IN THE HIGH COURT OF MALAYA IN JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TA'ZIM
[CIVIL APPEAL NO: JA-12B-62-08/2020]

BETWEEN

FA WAGEN SDN. BHD.
(Company No: 199720-X) ... APPELLANT

AND

PORATHA CORPORATION SDN. BHD.
(Company No: 518083-K) ... RESPONDENT

[IN THE SESSIONS COURT AT JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TA'ZIM, MALAYSIA
[WRIT NO: JA-A52-19-04/2018]

BETWEEN

PORATHA CORPORATION SDN. BHD.
(Company No: 518083-K) ... PLAINTIFF

AND

F. A. WAGEN SDN. BHD.
(Company No: 199720-X) ... DEFENDANT]

GROUNDS OF JUDGMENT

Introduction

[1] This was an appeal ("this Appeal") against the decision of the learned Sessions Court Judge ("SCJ") on 29 July 2020, in allowing the Respondent's claim. For ease of reference, the Appellant and Respondent will be referred to respectively as the Defendant and Plaintiff.

The factual background

[2] On 15 March 2013, the Plaintiff had purchased a brand-new Volkswagen Polo Sedan ("the Vehicle") from the Defendant, an authorised dealer for Volkswagen in Johor Bahru, for the sum of MYR104,509.22. The vehicle was purchased with a warranty that expired on 10 April 2018.

[3] Some time in May 2013, the Plaintiff discovered defects and faulty parts to the Vehicle that needed rectification and replacement. As a result thereof, the Vehicle went in and out of the Defendant's service centre several times, but the defects and faults to the Vehicle were never fully rectified.

[4] The Plaintiff finally left the Vehicle at the Defendant's service centre on 12 October 2013 to be rectified once and for all. However, the Vehicle was ready for collection only on 11 March 2016.

[5] In September 2016, the Plaintiff filed a claim against the Defendant for breach of contract. The learned SCJ allowed the Plaintiff's claim for MYR1,779.20 as special damages, and MYR88,300 for the loss of use of the Vehicle.

[6] As a result thereof, the Defendant appealed to this Court. The Appeal was dismissed for the following reasons.

Contentions, evaluation, and findings

Whether Plaintiff had correctly relied on breach of warranty

[7] At the outset, the issue was whether the Plaintiff was correct in suing for breach of warranty, and not breach of condition.

[8] In the present case, the Plaintiff had opted to affirm the contract and sue for damages for breach of warranty for acceptable quality and fitness for purpose, as provided for in the Consumer Protection Act 1999 ("Consumer Protection Act"), namely, sections 32 and 33, which read:

> Section 32 – *Implied guarantee as to acceptable quality*
>
> (1) Where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality.
>
> (2) For the purposes of subsection (1), goods shall be deemed to be of acceptable quality-
>
> *(a)* if they are-
>
> (i) fit for all the purposes for which goods of the type in question are commonly supplied;
>
> (ii) acceptable in appearance and finish;
>
> (iii) free from minor defects;
>
> (iv) safe; and
>
> (v) durable;
>
> *(b)* a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to-
>
> (i) the nature of the goods;

(ii) the price;

(iii) any statements made about the goods on any packaging or label on the goods;

(iv) any representation made about the goods by the supplier or the manufacturer; and

(v) all other relevant circumstances of the supply of the goods.

(3) Where any defects in the goods have been specifically drawn to the consumer's attention before he agrees to the supply, then, the goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality by reason only of those defects.

(4) Where goods are displayed for sale or hire, the defects that are to be treated as having been specifically drawn to the consumer's attention for the purposes of subsection (3) shall be defects disclosed on a written notice displayed with the goods.

(5) Goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality if-

(a) the goods have been used in a manner or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and

(b) the goods would have complied with the implied guarantee as to acceptable quality if they had not been used in that manner or to that extent.

(6) A reference in subsections (3) and (4) to a defect is a reference to any failure of the goods to comply with the implied guarantee as to acceptable quality.

****

Section 33 – *Implied guarantee as to fitness for particular purpose*

(1) Subject to subsection (2), the following guarantees shall be implied where goods are supplied to a consumer:

(a) that the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and

(b) that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.

(2) The implied guarantees referred to in subsection (1) shall not apply where the circumstances show that-

(a) the consumer does not rely on the supplier's skill or judgment; or

(b) it is unreasonable for the consumer to rely on the supplier's skill or judgment.

(3) This section shall apply whether or not the purpose is a purpose as to which the goods are commonly supplied.

[Emphasis added.]

[9] The Court's attention was drawn to the cases of *Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bh*d [2011] 9 CLJ 833 and *Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage*

Bintang Bhd & Anor [2010] 6 CLJ 681. However, it must be noted that in both cases, the plaintiffs had elected to treat the breach as a breach of condition, and to reject the vehicle.

[10] For instance, in *Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bh*d, the plaintiff had rejected the car when it was left at the defendant's workshop. The Court of Appeal held that abandoning the car at the workshop, constituted notification of the rejection. In *Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor*, the plaintiff had claimed for the refund of the full purchase price of a Mercedes Benz Avantgarde together with damages, interests and costs. In that case, although the High Court had dismissed the plaintiff's claim, it must be noted that the plaintiff in that case had opted to sue for breach of condition and to claim for the refund of the full purchase price.

[11] In the present case, the Plaintiff, by sending the Vehicle for repairs and by obtaining a courtesy car from the Defendant, whilst waiting for the repairs, had opted to affirm the contract.

[12] The Court's attention was also drawn to the provisions of the Sale of Goods Act 1957 ("Sale of Goods Act"), namely, sections 12 and 59. In section 12, the definitions of condition and warranty are provided. Section 12 reads:

> Section 12 – *Condition and warranty*
>
> (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.
>
> (2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. The stipulation may be a condition, though called a warranty in the contract.

[Emphasis added.]

[13] As such, in the present case and pursuant to section 12 of the Sale of Goods Act, the Plaintiff had the right to treat the breach as a breach of warranty only, and to claim damages as a result thereof. The conduct of the Plaintiff indicated that it had opted to affirm the contract and to treat the breach as a breach of warranty only, and to sue for damages for the loss of the use of the Vehicle, as provided under section 59 of the Sales of Goods Act, which read:

Section 59 – *Remedy for breach of warranty*

(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-

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

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution of the price does not prevent him suing for

the same breach of warranty if he has suffered further damage.

[Emphasis added.]

[14] The learned SCJ was, therefore, correct in treating the Plaintiff's claim as one for breach of warranty. Damages sought by the Plaintiff were, therefore, the proper remedy in the present case.

Whether expert opinion was required to verify defects and faults

[15] With regard to the defects and faults that formed the gist of the Plaintiff's claim, the Defendant contended that the failure of the Plaintiff to call an expert to testify had rendered such defects, the Plaintiff's own perception of the same.

[16] The provision that deals with opinion evidence of an expert is section 45 of the Evidence Act 1950 ("Evidence Act"), which reads:

Section 45 – *Opinions of experts*

(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

[17] At this juncture, it was crucial to understand the role of an expert, which was elucidated by Raja Azlan Shah CJ in the

Federal Court case of *Wong Swee Chin v. PP* [1981] 1 MLJ 212, in the following passage:

> In the Evidence Act, 1950, opinion of experts are under certain conditions admissible in evidence. Who are experts are explained in section 45 of the Act. Section 46 provides that facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant. DW2 was called as an expert witness. Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. Therefore, the nature of DW2's evidence must be examined in the light of the above principles. We see nowhere in the records to suggest that the trial judge had incorrectly or improperly evaluated the evidence of DW2.
>
> [Emphasis added.]

[18] Based on the above passage, I found the Defendant's argument untenable, as it was unnecessary to have relied on the opinion evidence of an expert to determine if the Vehicle was defective. The fact that the Vehicle could not be driven by someone who was competent to drive it, rendered it defective. Furthermore,

since the Plaintiff was relying on the Consumer Protection Act for breach of implied guarantee, the test for assessing if the Vehicle was defective was from the perspective of the 'reasonable consumer' as provided for in section 32(2)(b) of the Consumer Protection Act, and not a motoring expert. The provision reads:

> Section 32 – *Implied guarantee as to acceptable quality*
>
> …
>
> (2) For the purposes of subsection (1), goods shall be deemed to be of acceptable quality-
>
> **…**
>
> *(b)* a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to-
>
> (i) the nature of the goods;
>
> (ii) the price;
>
> (iii) any statements made about the goods on any packaging or label on the goods;
>
> (iv) any representation made about the goods by the supplier or the manufacturer; and
>
> (v) all other relevant circumstances of the supply of the goods.
>
> [Emphasis added.]

[19] The criteria of goods that were of acceptable quality were enumerated in section 32(2)(a) of the Consumer Protection Act, as follows:

a) fit for all the purposes for which goods of the type in question are commonly supplied;

b) acceptable in appearance and finish;

c) free from minor defects;

d) safe; and

e) durable.

[20] Based on the provisions cited above, all that was required of the Plaintiff was to establish that, pursuant to the criteria stipulated, that a reasonable consumer had found it unfit and its quality unacceptable.

[21] In any event, if the defects and faults were merely the perception of the Plaintiff, it then begs the question why the Defendant had proceeded to carry out repairs and replacements every time the Vehicle was sent in, which was supported by the documentary evidence in the form of invoices and repair orders, referred to by the learned SCJ.

[22] The Defendant had also suggested that the Vehicle was in such a condition because the Plaintiff had already clocked a mileage of 15,000 kilometres. In my view, this fact was not sufficient to exempt the Defendant from ensuring that the Vehicle met the criteria of a brand- new car. In any event, the Plaintiff had provided an explanation for such mileage which had been accepted by the learned SCJ.

[23] The Defendant further argued that the defects and faulty parts were characteristics of the Vehicle that the Plaintiff had purchased. In my view, since this was a particular fact that the Defendant had intended the Court to believe in, it, therefore, had to prove it by virtue of section 103 of the Evidence Act, which reads:

> Section 103 – *Burden of proof as to particular fact*
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> [Emphasis added]

[24] As such, the Defendant had failed to prove that the defects and faults were characteristics of the Vehicle that was purchased by the Plaintiff. In fact, instead of calling the salesperson, supervisor and technician ("the Material Witnesses") who had attended to the Plaintiff's complaints regarding the Vehicle, the Defendant had adduced one Daniel Abdullah ("SD1") and Loganathan a/l Muniappan ("SD2") who were unable to apprise the Sessions Court of the averments made by the Defendant regarding the defects and faults.

Whether adverse inference should have been invoked

[25] This brought to the forefront the adverse inference drawn by the learned SCJ against the Defendant for failure to produce the Material Witnesses. In my view, they would have been in a position to adduce the best evidence available, as they could have shed light on the actual condition of the Vehicle.

[26] Reference at this juncture was made to illustration (g) of section 114 of the Evidence Act, which reads:

> Section 114 – *Court may presume existence of certain fact*
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and

public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume:

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[27] As stated by the Supreme Court in *Munusamy v. PP* [1987] 1 MLJ 492, the evidence that is referred to in section 114(g) of the Evidence Act must not only be relevant, it must be material.

[28] In my view, the Material Witnesses were crucial to explain the Defendant's averments, as they would have been able to lend credence to the narrative provided by the Defendant. On this note, reference was made to the case of *Sabah Shell Petroleum Co Ltd & Anor v. The Owners of and/or Any Other Persons Interested in The Ship or Vessel the 'Borcos Takdir'* [2012] 5 MLJ 515, where it was stated by Nallini Pathmanathan J (as she then was):

> …The person best placed to explain fully the events of the day would have been the Master but the Defendant failed to call the master as witness. Stating that he was uncooperative. Given the importance of this witness' evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s. 114(g) against the defendant…
>
> [Emphasis added.]

[29] A further aspect of the evidence referred to in illustration (g) of section 114 of the Evidence Act is that an adverse inference is drawn only if there was deliberate withholding of the evidence. Deliberate withholding of the evidence is inferred from the lack of a reasonable explanation for the failure to produce the witness, as explained in *Adel Muhd El-Dabbah v. AG of Palestine* [1944] AC 156, *Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139, and *Marappan a/l Muthusamy v. R Sivam a/l Ramasamy* [2014] 4 MLJ 428. In the present case, there was no reasonable explanation proffered for the absence of the Material Witnesses, leading to the inference that there was deliberate withholding of such witnesses.

[30] As such, the failure to call the Material Witnesses had accordingly resulted in the invocation of an adverse inference against the Defendant, that is, if these witnesses had in fact been called, their evidence would have been unfavourable against the Defendant.

[31] In my view, therefore, the learned SCJ, after having considered the facts holistically, had not erred when she concluded that there were in fact defects and faults.

[32] As a result of the defects and faults, there arose an implied guarantee for the Defendant to ensure that repairs to the Vehicle would be done within a reasonable time. The Court's attention was drawn to sections 37, 41 and 42 of the Consumer Protection Act, which read:

> Section 37 – *Implied guarantee as to repairs and spare parts*
>
> (1) Where imported or locally manufactured goods are supplied to a consumer, there shall be implied a guarantee that the manufacturer and the supplier will take reasonable

action to ensure that facilities for the repair of the goods and the supply of spare parts for the goods are reasonably available for a reasonable period after the goods are so supplied.

(2) Subsection (1) shall not apply where reasonable action has been taken to notify the consumer, at or before the time the imported or locally manufactured goods are supplied, that the manufacturer or the supplier or both does not undertake that repair facilities and spare parts will be available for those goods.

(3) Where reasonable action has been taken to notify the consumer, at or before the time the goods are supplied, that the manufacturer or supplier or both does not undertake that repair facilities and spare parts will be available for those goods after the expiration of a specified period, subsection (1) shall not apply in relation to the imported or locally manufactured goods after the expiration of that period.

******

Section 41 – *Options against suppliers where goods do not comply with guarantees*

(1) Where a consumer has a right of redress against the supplier under this Part in respect of the failure of any goods to comply with a guarantee under Part V, the consumer may exercise the following remedies:

(a) where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time in accordance with section 42; and

(b) where the failure is one that cannot be remedied or is of a substantial character within the meaning of section 44, the consumer may-

(i) subject to section 43, reject the goods in accordance with section 45; or

(ii) obtain from the supplier damages in compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(2) In addition to the remedies under subsection (1), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the goods, which is proved to be a result or consequence of the failure.

(3) Where the supplier refuses or neglects to remedy the failure as required under paragraph (1)*(a)*, or refuses or neglects to do so within a reasonable time, the consumer may-

(a) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or

(b) subject to section 43, reject the goods in accordance with section 45.

******

Section 42 – *Satisfaction of requirement to remedy a failure*

(1) A supplier may satisfy a requirement under section 41 to remedy a failure of any goods to comply with a guarantee by-

(a) where the failure does not relate to title, repairing the goods;

(b) where the failure relates to title, curing any defect in title;

(c) replacing the goods with goods of identical type; or

(d) providing a refund of any money paid or other consideration provided by the consumer in respect of the goods where the supplier cannot reasonably be expected to repair or replace the goods or cure any defect in title.

(2) Where a consumer obtains goods to replace defective goods under paragraph (1)*(c)*, the replacement goods shall, for the purposes of this Act, be deemed to be supplied by the supplier and the guarantees and obligations under this Act relating to the supply of goods to a consumer shall apply to the replacement goods.

(3) A refund under paragraph (1)*(d)* means a refund in cash of the money paid or the value of any other consideration provided, or both, as the case may require.

[Emphasis added.]

[33] Since it was correctly found as a fact by the learned SCJ that there were defects and faults to the Vehicle which the Defendant was obliged to repair, the subsequent issue was whether the time taken by the Defendant to complete the repairs was reasonable as prescribed by section 41 of the Consumer Protection Act.

Whether Defendant had taken reasonable time to complete the repairs

[34] It was undisputed that the Vehicle was ready for collection only in March 2016, which meant that the Defendant took 29 months to complete the repairs. This, in my view, was beyond comprehension. According to SD1, the delay was exacerbated by the fact that the whole gearbox had to be replaced. I had to share the same view of the learned SCJ that such a reason was unacceptable.

[35] The learned SCJ was, therefore, correct in her conclusion that the time taken by the Defendant to complete the repairs was unreasonable.

[36] In the final analysis, it was my view that in this Appeal, the issues that were addressed by the learned SCJ were based predominantly on findings of fact. As such, I was guided by the Federal Court in *China Airlines Ltd v. Maltran Air Corp. Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, where it was stated through Mohamed Dzaiddin Abdullah FCJ in the following passages:

> In the light of the above findings of the learned Judge, a fundamental question of principle arises, which is, whether in the circumstances of the case, this Court can interfere with the findings of fact of the Court below.
>
> It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the Court below should be disturbed by a Court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a Court which has seen them and can

Judge their honesty and accuracy (*Crofter Harris Tweed Co. v. Veitch*) [1942] 1 All ER 142 HL per Lord Porter at p. 167.

However, the authority for the above proposition is the speech of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, particularly the following passage (at p. 487-8):

> I. Where a question of fact has been tried by Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;
>
> II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court.

[Emphasis added.]

[37] It was also crucial to remember that in the present case, the learned SCJ had relied on the oral evidence of the witnesses and

would have been in a better position as she had the benefit of seeing and listening to them. She would have weighed and evaluated all evidence by the witnesses, including their credibility. In fact, she had assessed and evaluated the witnesses accordingly, and based on contradictions and inconsistencies, found that the Defendant's witnesses were economical with the truth.

[38] On this point, I found instructive the Privy Council case of *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS 178 and the Federal Court case of *Bong Nyi Moi v. Narayanasamy & Anor* [1973] 1 MLJ 250. In *Tan Chow Soo v. Ratna Ammal*, it was stated by Lord Diplock in the following passage:

> In this kind of case it is very rarely that an appellate Court is justified in reversing the decision of the trial Judge who has had the opportunity of seeing and hearing the witnesses and who has directed himself correctly, as in their Lordships' view the learned Judge in this case did…
>
> [Emphasis added.]

[39] In *Bong Nyi Moi v. Narayanasamy & Anor* [1973] 1 MLJ 250, it was stated by the Federal Court, through Ali FJ, in the following passage:

> Here lies the difficulty in this appeal. The learned trial judge had seen and heard the witnesses and was not satisfied with his evidence. He gave his reason for not being so satisfied. Speaking for myself, I must say I cannot quarrel with this reason. Indeed, I do not think I should.
>
> [Emphasis added.]

Whether learned SCJ was correct in her award of damages

[40] The learned SCJ had awarded MYR1,779.20 as special damages and MYR88,300 for loss of use of the Vehicle. The Defendant contended that the learned SCJ had gone beyond the pleadings and granted awards for items that were not pleaded.

[41] In my view, the Defendant's contention was untenable. According to the Plaintiff, an oral amendment had been made to the pleadings to claim special damages in the amount MYR1,779.20, which the learned SCJ had granted. Although the judgment/ order itself indicated only the amount of MYR779.20, the Plaintiff had explained that this was due to the Defendant's error in stipulating so.

[42] With regard to the loss of use of the Vehicle, the Plaintiff had pleaded a loss of MYR176,600, based on a daily rate of MYR200 for 883 days. To mitigate its losses, the Plaintiff through its director, one Naresh Nair Surasan ("SP1"), had arranged to hire a car from his friend, one John Anthony @ Anthonysamy ("SP3") at a daily rate of MYR200. Although the Defendant contended that SP3 was not licensed to let out cars for hire, in my view this was irrelevant as it had been proved that there was loss of use of the Vehicle for 883 days.

[43] The learned SCJ, however, granted an award in the amount of MYR88,300 on the basis of a daily rate of MYR100. I am unable to agree with the Defendant that this was granted without any proof of loss. It was undisputed that the Plaintiff had suffered loss of use of the Vehicle, there was documentary evidence indicating that the Plaintiff had issued payment vouchers to SP1 for the rental of the car. However, the learned SCJ had granted a rate lower than that claimed by the Plaintiff.

[44] In any event, paragraph (f) of the Plaintiff's statement of claim contains the catch all, omnibus provision 'such further or other relief as the Court may deem just'. I am mindful that such

phrase is not a carte blanche for the Courts to grant any relief whatsoever. However, the provision "must not be treated as a mere ornament to pleadings devoid of any meaning": per Salleh Abas FJ in *Lim Eng Kay v. Jaafar Bin Mohamed Said* [1982] 1 LNS 12; [1982] 2 MLJ 156. It is, therefore, a provision to ensure justice is done, provided it is not inconsistent with what was expressly pleaded. I drew guidance also from *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, and *Malaysian Assurance Alliance Bhd v. COMSA Properties & Another Appeal* [2011] 7 CLJ 942.

[45] There was, therefore, no error in the decision of the learned SCJ as it was a reduction from what the Plaintiff had claimed. It was palpable that the Plaintiff had sustained losses as it had to continue paying for the hire-purchase instalments for the Vehicle, despite being unable to use the same. A daily rate of MYR100 awarded by the learned SCJ was, in my view, fair and reasonable.

Conclusion

[46] Bearing in mind that this was an appeal from the Sessions Court, it was my view that the learned SCJ did not fall within the 'plainly wrong' test as prescribed by the English Supreme Court in *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, in the following passage:

> The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. What matters is whether the decision

under appeal is one that no reasonable judge could have reached.

[Emphasis added.]

[47] The principles expounded in *Henderson v. Foxworth Investments Ltd and Another* have been adopted and applied by a plethora of Malaysian cases including the Federal Court cases of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 and *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821, and the Court of Appeal case of *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665.

[48] The 'plainly wrong' test was defined in *Henderson v. Foxworth Investments Limited & Another to* mean "one that no reasonable judge could have reached". In the present case, after scrutiny of the grounds of judgment of the learned SCJ, I found no error that warranted intervention.

[49] In the upshot, therefore, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this Court, including the written and oral submissions of both parties, and the grounds of judgment of the learned SCJ, this Appeal was dismissed with costs.

Dated: 14 FEBRUARY 2022

(EVROL MARIETTE PETERS)
Judicial Commissioner
High Court, Johor Bahru

COUNSEL:

For the appellant/defendant - Viknesh Selvanathan & Elfira Rosellini Abdul Hamid; M/s Viknesh & Yap

For the respondent/plaintiff - A Kailesh; M/s Kailesh Aru & Co

Case(s) referred to:

Adel Muhd El-Dabbah v. AG of Palestine [1944] AC 156

Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor [2010] 6 CLJ 681

Bong Nyi Moi v. Narayanasamy & Anor [1973] 1 MLJ 250

China Airlines Ltd v. Maltran Air Corp. Sdn Bhd & Another Appeal [1996] 3 CLJ 163

Henderson v. Foxworth Investments Ltd and Another [2014] 1 WLR 2600

Lim Eng Kay v. Jaafar Bin Mohamed Said [1982] 1 LNS 12; [1982] 2 MLJ 156

Malaysian Assurance Alliance Bhd v. COMSA Properties & Another Appeal [2011] 7 CLJ 942

Marappan a/l Muthusamy v. R Sivam a/l Ramasamy [2014] 4 MLJ 428

MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665

Munusamy v. PP [1987] 1 MLJ 492

Murugan v. Lew Chu Cheong [1980] 2 MLJ 139

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1

Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821

Sabah Shell Petroleum Co Ltd & Anor v. The Owners of and/or Any Other Persons Interested in The Ship or Vessel the 'Borcos Takdir' [2012] 5 MLJ 515

Tan Chow Soo v. Ratna Ammal [1967] 1 LNS 178

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771

Wong Swee Chin v. PP [1981] 1 MLJ 212

Legislation referred to:

Consumer Protection Act 1999, ss. 32(2)(a), (b), 33, 37, 41, 42

Sale of Goods Act 1957, ss. 12, 59

Evidence Act 1950, ss. 45, 103, 114