a specific product by trade name as recommended by the seller to the buyer for a particular purpose. The facts are distinguishable from the present case.

[92] Concerning the second condition, the buyer's reliance on the seller's skill and judgment is a question of fact to be determined on the evidence[26]. The onus is on

[26] Medway Oil and Storage Co Ltd v Silica Gel Corpn (1928) 33 Com Cas 195 at 196, HL, per Lord Sumner.

the buyer to show that he has made it known to the seller the purpose for which he is buying the goods.

[93] In Halsbury's Laws of England[27] on the Sale of Goods Act, 1893, (in relation to contracts made before 18 May 1973,) the onus was on the buyer to show that the buyer relied on the seller's skill and judgment and that a reasonable person in the shoes of the seller would have realized that the seller was being relied on.

[94] In **Henry Kendall & Sons (A Firm) v William Lillico & Sons Ltd. And Others**[28], a case which discussed the English Sale of Goods Act, 1893 which is in pari materia with ours and in which their section 14(1) mirrors our section 15(a), Lord Reid said as follows:

> *"The difficult question is whether the circumstances were such as to show that Grimsdale were relying on Kendall's skill and judgment: but before I come to that there are two other matters which require some explanation. If the law were always logical one would suppose that a buyer, who has obtained a right to rely on the seller's skill and judgment, would only obtain thereby an assurance that proper skill and judgment had been exercised. and would only be entitled to a remedy if a defect in the goods was due to failure to exercise such skill and judgment. But the law has always gone farther than that. By getting the seller to undertake to use his skill and judgment the buyer gets under section 14 (1) an assurance that the goods will be reasonably fit for his purpose and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment on the part of the seller would not have detected them. It is for that reason that, if section 14 (1) applies. Grimsdale are entitled to relief even although Kendall had no reason to suspect that the goods might be poisoned."*

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[27] volume 91, 2024 para 84
[28] [1969] 2 A.C. 31 at 95

[95] Lord Morris of Borth-y-Gest on the 1893 Act said[29]:

> *"The Act of 1893 was an Act for codifying the law relating to the sale of goods. If its provisions are clear it should be possible to reach a decision by reference only to the facts that arise in some particular situation. The law as it evolved before 1893 is revealed by a study of a number of notable decisions. The law since 1893 is in the terms of the statute. Many of the reported cases since 1893 are seen when analysed to be no more than decisions on the facts of a case as to whether the words of the section applied. I therefore limit my citations.*
> *In general there is no implied warranty or condition as to the quality of goods which are supplied under a contract of sale nor as to their fitness for any particular purpose. There are however, exceptions to this general rule. One exception arises in the following circumstances: (1) if the buyer makes known to the seller the particular purpose for which the goods are required; that may be made known expressly or it may be made known impliedly, and (2) if the buyer makes that known so as to show that he relies on the skill or judgment of the seller and (3) if the goods are of a description which it is in the course of the business of the seller (who need not necessarily be the manufacturer) to supply. In those circumstances (subject to one proviso) there will be an implied condition that the goods shall be reasonably fit for the purpose which has been made known."*

[96] Concerning the words "particular purpose" the learned judge continued at page 94:

> *"The degree of precision or definition which makes a purpose a particular purpose depends entirely on the facts and circumstances of a purchase and sale transaction. No need arises to define or limit the word "particular." If a buyer explains his purpose or impliedly makes it known so that, to put the matter in homely language, in effect he is saying "that is what I want it for,*

[29] page 92

but I only want to buy if you can sell me something that will do," then it will be a question of fact whether the buyer has sufficiently stated his purpose. There is no magic in the word "particular." A communicated purpose, if stated with reasonably sufficient precision, will be a particular purpose. It will be the given purpose. Sometimes the purpose of a purchase will be so obvious that only one purpose could reasonably be in mutual contemplation. An only purpose or an ordinary purpose may therefore be a particular purpose: Preist v. Last [1903] 2 K.B. 148, C.A.; Wallis v. Russell [1902] 2 I.R. 585, C.A. Sometimes a particular purpose will be made known expressly: sometimes it will be made known by implication…. The law neither requires the use of any set formula nor the formal reiteration of that which has been made clear.

The next question that arises is whether that particular purpose was made known so as to show that the buyers relied on the skill and judgment of the sellers. The object of stating or making known a particular purpose will usually be to ensure that the seller only sells something that is reasonably fit for the purpose. It was well established at common law (see Jones v. Bright (1829) 5 Bing. 533) and it would appear to be common sense that if a man sells something for a particular purpose he undertakes that it will be fit for that purpose. A question of fact may arise therefore whether a particular purpose was made known in such a way or in such circumstances that showed that the buyers were relying on the sellers to show skill and judgment so that they would supply what was reasonably fit for the buyer's need. Again, there is no magic in any particular word in the section.

[97] In **Cammell Laird & Co. Ltd v Manganese Bronze and Brass Co Ltd** [30], Lord Wright said:

"Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller

[30] [1943] AC 402

can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation."

[98] This reliance need not be total or exclusive. In a later case of **Grant v. Australian Knitting Mills Ltd**.[31], Lord Wright said, at p. 99:

"It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: …"

[99] The claimant's reliance on the defendant as seller is demonstrated by qualifying words in his witness statement such as "new" and "high end." These words distinguish a new car from a used car and describe one which is in the category of the higher price point than one which is on the lower end of the market. The descriptors used suggest that the claimant knew that the VW was reputable, he liked how it looked and knew of its high quality. The circumstances of the sale suggest that the claimant approached the defendant, to buy a reputable vehicle which would perform according to its specifications and features. The second condition has therefore been fulfilled.

[100] The claimant argues that the implied condition that the goods shall be reasonably fit for purpose applies as he has fulfilled all of the other conditions set out in section 15(a) of the Act. This fourth condition is dependent on whether the proviso to section 15(a) applies.

The proviso to section 15(a) of the Sale of Goods Act

[101] Mr Williams for the claimant contends that the proviso does not apply, while the defendant argues that it does, in that this contract was for a sale of "specific goods" as provided by sections 2, 15(a) and 60 of the Act.

[102] It was submitted that the term 'specific goods' is defined by section 60 as *goods identified and agreed upon at the time a contract of sale is made.* This means that

[31] [1936] A.C. 85

the claimant bought the VW having identified it and agreed with the defendant that it was what he desired to purchase. The evidence that the defendant sells several other types of vehicles was not disputed therefore it suggests that the claimant went with the aim of purchasing a VW specifically. The claimant accepted the terms of the offer made by the defendant and took delivery of the VW on February 25, 2014.

[103] It was argued by the defendant that the claimant failed to have the VW examined until December 4, 2020, approximately five years and ten months after delivery to him. This is in spite of the claimant's declaration on or about July 14, 2014 to the Consumer Affairs Commission that the VW was defective.

[104] Kings Counsel submitted that when the VW was inspected by Mr Jacas, the claimant falsely said that he had been driving when the brakes failed. Mr Jacas could not conclusively state whether the VW had manufacturer's defects or faults occasioned by normal wear and tear given the length of time after the collision and delivery. Importantly, his report does not speak to any defect in the VW at the time of purchase or within a reasonable time thereafter.

[105] Further, there is nothing in the contract about a particular purpose and no evidence in the witness statement of the claimant about this purpose as pleaded. There was no evidence in this case concerning the sale of this VW and what transpired at that time. There is no evidence upon which to make a finding that the conditions in section 15(a) have been fulfilled.

Discussion

[106] What is the meaning and effect of the proviso to section 15(a)? It would seem to me that the mischief to be prevented by the inclusion of this proviso in the section would be a case in which a specific article is ordered. The proviso applies to the case of a contract for sale of a specified article under its patent or other trade name, however, the court must look at the circumstances of each case.

[107] The contract between the parties is one for the sale and purchase of a motor car. The claimant neither pleaded nor adduced any evidence of a representation made to him at the time this contract was entered into. This is against the backdrop of the general rule that in a contract of sale, if a seller wishes to exclude what would be the ordinary statutory rights of a purchaser, he must do so in plain and unambiguous terms.

[108] In the circumstances of the instant case, the claimant bought a motor car from a dealer of new cars. The pro forma invoice for the sale of the VW was dated June 6, 2013, and is Exhibit 2. It was signed by the claimant, Kerry-Ann Smiley, Sales Consultant for the defendant and Adam Harris, Brand Manager, Volkswagen, for the defendant. This document while stating it was a non-binding offer for sale, also stated it was not a contract. Its terms among others were accepted by the claimant. This pro forma invoice has all the requirements of a valid contract and is the only document before the court which binds the parties and governs the sale and purchase of the VW based on its content and the surrounding circumstances.

[109] The relevant time is the time of sale.[32] It is arguable that the defendant by making the offer of sale of the VW to the claimant led him to reasonably rely upon and to understand that as a dealer, it was capable of exercising sufficient skill or judgment to supply a Volkswagen motor car which would be fit for the particular purpose for which it knows the claimant wanted it.

[110] I believe it is a reasonable inference to draw from the purchase of the VW quoted in the pro forma invoice that the claimant ordered specified goods in the name Volkswagen from the defendant, a Volkswagen dealer. This is not to my mind an exclusion of liability unless the circumstances of the purchase are such that the buyer was not relying on the seller's skill and judgment.

[111] In my view, in the proviso, the language used: "*a specified article under its patent or other trade name"* means that the purchaser goes to the seller and tells the

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[32] See Manchester Liners Ltd v Rea Ltd [1922] 2 AC 74 at 89, HL, per Lord Sumner.

seller what he wants to buy. If the article is sold to the purchaser under its patent or trade name, then the warranty is excluded even though the purchaser has made known his particular purpose to the seller. This would logically tend to negative any argument by the purchaser that he was relying on the judgment or skill of the seller.

[112] The claimant had no power over what happened after he put in his order. He had an expectation that the VW ordered would accord with the pro forma invoice. He relied on the reputation of the dealer when he paid for the VW. I say this as there is no evidence before me that the dealer was the manufacturer of VW and the issue of trade names was not argued by either side.

[113] In addition, it is not disputed that the claimant did not inspect the VW before purchase. This is a demonstration of the claimant's inability to do anything other than to rely on the skill and judgment of the seller. He had no opportunity to examine the VW for defects which would have been discoverable upon inspection.

[114] He cannot be said to have identified the specified article within the meaning of the Act as there was no opportunity for him to do so. The VW was imported into the island after the order for purchase was made. The model delivered to the claimant could not have been either identified or inspected by the claimant who paid for the VW before ever laying eyes on it. In my view, the proviso to section 15(a) of the Sale of Goods Act does not apply to these facts. However, I will look more closely.

2. Whether the VW sold to the claimant was reasonably fit for its intended purpose

[115] The pleadings filed by the claimant state the cause of action as breach of contract, in that the VW was not suitable for its required purpose, this is founded on section 15 of the Act. Paragraph 5 of the Particulars of Claim specifically invokes the provisions of the Sale of Goods Act and this paragraph was admitted by the defendant in its defence. The claimant is making a complaint as to the quality of

the VW. The burden of proof of fitness is on him.[33] The use of the VW during the period of repairs while under warranty is not a factor as the undisputed evidence is that the claimant was not at fault.

[116] The defendant argues that the complaints made by the claimant were all addressed within the terms of the warranty over a year and ten months from delivery. The claimant did not reject the VW on the ground that it was not fit for purpose and retained possession of it. The evidence is that having used the VW for the very purpose for which it had been purchased, the claimant accepts that the purpose has been fulfilled.

[117] The defendant distinguishes the case of **Appleton Hall Limited** on the facts and the holding of the Court of Appeal in paragraphs 12 to 16, in that the goods purchased fell outside of the proviso to section 15(a) of the Sale of Goods Act and were subject to the implied condition of having not been reasonably fit for the purpose.

[118] The defendant contended that the present case comes within the proviso to section 15(a) of the Sale of Goods Act and that the implied condition as to fitness for purpose does not apply. There was no breach of the provisions of the Sale of Goods Act as to whether the VW sold was reasonably fit for the purpose. It was further submitted by the defendant that in the case of **Sisa Logos and Emblems v Quest Security Services Limited**,[34] goods supplied were not fit for the intended purposes, the approach of the court in that was commended to this court.

Discussion

[119] **Sisa Logos** involved a sale by description as opposed to the sale of a specific product as is the present case. The product failed to meet the detailed requirements of the defendant who had relied on the manufacturer's skill and judgment to provide goods to their specifications. As a result, the buyer was

[33] Hayden v Hayward (1808) 1 Camp 180; Henry Kendall & Sons (A Firm) v William Lillico & Sons Ltd. And Others [1969] 2 A.C. 31
[34] [2020] JMCA Civ 32

entitled to reject them as they had been ordered for a particular purpose and they were not fit for that purpose.

[120] In **Sisa Logos**, the Court of Appeal agreed with the learned trial judge's finding that the bulletproof vests and the belt buckles which the appellant sold to the respondent were not fit for the particular purpose for which they had been purchased. However, whether they were not of merchantable quality was a separate consideration. The majority held that there was no evidence to support a finding that the items were of merchantable quality. The finding that the items were not fit for purpose meant that the conclusion that they were not of merchantable quality was academic.

[121] These submissions are all well-made however, the factual circumstances paint a different picture. In **Sisa Logos** the learned President said:

> *"[106] Section 15(a) of the Act provides, therefore, that where the buyer makes it known expressly or by implication to the seller the purpose for which the goods are required, there is an implied condition that the goods supplied shall be reasonably fit for the purpose for which they were purchased.*
>
> *[107] BSS Group plc is a helpful authority on that point. In that case, the English Court of Appeal held that: "The position now is that in a case in which the buyer has made known his purpose, there is prima facie an implied condition of fitness which the seller can defeat only by proof that the buyer did not rely, or that it was unreasonable for him to rely, on the skill or judgment of the seller."*

[122] The present case is distinguishable on the facts from **Sisa Logos** in that there was no evidence from which to make a finding that the claimant purchased the VW based on certain specifications or by using a particular description which formed the essence of the contract.

[123] The evidence of Mr Samuels was that he had gone to the defendant to purchase a new Volkswagen Jetta. He described the car being purchased in his witness statement as a high-end motor car *"of repute in terms of aesthetics, service, driving, quality and performance."* There was no cross-examination on the fact that there was no evidence from Mr Samuels as to the purpose for which the VW was purchased even though a statement of purpose had been pleaded and said to have been known to the defendant.

[124] I find that there is no evidence which addressed the purpose for which the claimant was making the purchase or how he communicated this purpose to the defendant. Therefore, in the absence of such evidence, it is reasonable to infer that it was for a general purpose there being no evidence of a specific purpose.

[125] In my view, there is some evidence that the claimant as the buyer in placing the order for the VW and at the point when the order was being placed relied upon the defendant's skill and judgment for the purpose of convincing or assuring himself that it would live up to its reputation. In these circumstances, the proviso has no application and the claimant would be entitled to the benefit of the provisions of section 15(a). The cause of action is in breach of contract. The claimant is really alleging a breach of the implied term in the Sales of Goods Act that the VW was unfit for its required purpose.

[126] When all the circumstances, evidence, law and submissions are taken as a whole, I find that there was a breach of the implied condition as the VW was not reasonably fit for the purpose intended pursuant to section 15(a) of the Act on the evidence presented to the court.

3. Whether the VW sold to the claimant met the standard of merchantable quality

[127] This issue is to be considered academic if there is a finding as to a breach of the implied condition of fitness for purpose in section 15(a) of the Act. However, if I am wrong in so finding, I will continue on to merchantability.

[128] Section 15(b) of the Act provides that where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality.[35]

[129] The definition of merchantable quality is set out in the case of **Cammell Laird & Co.**[36]:

> *"What sub-s. 2 now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description."*

[130] Dixon J at first instance in **Grant v Australian Knitting Mills Ltd**[37] defined it as:

> *“The goods should be in such a state that the buyer, fully acquainted with the facts, and therefore knowing what hidden defects exists and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and without special terms.'*

[131] At 99-100:

> *"Whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination. That is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make.”*

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[35] Sisa Logos para [111]
[36] [1943] AC 402 at 430
[37] (1933) 50 CLR 387 at 418 and approved by the Privy Council ([1936] AC 85, [1935] All ER Rep 209)

[132] The undisputed evidence is that the VW quoted on Exhibit 2, had been imported into the island. The claimant would not have had an opportunity to inspect or examine it before it arrived. The contract was concluded before it was shipped in because payment for the VW was required prior to its arrival on the island as was set out on the latter page of Exhibit 2 as a condition of the sale.

[133] The question as to merchantability is to be determined on delivery. Though the defects complained of and repaired were not ascertainable on delivery this does not affect the fact that a vehicle is not of merchantable quality.

[134] In **Rogers v Parish (Scarborough) Ltd,** the plaintiff, a businessman, purchased a Range Rover from motor dealers with financing from a finance house. The vehicle, sold as new, had defects in the engine, gearbox, and bodywork. Despite attempts at repair, the vehicle remained unsatisfactory. The trial judge ruled that the defects didn't render the vehicle unroadworthy and were repairable; this decision was challenged on appeal.

[135] The Appeal Court examined the Sale of Goods Act 1979, particularly section 14(6), which defines merchantable quality. They disagreed with the learned trial judge's assessment, stating that the defects made the vehicle unfit for its intended purpose as a motor vehicle. The warranty provided did not diminish the buyer's rights. Even if the warranty allowed for repairs, it did not change the fact that the vehicle did not meet reasonable expectations based on its description, price, and market. The appeal was allowed. Mustill LJ had this to say:

> *"…There are two respects in which the judge in his opinion applied a test which was not that of s 14(6). In the passage already quoted he gave much weight to the fact that the defects were capable of repair and that the defendants had in some measure been able to repair them. Yet the fact that a defect is reparable does not prevent it from making the res venditur unmerchantable if it is of a sufficient degree (see Lee v York Coach and Marine [1977] RTR 35). The fact, if it was a fact, that the defect had been repaired at the instance of the purchaser, which in the present case does*

not appear to be so, might well have had an important bearing on whether the purchaser had by his conduct lost his right to reject, but it cannot in his view be material to the question of merchantability, ***which falls to be judged at the moment of delivery****. Furthermore, the judge applied the test of whether the defects had destroyed the workable character of the car. No doubt this echoed an argument similar to the one developed before us that, if a vehicle is capable of starting and being driven in safety from one point to the next on public roads and on whatever other surfaces the car is supposed to be able to negotiate, it must necessarily be merchantable. he can only say that this proposition appears to have no relation to the broad test propounded by s 14(6) even if, in certain particular circumstances, the correct inference would be that no more could be expected of the goods sold."*[38]

[136] Mustill LJ opined that:

"It is, however, also necessary to deal with an argument based on the fact that the vehicle was sold with the benefit of a manufacturer's warranty, a fact which was relied on to show that the buyer was required to take in his stride to a certain degree at least the type of defects which would otherwise would have amounted to a breach of contract. Speaking for myself, I am far from satisfied that this argument is opened to the Defendants at all, having regard to the express disclaimer in the contract of sale, and also in the warranty, of any intention to vary the buyer's rights at common law and also having regard to s. 6 of the Unfair Contract Terms Act 1977. Nor am he convinced that this objection can satisfactorily be answered by saying that the argument founded on the warranty operates not to deprive the buyer of his common law rights but rather as a relevant circumstances for the purposes of section 14(6) operating simply to diminish the reasonable expectations of the buyer."[39]

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[38] Per Mustill LJ – Rogers –v- Parish (Scarborough) Ltd [supra] - @ P. 236 – Letters g - j

[39] Per Mustill LJ – Rogers –v- Parish (Scarborough) Ltd [supra] - @ P. 237 – Letters e - f

[137] Mustill L.J., observed:

> *"… I think it legitimate to look at the whole issue afresh with the direct reference to the words of s.14(6). Starting with the purpose for which 'goods of that kind' are commonly bought, one would include in respect of any passenger vehicle not merely the buyer's purpose of driving the car from one place to another but of doing so with the appropriate degree of comfort, ease of handling and reliability and, one might add, of pride in the vehicle's outward and interior appearance. What is the appropriate degree and what relative weight is to be attached to one characteristic of the car rather than another will depend on the market at which the car is aimed.*
>
> *To identify the relevant expectation one must look at the factors listed in the subsection. The first is the description applied to the goods. In the present case the vehicle was sold as new. Deficiencies which might be acceptable in a second-hand vehicle were not to be expected in one purchased as new. Next, the description of 'Range Rover' would conjure up a particular set of expectations, not the same as those relating to an ordinary saloon car, as to the balance between performance, handling, comfort and resilience. The factor of price was also significant. At more than £14,000 this vehicle was, if not at the top end of the scale, well above the level of the ordinary family saloon. The buyer was entitled to value for his money."*

[138] In my mind, the proviso in section 15(a) does not apply to the exception in section 15(b). The implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise.

[139] The proviso in section 15(b), namely, examination by the buyer, is negatived by the clear evidence that the VW had to be shipped in and could not have been examined before delivery.

[140] The language used in section 15(b) means that the specified article is to be of such quality and in such condition that on any objective standard, a reasonable man in

the position of the buyer, would have accepted it in all the circumstances of the case whether for his own use or for some other.

[141] The implied condition in 15(b) applies to this case. Though it is argued by the defendant that as the seller it had complied with the contract by supplying the claimant with what he had ordered, this does not exonerate the defendant from liability. The contract must satisfy the terms of section 15(b) and the implied condition as to merchantability cannot be excluded.

[142] There is no evidence that any of the repairs which were completed after the delivery of the VW were due to problems which could have been discovered upon inspection had there been one.

[143] The VW was returned to the defendant ten times. None of the repairs were attributed to the fault of the claimant. The undisputed evidence of the extent of the repairs to the VW during the warranty period was that the first major repairs were made some four to five months after delivery. This must mean that in actual commercial practice, the issue of merchantability arises when having taken delivery, the claimant became aware of the defects of which he complained. Four to five months cannot be considered an unreasonable period in all the circumstances of the case.

[144] The object and effect of the written contract is to define the respective obligations of the contracting parties. When the contract has been construed, i.e., when those obligations have been ascertained, the law determines the consequences of them being violated. This means to my mind that the language of the contract creates the obligation to deliver the VW in a merchantable state, and that this has the status of a condition. It cannot, therefore, be affected or limited by a clause which negatives the existence of warranties, i.e., of stipulations in the contract which, whatever their nature, are merely collateral to the main purpose of the contract, which was the sale and purchase of a new VW between ATL and Mr Samuels.

[145] Since the language of the contract is adequate to create the obligation to deliver a VW of merchantable quality, it follows of necessity that it brings with it the legal consequence that if it is not performed, the purchaser has a right of action in damages for such non-performance.

[146] Mr DuQuesnay said that N/C was not about goodwill, it meant no charge and that whatever was not charged meant it was included in the sales package. It was put to Mr Samuels that N/C meant goodwill on the part of the defendant. This is a discrepancy on the defendant's case between the questions put to Mr Samuels in cross-examination and the evidence of the defendant's own witness, Mr DuQuesnay.

[147] The evidence of Mr DuQuesnay is accepted by the court given his capacity as Group After Sales Manager. He was best placed to answer questions concerning what happened after a vehicle was sold by ATL. His evidence as I understand it was that N/C meant that Mr Samuels was not being charged for all the many repairs and parts replaced in order to resolve the issues complained of. Mr Samuels agreed that N/C meant no charge. There was no evidence from anyone in sales speaking to the package sold to Mr Samuels at the time the contract was entered into.

[148] The claimant submitted and it is unchallenged, that of the two hundred and thirteen (213) days between May 30, 2014 and December 29, 2015, the defendant had the VW in for repairs for one hundred and four (104) of those 213 days. Of the one hundred and eighty-five (185) days between June 30, 2015, and December 31, 2015, the defendant was in possession of the vehicle for repairs eighty-six (86) of those 185 days despite the fact that the VW was sold to the claimant as a new vehicle.

[149] That evidence leads to the reasonable inference that the VW was delivered with issues some of which required extensive repairs such as the braking system and the clutch kit. In addition, the VW spent most of the period under warranty with the defendant being repaired, rather than with the claimant being driven. This

demonstrates the time spent repairing the vehicle and the expense of its rectification which was borne by the defendant. These are relevant considerations as they are some evidence of the nature and quality of the VW, not attributable on any of the evidence to Mr Samuels.

[150] The question of who paid for the repairs is to my mind not relevant when the Act is reviewed. Though Mr Samuels did not foot the bill, even if the repairs were such that he could not justifiably argue for the rescission of the contract, he could have claimed compensation in damages.

[151] There is no evidence after 2015 to suggest that the VW was returned to a condition described as 'good as new.' The second repair of the defective clutch and the repair of the defective brake booster/server[40] suggest that the VW maintained serious issues. This is a case where the defendant was unable to locate and rectify intractable problems which constantly manifested themselves over and over. The repairs which were ultimately carried out were lengthy and that is evidence of the failure to identify or repair the issues which were many and varied.

[152] On at least three (3) occasions the defendant found defective and/or faulty parts in the vehicle and replaced these with new parts.[41] Up until December 2015, there were still major issues such as a defective clutch. The clutch kit had to be replaced and there was recurrent squeaking coming from the wheels, the job was closed out on December 31, 2015, this was at 30,603 km.[42] The accident spoken of by the claimant was in January 2016.

[153] Attempts were made to discredit the claimant and his witness in that there was no report to the insurer that the brakes were defective. The opinion of the claimant and his witness are immaterial on this issue as the issue of merchantable quality reverts to the delivery of the VW. It is noted that there was no acknowledgement

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[40] invoices 320492, 326969

[41] EXHIBIT 1/P. 137 – Invoice 320492 – Faulty Clutch; EXHIBIT 1/P. 143 – Invoice No. 326969 – Defective brake booster/service; EXHIBIT 1/P. 148 – Invoice No. 331909 – defective Clutch.

[42] invoice 331909

by the defendant that the driver could have been involved in a far more serious collision given the major braking problems which it can be safely inferred were still not remedied.

[154] I would add that it is a hopeless suggestion that a car with defective brakes or a defective clutch should be driven on the road. These were defects which rendered the VW unsafe. A new car which cannot be driven safely is useless to its owner and cannot be described as of merchantable quality. The defendant called no expert witness of its own to examine the VW. In all the circumstances there is a clear breach of section 15(b) of the Sale of Goods Act.

4. Whether the breach of the Sale of Goods Act entitled the claimant to rescind the contract.

[155] The fact that the claimant did not reject the VW at the first sign of trouble, but persevered and endured the many attempts to have the matter put right, does not extinguish his right of rescission. This applies if it can be deemed that he has not accepted the VW. Given all of the evidence, and particularly the offer for purchase of the VW by the defendant which the claimant rejected. I find that the claimant accepted the specific goods within the meaning of section 35 of the Act so that his claim under section 15 is a claim for breach of warranty and limited to a remedy in damages rather than to rescission of the entire contract.

5. Whether the defendant breached the Consumer Protection Act.

[156] There is simply no particularization under this head of the claim. The claimant complained to the CAC. The second letter from the CAC[43] directed the claimant to take the VW to a certified mechanic and indicated that it could not assist the claimant in pursuing a demand for a refund of the purchase price of the VW, it closed its case once more. This ground fails.

[43] Dated May 6, 2016, Exhibit 1 page 155

6. Whether the defendant made material misrepresentations in selling the VW to the claimant which were either fraudulent and/or negligent

[157] The particulars of fraudulent misrepresentation have not been made out on the evidence there being no representation to the claimant upon which he placed any reliance. The evidence of the document known as the *Technical Product Information* connecting the defendant to knowledge of defects in the 2014 VW Jetta was asserted but not proven on the evidence.

7. Whether the claimant is entitled to claim from the defendant all foreseeable consequential losses flowing from the defendant's conduct.

[158] It was argued by Mr Williams that invoices numbered 319713[44], 324138[45] and 329450[46] show that the claimant was abiding by the mileage service requirement and took the vehicle to the defendant for servicing at 7500km, 15,000km and 22,500km respectively. This is not the case.

[159] The claimant agreed in cross-examination that on a valuation report obtained by ATL, (Exhibit 3) the VW's odometer showed mileage over the recommended mileage for service at 22500km as the reading was 22,669 kilometres on July 1, 2015. While this valuation report is an agreed document, there is no evidence as to how it came into being. When the valuation was done by ATL on July 1, 2015, it was not explained in the evidence by any witness for the defendant as to how a valuation report came about and whether the vehicle was in the custody of the claimant or defendant on that date. This valuation report also records the name of the registered owner of the VW as the defendant.

[160] The defendant's dealings with the VW are set out in a document called the repair service history as well as in invoices for the jobs done to it. According to the evidence of Mr DuQuesnay, the repair service history of the VW has been provided

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[44] Exhibit 1, Vol. 3 p. 135
[45] Exhibit 1, Vol. 3 p. 142
[46] Exhibit 1, Vol. 3 p. 145

to the claimant. It is before the court as an agreed document in an agreed bundle. It shows that on July 2, 2015,[47] which is the date the service record/job was closed, the mileage recorded by the VW's odometer is 21650 km. There is no corresponding invoice for this item. Though the claimant agreed that the mileage was over the recommended limit there was no re-examination on this point.

[161] It was the evidence of Mr DuQuesnay, that the date an invoice is closed reflects the date the invoice was sent to the cashier but it does not necessarily reflect the time the customer picked up the vehicle. The evidence of when Mr Samuels picked up the VW after each job is not before the court.

[162] What is clear from invoice 326969 is that the vehicle was brought in to ATL on May 4, 2015 and approximately two months later on June 30, 2015 the invoice was closed out. The repairs done over that period will not be reproduced here save to state that the defendant "*removed and refitted front bumper assembly, head lamps, front drive shaft, couplings and control arm ball joints, engine and transmission, brake master cylinder in order to change defective brake booster/server."*

[163] This invoice was closed out on June 30, 2015, meaning the cashier received the invoice. The sum of $4,065.00 was paid by the claimant for this job on a date unknown. There is no corresponding entry in the repair service history for May 4 to June 30, 2015, rather the entry is dated July 2, 2015.

[164] This evidence is important as it demonstrates the quality of the record-keeping and the manner of dealing with the VW by the defendant in acting on the complaints of the claimant. It is the defendant's evidence that the VW underwent quality control after each visit and that this was done by a separate employee of the defendant.

[165] It is not clear to what job the dates in the repair service history relate. The reason an indication of what actions were taken by the defendant is important is that on June 30, 2015, the odometer read 21650km, this is the date invoice 326969 was

[47] Exhibit 1, Vol.3 p. 172

closed out.[48] The VW was brought in on May 4, 2015 with mileage of 21650km and the invoice was closed out at the same mileage. On July 1 the VW had an odometer reading of 22669 km as observed by MSC McKay in its valuation report. On July 2 the reading in the history is 21650 km. This difference of 1,019 km on the odometer has not been explained. It is uncontroverted that the vehicle remained in the defendant's custody until July 8, 2015, when the claimant picked it up.

[166] The evidence of the claimant was that he collected the VW on July 8, 2015 having left it at ATL for the brakes to be replaced in June/July 2015. In light of the claimant's evidence, the VW was not being retained by the defendant after June 30, 2015, rather it was the claimant who had not picked it up on his own evidence. The claimant took the car to the defendant's Oxford Road branch on the 8th of July 2014 and was called by members of the defendant's service team to collect the vehicle on the 17th of July 2014.

[167] The said repair service history sets out that the service due at 22,500km was closed out on September 7, 2015 with an odometer reading of 24,880km.[49] While the invoice[50] supplied to Mr Samuels shows that the service due at 22,500 km was closed out on August 19, 2015, when the VW came in with mileage at 24,880km and left with the same reading. Mr Samuels paid the sum of $526.02.

[168] The claimant is entitled to the sums paid on each invoice which totals $26,512.11.

[169] Sections 52 and 53 of the Sale of Goods Act provide that:

> *52 (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may*

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[48] 326969
[49] ibid p. 171
[50] 329450

(a)set up against the seller the breach of warranty for breach in diminution or extinction of the price; or

(b) maintain an action against the seller for damages

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action far the same breach of warranty if he has suffered further damage.

53. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law, interest or special damages may be recoverable, or to recover money paid where the consideration of the payment of it has failed.

[170] Mr Williams submitted that the court should award damages for the claimant's loss of expectation interests as compensatory damages. He also relied on the second limb of the well-known case of **Hadley v Baxendale** and sections 52 and 53 of the Sale of Goods Act.

[171] Mr Piper, KC argued that there is no evidence before the court upon which an assessment of damages can properly be made.

[172] In **Hadley v Baxendale**, the court said:

"Now we think the proper rule is such as the present is this: 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 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****. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury, that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case*."

[173] Section 52(2) of the Act reproduces the first limb of **Hadley v Baxendale**[51], *the measure of damages for breach of warranty is the estimated loss directly and*

[51] [1854] 9 Exch. 341

naturally resulting, in the ordinary course of events, from the breach of warranty. Under section 52(4), *the fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage*, allows *for special damages*, is also a reproduction of the second limb.

[174] I agree with Mr Williams in that the second limb of **Hadley** applies to this case as articulated in the Act. The claimant is entitled to claim further damages in addition to damages for the breach of warranty.

[175] The special circumstances under which the contract was made was clearly communicated by the claimant to the defendant, and thus known to both parties, as this was a vehicle purchased with a loan and with a duty concession.

[176] The damages resulting from the breach of such a contract, which would reasonably be contemplated, are those which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. The claimant could not reasonably have been expected to default on his loan payments while the defendant had the VW in their custody for repairs. The lengthy repair process was not challenged by the defendant and the time in their custody is accepted at 213 days. This is approximately seven months and three days. Neither side produced evidence that the claimant received alternate transportation from the defendant other than a loaner for fourteen days. This leaves 199 days or six months and approximately three weeks of loan payments and interest without the use of the VW.

[177] The claimant provided no specificity as to transportation costs. This claim is for a period after 2016 which has not been supported by any documentary evidence or dates.

[178] The defendant does not deny the inordinately long period over which it kept the VW for repairs totalling some 213 days. I would discount this period of loss of use by the days between July 1, 2015, and December 30, 2015 or 184 days as the

claimant had rejected the lump sum payment for the VW against which he could have offset his expenses. I would further reduce that total number of days by two weeks or 14 days for the undisputed evidence that he was given a loaner vehicle. The total number of days of loss of use is 170 days. The evidence is that the date a job is recorded as closed by the defendant, is not necessarily the date the customer picked up the vehicle. It was for the claimant to indicate these dates to the court. The difficulty is there is simply no evidence upon which to make an award. While the court is practical in its outlook and accepts that there had to be a means of transportation the claimant has not produced any evidence to support this aspect of the claim. Unfortunately, the claim of $15,000 per day is unsubstantiated and the court cannot create evidence where there none has been presented.

[179] The claimant also failed to indicate in his evidence that he was offered a substitute vehicle by the defendant to see if the brakes on that unit felt the same as his. This evidence was set out in a letter from the Consumer Affairs Commission to the claimant dated August 14, 2015 on which it closed its case having investigated and determined no breach of its parent act had been committed by the defendant.

[180] Any award ought to also discount the insurance payment of $250,000.00 the details of which the claimant has chosen not to disclose to this court.

[181] In appropriate circumstances, by virtue of section 52(3) of the Act, the purchaser who has been compelled to treat a breach of condition as to quality as a breach of warranty would be entitled to the difference between the value of the goods at the time of delivery to him and the value they would have had if they fulfilled the warranty.

[182] Unhappily for the claimant in this case, there is no evidence before me of what the two figures are. There was the offer to purchase the vehicle made to the claimant in July 2015 for $2,800,000.00 which was rejected, the offer was below the valuation amount of $3,100,000.00. The claimant did not quantify the value of the VW by obtaining his own valuation at any point, nor is there evidence of a counter-

offer or trade-in value. There is no evidential basis to make an award of damages for breach of warranty under section 52(2) as no loss or diminution of value has been proved under this heading.

[183] Remoteness of damages concerns quantification as set out in **Hadley v Baxendale**, that is what may reasonably have been in the contemplation of both parties at the time they made the contract. The interest on the loan payable to JMMB is not too remote such that no award can be made.

[184] In the case of **Cole's Farm Store Ltd v China Motor Ltd.,**[52] L. Campbell, J determined a claim involving an alleged breach of section 15 of the Sale of Goods Act. The claimant alleged that the defendant sold and delivered a new motor truck, which was defective, unmerchantable and not reasonably fit for the claimant's purpose. The learned judge found for the claimant on its claim in breach of contract and for breach of section 15 of the Sale of Goods Act in similar circumstances to the present case. Evidence was led before the trial judge in ***Cole's Farm Store (supra)*** that the purchase of the motor truck was financed with a loan from RBTT Bank.[53] When considering the claimant's claim for damages in relation to the payment of interest on the RBTT loan used to purchase the truck, Campbell J noted at paragraph 26 of his judgment that:

> "*[26] It must also be imputed to the parties that they must have been aware that the financing of the purchase of the vehicle would incur a cost to the purchasers. The application for the interest on the loan is granted. It seems to me that if the claimant is to be put back in the situation as if the breach had not happened, then those rates are applicable. See* ***Design Matrix Limited & Orville Dixon v L. Phillips …*** *The court had the benefit of exhibit 2 from the RBTT, which had interest rate on the loan at a rate of 18.5 per cent per annum. I make an award that the rate of 18 per cent*

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[52] Decision of the Justice L. Campbell in Claim no. 2007 HCV 03578 – Judgment delivered on the on 11th February 2011 (unreported)

[53] See paragraph 2 of the judgment of Campbell J

applied on the amount of $1,249,000.00 from the 7th November 2006 to the 13th September 2007."

[185] In the instant case, the interest on the loan is calculated at $1,338,042.68 over the life of the loan for 84 months. This amount is discounted by $250,000.00 paid to the claimant by his insurers. This is not an unreasonable award given that the defects in the VW were uncovered by the defendant at the first service at 7500km on a new car and it was not challenged that the claimant was still making loan payments on the date this claim was filed.

[186] In light of the foregoing the court makes the orders below.

[187] Orders:

1. Judgment for the claimant.
2. The claimant is awarded the sum of $26,512.11 as special damages.
3. The claimant is awarded the sum of $1,088,042.68 as general damages with interest at 3% per annum from February 25, 2014 to July 19, 2024.
4. Costs to the claimant to be taxed if not agreed.

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Wint- Blair, J