PORATHA CORPORATION SDN BHD

v.

FA WAGEN SDN BHD

SESSIONS COURT, JOHOR BAHRU
MABEL S MUTTIAH SJ
[CIVIL SUIT NO: JA-A52-19-04-2018]
6 OCTOBER 2020

DAMAGES: *Claim for - Loss of use - Purchaser purchased car from distributor - Car required repairs and rectifications and left at workshop - Purchaser hired another car while car in workshop - Whether purchaser had locus standi to maintain action - Whether car had defects - Whether problems and faults were purchaser's own perception - Whether complaints were actual characteristics of car*

CONSUMER LAW: *Consumer Protection Act 1999 - Sections 32 & 33 - Purchaser purchased car from distributor - Car required repairs and rectifications and left at workshop - Whether car 'acceptable quality' and 'fit for purpose' for brand-new car*

EVIDENCE: *Adverse inference - Failure to call material witness - Purchaser purchased car from distributor - Car required repairs and rectifications and left at workshop - Allegations by distributor that there was nothing wrong with car, problems and faults were purchaser's own perception and complaints were actual characteristics of car - Whether expert evidence called to explain alleged unique characteristics of car - Whether failure to call persons who attended car to give evidence invoked adverse inference - Evidence Act 1950, s. 114(g)*

The plaintiff, a company, had purchased a Volkswagen Polo Sedan 1.6 ('car') from the defendant, an authorised distributor of Volkswagen motor vehicles in Malaysia. The plaintiff started encountering problems with the car after a month of taking delivery of the car and driving the same. Within a period of four months, the car was in and out of the defendant's service centre for repairs over eight to ten times. As the car was still under warranty, the plaintiff decided to leave the car at the defendant's workshop, in October 2013, for proper rectification. In early 2016, the defendant rectified the problems by changing the defective gearbox and the engine mounting. The plaintiff then collected the car in March 2016 after being satisfied with the condition of the car. While the car was being repaired, the plaintiff had to hire another car at the rate of RM200

per day from 15 October 2013 until 15 March 2016. The plaintiff commenced the present action claiming for RM176,600 for loss of use of the car. Objecting to the claim, the defendant argued that, *inter alia*, (i) the plaintiff had no *locus* to maintain the action; and (ii) there was nothing wrong with the car as the problems and faults were the plaintiff's own perception and the complaints were the actual characteristics of the particular vehicle.

Held (allowing claim):

(1) The plaintiff had *locus standi* against the defendant because the hire-purchase *vis-à-vis* the car was duly paid off in full by the plaintiff prior to filing of the action. There was no ownership claim by any party in respect of the car and the defendant did not pursue this line of defence. (para 15)

(2) The plaintiff's claim for damages for loss of use of the car arose from the defendant's breach. There were fundamental defects to the car which the defendant failed to rectify within a reasonable time. The plaintiff did not elect to rescind/repudiate the contract but chose to affirm it and claim damages arising from the breach of warranty for the delay in rectifying the car. The plaintiff inevitably sustained losses as it had to continue paying for the car's hire-purchase instalments yet unable to use it. It was reasonable and foreseeable that the plaintiff got an alternative car for its use. (paras 16 & 17)

(3) Sections 32 and 33 of the Consumer Protection Act 1999 ('Act') states that there is an implied guarantee that the goods supplied to a consumer shall be of acceptable quality. Pursuant to s. 32(2) of the Act, goods shall be deemed to be of acceptable quality if they are, *inter alia*, fit for purpose, free from minor defects, safe and durable. The statutory provision of 'acceptable quality' and 'fit for purpose' wholly applicable in this case because the plaintiff had purchased a brand-new car, not a second-hand car. It was only right and proper that there should be an implied guarantee that the car sold and delivered by the defendant shall be of acceptable quality and fit for its purpose. Documentary evidence showed (i) that the car was not in proper working order and had numerous defects with its gearbox, engine mounting, brake disc and air-conditioning; (ii) the battery and tyres of the car had to be replaced within a short span of time after the purchase; (iii) the car was not safe due to the

defective brake disc that caused juddering when breaking; and (iv) the driver's seat kept moving instead of staying locked in a secured position. (paras 18-20)

(4) The defendant failed to prove that the plaintiff's complaints were actually the characteristics of the vehicle. No Volkswagen expert was called to justify the defendant's defence that the car had such unique characteristics. Whilst the defendant claimed that there was nothing wrong with the car, however, every time the car was sent in for repair, some repairs and replacements were in fact carried out, evinced through the invoices and repair orders. Therefore, to say that the car had such characteristics and/or it was the plaintiff's own perception was not a palatable defence. (paras 21 & 23)

(5) The defendant failed to repair the car within a reasonable time. It took more than two years to rectify and repair the car. The defendant failed to call the persons who attended the car to give evidence and failed to proffer any explanation or reasons as to why they were not called to testify. Such failure drew the presumption of adverse inference against the defendant pursuant to s. 114(g) of the Evidence Act 1950. (paras 30, 36 & 37)

(6) The plaintiff had adduced evidence to prove its claim. However, for the loss of use of the car, RM100 per for 883 days (RM88,300) was a fair and just amount. The plaintiff's claim for RM1,779.20, as special damages, was also allowed. (paras 42 & 43)

Case(s) referred to:

Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor [2010] 6 CLJ 681 HC ***(dist)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bhd [2011] 9 CLJ 833 CA ***(refd)***

Legislation referred to:

Consumer Protection Act 1999, ss. 32(2), 33, 37
Evidence Act 1950, ss. 101(1), (2), 114(g)
Sale of Goods Act 1957, ss. 12, 59

Bagi pihak plaintif - M/s Kailesh Aru & Co
Bagi pihak defendan - M/s Viknesh & Yap

Reported by Najib Tamby

JUDGMENT

Mabel S Muttiah SJ:

Introduction

[1] The plaintiff is suing the defendant for the loss of use of a brand-new car he had purchased from the defendant.

Parties And Claim

[2] The plaintiff ("P") is a private limited company registered in Malaysia and at all material times was in the construction business specialising in mechanical field erection works for oil, gas and power generation industry.

[3] On 15 March 2013 the P purchased a brand-new Volkswagen Polo Sedan 1.6 (the said car) from the defendant. On 11 April 2013, the P took delivery of the said car and thereafter the P encountered fundamental problems, mechanical faults and defects to the said car. As a result of these problems, the P was unable to use the said car from 27 September 2013 to 17 March 2016.

[4] The defendant ("D") is a private limited company incorporated in Malaysia and has its place of business at No. 10C, 5112 Milestone, Jalan Skudai, Tampoi, U2A0 Johor Bahru, Johor and carried on the business as the authorised distributor of Volkswagen motor vehicles in Malaysia.

[5] The D denies the P's claim and avers the P's allegation is highly inaccurate, untrue and/or misleading and done in bad faith with the intention of depicting a distorted version of events and concealing the actual facts and truth.

Facts Of The Case

[6] On 15 March 2013, the P through its manager had purchased the said car from the D for RM104,509.22 and the said car was registered as JPG 4113. The said car was purchased by the P based on the D's advertisement and representation made by its salesman,

one Mr Roger Kong that the said car had excellent quality in respect of both its built and engine. It is undisputed that the P had purchased the said car with an extended warranty that expired only on 10 April 2018.

[7] In March 2013, the P took delivery of the said car and after driving over a month the P encountered problems with the said car. Within a period of four months the said car went in and out of the D's service centre for repairs over eight to ten times. On 12 October 2013, the P feeling rather disappointed and frustrated, decided to leave the said car at the D's workshop for the car to be properly rectified. At the material time the said car was still under warranty and as such the D was statutorily obligated to carry out the repairs and rectify the defects in order for the said car to be roadworthy.

[8] From the P's evidence, the problems, faults and defects to the said car were in fact all real problems and not merely the P's own perception as alleged by the D. No evidence whatsoever was shown to the P either as a similar comparison to establish the fact that the list of complain fits the characteristic of the car or a Volkswagen specialist was called to testify on the same. The P's witnesses SP1 and SP2 said they had better things to do than to spend their time going in and out of the D's workshop to complain for nothing.

[9] It is not disputed that the D in early 2016 took the necessary actions to rectify the problems such as changing the defective gearbox and the engine mounting. The P states that it is an undisputed fact that the D did carry out rectification and replacements to the said car eventually. After receiving instructions *vide* D's email dated 11 March 2016, the P collected the said car on 17 March 2016 and thereafter the P was very satisfied with the condition of the car.

[10] When the said car was left at the D's service centre on 12 October 2013 for repairs to be carried out, the P had to hire another car from SP3 at the rate of RM200 per day from 15 October 2013 until 15 March 2016. Hence, the P claims RM176,600 for loss of use of the said car.

[11] The D's defence is that the P has no *locus* to maintain this action and that there was nothing wrong with the said car. The D claimed that the problems and faults were the P's own perception and the complaints were the actual characteristics of the particular

vehicle. The D also did not hand the car to the end financier as they initially planned and did not also pursue the storage claim against the P.

The Issues

(i) whether plaintiff has *locus* to maintain this action?;

(ii) whether there were fundamental defects and/or faulty parts to the said car that needed rectification and replacement?; and

(iii) did the D take an unreasonable time to rectify and replace the defects and/or faulty parts?

The List Of Witnesses

[12] The P has called the following witnesses:

	Name	Position	Remarks
1	Naresh Nair Surasan (SP1)	Company Director	Witness Statement has been marked as "WS-SP1"
2	Sheila Dewi Vadivaloo (SP2)	Company Director	Witness Statement has been marked as "WS-SP2"
3	John Anthony A/L Anthonoysamy (SP3)	Business Developer	Witness Statement has been marked as "WS-SP3"

[13] The list of the D's witnesses are as follows:

	Name	Position	Remarks
1	Daniel B. Abdullah (SD1)	Technician	Witness Statement has been marked as "WS-SD1"
2	Logananthan A/L Muniappan (SD2)	Head of Sales	Witness Statement has been marked as "WS-SD2"

Court's Findings

[14] In reference to s. 101(1) and (2) of the Evidence Act 1950 ("Act 56") (EA), the facts and evidence of the P's claim must be proven on the balance of probabilities. The P has the burden of

proof as well as the onus of proof to adduce evidence to prove its claim. The onus of proof shifts to the defendant when the plaintiff has established its case. This is seen in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697.

[15] The court, looked at the chronology of the facts of the case, the documentary evidence, the oral evidence, the witness statements, circumstances of the transaction as well as the conduct of the parties and the provisions of the laws referred, to consider in its entirety on an objective test whether the P on the balance of probabilities succeeded in proving its case against the D.

Locus Standi

[16] The P has *locus standi* against the D because the hire purchase *vis-a-vis* the said car was duly paid off in full by the P prior to filing of this action. Therefore, there is no ownership claim by any party in respect of the said car and the D did not pursue this line of defence.

Whether There Were Fundamental Defects And/Or Faulty Parts To The Said Car That Needed Rectification And Replacement

[17] The court finds that the P's claim for damages for loss of use of the said car arose from the D's breach. The court's findings from the evidence of the SP1 and SP2 as well the documents exhibited in bundle B, there were real and fundamental defects to the said car and the D had failed to rectify the problems and defects within a reasonable time for the P. The court further finds that the P did not elect to rescind/repudiate the contract but chose to affirm it and claim damages arising from the breach of warranty for the said delay in rectifying the said car.

[18] The P inevitably sustained losses as it had to continue paying for the car's hire-purchase instalments on the one hand but was not be able to use it, on the other hand. The court finds it reasonable and also foreseeable under the circumstance that the P got an alternative car for the P's use. The P hired a car from his acquaintance SP3 and not from a commercial hirer or a car rental service company so as to mitigate the P's losses which otherwise would have costs far higher. The receipts were enclosed in bundle C from pp. 7 to 36.

[19] The court is reminded of ss. 32 and 33 of the Consumer Protection Act 1999 ("Act 599") which states that there is an implied guarantee that the goods supplied to a consumer shall be of acceptable quality. Pursuant to s. 32(2) of the Act 599, goods shall be deemed to be of acceptable quality if they are amongst others, fit for purpose, free from minor defects, safe and durable. The court finds that the statutory provision of "acceptable quality" and "fit for purpose" is wholly applicable in this case.

[20] Why does the court say so? In the present case the P had purchased a brand-new car and not a second-hand car. Therefore, it's only right and proper that there should be an implied guarantee that the said car sold and delivered by the D shall be of acceptable quality and fit for its purpose.

[21] Unfortunately, in this case, it is clear from the documentary evidence in bundle B that the said car had numerous defects with its gearbox, engine mounting, brake disc and the said car was not in proper working order. Further, as ridiculous as it may sound the battery and the tyres of a brand-new car had to be replaced within a short span of time after the purchase. Evidence was further led that the said car was not safe due to the defective brake disc that caused juddering when breaking, the driver's seat keeps moving and not locking in a secure position and defects to the faulty air conditioning that caused "sweating" on the dashboard. The court is able to accept such defects present in a second-hand car but not in a brand-new car such as the said car.

[22] In fact, no Volkswagen expert was called to justify the D's defence that the said car has such unique characteristics. This court takes note that whilst the D claim that there was nothing wrong with the said car, however, every time the car was sent in for repair, some repairs and replacements were in fact carried out to the said car. All these defects and repairs can be seen in the invoices and the repair orders found from pp. 55 to 65 and 74 to 85 respectively in bundle B. Hence, to say the said car had such characteristics and/or it was the plaintiff's own perception is not a palatable defence. This is further fortified by SD1 when he agreed in cross-examination that repairs were carried out to the said car.

Q : Saya cadangkan sememangnya aduan-aduan plaintif adalah benar dan betul-betul berlaku sebab itu defendan telah membuat penukaran, setuju?

A : Setuju.

[23] The same witness said that SP1 came back to the service centre on 21 October 2013 and 22 October 2013 with the said car to change the battery and to replace the tyres. Be that as it may, the said car had been left behind with the D since 12 October 2013! Hence, the credibility of SD1 is questionable because he is obviously lying in this instance.

[24] In the present case, the D had failed to prove that the complaints of the P were actually the characteristics of the said vehicle. This clearly defies logic! The court finds that the defence is a sheer afterthought and a sham defence created in their attempt to avoid liability towards the P. Lest not forget the D had forgone its storage claim for approximately two years for reasons best known to them.

[25] *Obiter dicta*, this court looked at the Lemon Law which provides a remedy for purchasers of cars and other consumer goods, ie, to compensate for products that repeatedly fail to meet standards of quality and performance. As adduced in court during the cross-examination of SD2, the said car purchased by the P was in fact a "lemon" which was eventually rectified only in 2016. This court is of the view an unusual delay to obtain a remedy is indeed injustice for any consumer who paid and expect the product to be in good condition. Therefore, new laws must be enacted by our Parliament to safeguard unlucky purchasers in similar circumstance as the P in this case, until then the public can only hope and rely on the courts to uphold justice on such matters.

[26] The Lemon Law is a remedy for purchasers of consumer products, particularly motorised vehicles, that repeatedly fail to meet the standards of quality and performance. A consumer may request for a reduction in price or a refund under this law. In recent years, countries like the United States, Singapore, South Korea, China and the Philippines have implemented the Lemon Law. In Singapore, it is incorporated into the Consumer Protection (Fair Trading) Act (CPFTA) 2004.

[27] The Lemon Law considers the nature of the problem; the number of days the vehicle is unavailable to the consumer for repair of the same mechanical issue; the number of repair attempts made; If the repairs cannot be completed within the number of days stated in the Act, the manufacturer is obligated to buy back the defective vehicle; the Lemon Law covers second-hand cars as well,

introducing a standard vehicle assessment report check-list for visual, equipment and road test checks done concurrently by both the dealer and buyer to ensure transparency; and it covers a wide range of defects from aesthetics to mechanical related issues.

[28] In most cases, the various defects detected in new cars leave their owners with little option besides taking their vehicles for repairs at authorised workshops. Defective cars are not only a rip-off of consumers, they are also unsafe on the roads and a danger to other road users. With the Lemon Law in Singapore, a consumer can make a claim for a defective product purchased within six months. This court is of the view after observing similar cases involving defects in new cars that it is timely for the Lemon Law to be introduced in Malaysia legal landscape to provide consumers holding onto "lemons" (nice to see but sour and tart to taste) an avenue for legal redress.

[29] A reasonable driver who enjoys driving a new car would want a repair-free car at least three to five years as he has paid a valuable consideration for the car. In cannot be denied that he also seeks security, peace and pleasure driving the new machine. Therefore, from the above, the court finds there were fundamental defects and/or faulty parts to the said car that needed rectification and replacement.

Did The D Take An Unreasonable Time To Rectify And Replace The Defects And/Or Faulty Parts?

[30] The court is puzzled why the repairs to the said car were never fully rectified at the earliest possible time but all rectification and replacement were only finalised by the D in 2016 when the said car parked in D's service garage since 2013. At this juncture, it is only apt for this court to refer to s. 37 of the Act 599.

> Implied guarantee as to repairs and spare parts
>
> 37.(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.
>
> (emphasis added)

[31] In this case, the D had failed to repair the said car within a reasonable time as envisaged but took more than two years to rectify and repair of the same. SD1 confirmed and admitted that the gearbox problem was only rectified in 2016. He said the problem was with the oil pump of the gearbox and because it comes as one complete set, the whole gearbox had to be replaced. However, the court was not informed by the D why the repairs took so long to be rectified by them. Surely, while the said car was parked in the D's garage for two to three years the value of the said car would have depreciated tremendously!

[32] Counsel for the P then, referred to s. 12 of the Sale of Goods Act 1957 ("Act 382"), and had rightly pursued to treat the breach as a breach of warranty only and is now claiming for damages only. He drew wisdom from the decision of the Court of Appeal in the case of *Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bhd* [2011] 9 CLJ 833 (W-02(IM)-2348-2009) which is wholly-binding on this court. In this case there were problems and defects to a new Mercedes-Benz car where it could not start on various occasions. It was then left at the defendant's workshop for 128 days to be repaired. Despite assurance that the defect had been rectified, however, when the plaintiff retook the vehicle, the same defect recurred. The Court of Appeal held that the defendant was liable under the provisions of the Consumer Protection Act 1999.

[33] The plaintiff in the above Court of Appeal case had rejected the car and sued for a breach of condition which the court allowed. However, in the present case the P had chosen to affirm the contract and to treat the breach as a breach of warranty only and to sue for damages for the loss of use of the vehicle as provided under s. 59 of the Act 382.

[34] In *Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor* [2010] 6 CLJ 681, the plaintiff had sued for a breach of condition for the several mechanical and electrical defects to a Mercedes-Benz Avantgarde car it purchased and sought a full refund of the purchase price together with damages, interest and costs from the defendant. However, based on the facts of that case the High Court held that the defects did not tantamount to a breach of implied condition of merchantable quality and therefore could not be said to be "of no use". The car was in a usable condition.

[35] The facts of the above case are clearly distinguishable from the present case. It is worthy to note from the above High Court case had the plaintiff sued for a breach of warranty it would have been successful to claim damages if it could prove its losses. However, because a courtesy car was in fact provided for the plaintiff's use throughout the period so therefore in fact no loss was sustained by the plaintiff. The court stated:

> ... The plaintiff could only bring an action for damages against the 1st defendant if the 1st defendant had refused or neglected to remedy or had not succeeded in remedying the failure within a reasonable time ... In any event, the plaintiff had also failed to prove loss of use since a courtesy car similar to the one purchased by the plaintiff was provided by the 1st defendant for PW1's use.
>
> However, in the present case before this court, the D asked the P to return the courtesy car which SP1 did on 17 October 2013. Therefore, this court holds that the P's claim for damages for breach of warranty is the correct action in law.

Whether Presumption Of Adverse Inference Applies To D1?

[36] The documents adduced by the D fail to show SD1's name being mentioned or referred to anywhere. SD1 was clearly not involved in this case at all the material time.

[37] SD1 agreed during cross-examination that he never dealt with SP1.

> Q : Adakah En Daniel sendiri melayani customer yang complaint tersebut?
>
> A : Tidak.

[38] However, there were other names of salesperson, service supervisor and technicians indicated in the documents such as one En Syaril bin Mohd Shah and one Mr Wong. Ironically, neither En Syaril nor Mr Wong who attended to the said car was called to give evidence. The D also failed to proffer any explanation or reasons as to why they were not called to testify against the P.

[39] During cross-examination SD1 said:

> Q : Dalam ms. 75 nama yang tertera adalah Mohd Syaril bin Mohd Shah, Adakah nama En Daniel tertera dalam dokumen yang difailkan di mahkamah ini?

A : Tiada.

Q : Setuju atau tidak, tiada sebarang dokumen yang telah dikemukakan oleh plaintiff dan defendan di mahkamah pada hari ini menunjukkan nama En Daniel tertera disitu?

A : Setuju, tiada.

Q : Saya cadangkan orang yang berurusan dengan En Naresh iaitu wakil syarikat plaintiff ada/ah kebanyakannya seorang bernama Syaril bin Mohd Shah?

A : Setuju

[40] The court believes that D has the legal burden to call Syaril bin Mohd Shah and/or Mr Wong to explain the condition of the said car when they attended to it. The failure to do so draws the presumption of adverse inference against D.

[41] The court referred to illustration (g) of s. 114 of the Act 56 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;

(emphasis added)

[42] The Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, held that the evidence that is referred to in s. 114(g) of the Act 56 must not only be relevant, it must also be material.

[43] In my view, it is not only relevant but also material for the court to be informed about the defects and the reason for not completing the repairs within a reasonable time despite the car was in the D's possession for nearly two to three years.

[44] Hence, the best person to explain fully the events would be someone from D who handle the said car for the D. Given the importance of the evidence from the above-mentioned names, D's failure to produce them as witnesses had led this court to conclude that if they were produced, would affect D adversely. Therefore, this was a fit and proper case for this court to draw an adverse inference under s. 114(g) against D.

Plaintiff's Claim

[45] The plaintiff had adduced evidence to prove its claim. SP3 confirmed without much challenge that he had in fact let his car out to the P after seeing the difficulties SP1 was having due to the unavailability of a car for his wife and the children. SP1 and SP3 had entered into agreed arrangement to hire SP3's car pending resolution of the Volkswagen vehicle from the D. They had agreed at the rate of RM200 per day after checking out the applicable local rates. However, this court is of the opinion that for the loss of use of the said car, RM100 per day for 883 days is a fair and just amount.

[46] Therefore, the court, allowed the P's claim for RM1,779.20 as special damages, RM88,300 for the loss of use of the said car and interest as pleaded in the statement of claim.

Conclusion

[47] As such, this court finds that based on the oral evidence, the witness statements, circumstances of the transaction as well as the conduct of the parties, on the balance of probability the P has successfully proved its case against D. The court allows the P's claim with costs and interest.