

THE EASTERN CARIBBEAN SUPREME COURT  
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2020/0073

BETWEEN:

YAZAN AYOUB

CLAIMANT/ COUNTER DEFENDANT

AND

[1] HADEED MOTORS LTD

[2] HML AUTOHAUS LTD

[3] ANDREW HADEED

DEFENDANTS/ COUNTER CLAIMANTS

Appearances:

Mr. Sherfield Bowen for the Claimant/Counter Defendant

Mr. Clement E. M. Bird for the Defendants/Counter Claimants

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2023: October 9<sup>th</sup>

December 20<sup>th</sup>

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**DECISION**

[1] **Drysdale J:** This matter concerns a claim for breach of contract relating to the sale of a 2018 BMW X4 and an assault allegedly committed by the 3<sup>rd</sup> Defendant.

**Background**

[2] The Claimant's case is that in November 2018 he inspected and purchased a new luxury BMW vehicle from the Hadeed Motors Ltd car dealership. Upon delivery of the vehicle, he noticed several

issues which later led him to believe that the vehicle was not new. In January 2019 the Claimant returned the vehicle to the car dealership with a complaint that the vehicle was overheating and leaking coolant. The Claimant has filed a claim for breach of contract and contends that the Defendants misrepresented the state of the vehicle that was sold to him and further that they committed fraud when they sold him a used vehicle in place of the new vehicle he negotiated for.

- [3] The claim against the 3<sup>rd</sup> Defendant arises out of his personal conduct, namely menacing eye contact allegedly made by the 3<sup>rd</sup> Defendant and directed at the Claimant.
- [4] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Defence denying the allegations of the Claimant that they swapped the new vehicle he initially inspected for a used vehicle. They say the vehicle sold to the Claimant had limited prior use as it was used as a promotional tool in the dealership showroom and that the Claimant was aware of this when he purchased the vehicle. Additionally, the Defendants have counterclaimed for sums outstanding by the Claimant for the purchase, repair and storage of the vehicle.
- [5] The 3<sup>rd</sup> Defendant denies making menacing eye contact with the Claimant. He asserts that he had a passing interaction with the Claimant at a very preliminary stage of the purchasing process. He also denies the allegations that he committed any act of fraud or deceit against the Claimant.

### **The Claimant's Statement of Claim**

- [6] The Claimant's case is that in November 2018 he went to the 1<sup>st</sup> Defendant's premises and inspected new models of the BMW X4 with the intention of purchasing a car as a gift for his wife. He says that an agreement was made between him and the 1<sup>st</sup> Defendant for the purchase of a new BMW X4.
- [7] On 21<sup>st</sup> November, 2018 the Claimant concluded the sale and purchase agreement, at the premises of 1<sup>st</sup> Defendant the BMW X4, in consideration of \$160,000.00. He says that on the same day upon delivery of the vehicle he noticed several issues with the vehicle namely, that the odometer had a reading of 76 kilometers, the mats in the vehicle were emblazoned with the text "BMW X3" and that

all plastics were removed from the seats and visors. The Claimant immediately complained to the salesperson Mr. Dylan Simon who indicated that the odometer reading was occasioned by the movement of the vehicle from the port of St John's to the dealership, driving it to and from accessing petrol, and to and from the points of inspection, licensing, cleaning and detailing in preparation for delivery. Mr. Simon also indicated that he removed the plastic from the vehicle himself and told the Claimant that he would replace the mats in the vehicle with X4 mats by Christmas.

[8] It was an agreed term of that contract that the Claimant would trade-in his 2007 Black Honda CRV Sport Utility Vehicle, valued by the Defendant Hadeed Motors Ltd at \$15,000.00 as part of the purchase price, with a cash component of \$145,000.00 which was paid by the Claimant by way of five personal cheques as follows:

- |                                                        |              |
|--------------------------------------------------------|--------------|
| a. Cheque #00024 dated 21 <sup>st</sup> November, 2018 | \$100,000.00 |
| b. Cheque #00027 dated 30 <sup>th</sup> December, 2018 | \$10,000.00  |
| c. Cheque #00026 dated 31 <sup>st</sup> January, 2019  | \$10,000.00  |
| d. Cheque #00025 dated 28 <sup>th</sup> February, 2019 | \$10,000.00  |
| e. Cheque #00028 dated 30 <sup>th</sup> March, 2019    | \$15,000.00  |

[9] In January 2019 the Claimant's wife noticed the check engine light was illuminated with a caution message which stated "Engine Coolant level too low. Top up Coolant at the earliest opportunity. See Owner's handbook. Risk of engine damage. Attention: risk of scalding."

[10] The Claimant then went to the 1<sup>st</sup> Defendant's premises to report the problem and was told to take the vehicle to Caribbean Premier Motors Ltd, which is another car dealership owned by the 3<sup>rd</sup> Defendant. At Caribbean Premier Motors the vehicle was checked by an Engineer and was found to be leaking a green-coloured coolant which was flooding the passenger seat and pooling on the mats and on the floor.

[11] According to the Claimant, when the Engineer opened the door and observed the flooding, he blurted out, "O Shit, that again", the Engineer then turned to the Claimant and said, "I am going to have to remove the entire dashboard to get to that problem".

[12] At that moment, the Claimant recalled the issues upon delivery of his vehicle and formed the impression that the state and condition of the vehicle delivered to him was misrepresented and that the vehicle he now had was switched from the one initially shown to him.

[13] The Claimant went back to the 1<sup>st</sup> Defendant's showroom and spoke to and had heated discussions with the 1<sup>st</sup> Defendant's salesperson Mr. Simon regarding the switch of vehicles. After the heated exchange, and upon further negotiations, an agreement was made with the 1<sup>st</sup> Defendant for a 2019 BMW X5 in the place of the 2018 BMW X4 in consideration of a further payment of \$35,000.00.

[14] The Claimant agreed to these terms and conditions and upon agreeing, went home for his cheque book to finalize the transaction. Upon his return to make the payment Mr. Simon reported that the deal was no longer available.

[15] As a result, the Claimant demanded to see the 3<sup>rd</sup> Defendant, Mr. Hadeed, and was refused. The Claimant says he could see Mr. Hadeed at that point and that Mr. Hadeed made menacing eye contact with him.

[16] The Claimant then demanded the return of his vehicle, but the 1<sup>st</sup> Defendant detained the vehicle and denied him the opportunity to see it. The Claimant says that his subsequent and ongoing requests for the return of his vehicle were denied unless he made a payment to the 1<sup>st</sup> Defendant of upwards of \$5,000.00.

[17] The Claimant also says that Hadeed Motors Ltd made calls to the police to take the Claimant into custody alleging that the Claimant tampered with the vehicle.

[18] As a result of the foregoing the Claimant filed a claim in these proceedings asking for various forms of relief including relief for breach of contract, relief for rescission of the purported contract for purchase of the 2019 BMW X5, damages for misrepresentation and injunctive relief. The Claimant has also brought an action for assault against the 3<sup>rd</sup> Defendant.

## **The Defence and Counterclaim of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

[19] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case is that it was the 2<sup>nd</sup> Defendant who negotiated with and sold the Claimant the vehicle.

[20] The Defendants say that the parties initially agreed that the 2<sup>nd</sup> Defendant would present a warrant seeking waiver of taxes and duties and that there was no agreement to sell the vehicle for \$160,000.00. The list price of the vehicle with duty paid was \$218,385.00.

[21] The parties agreed that a waiver of duties and taxes would be sought, that proceeds of sale of Claimant's CR-V and a \$4,000.00 discount for prior limited use would apply and that upon the concessions being finalized the final price would be calculated.

[22] It was a term of the agreement that the Claimant would pay an initial deposit of \$100,000.00, with the balance to be paid in full upon calculation of the duty-free price. The deposit was paid and in good faith, the vehicle was released to the Claimant.

[23] The concessions having been obtained, the Claimant requested and on adjusted terms of the agreement was granted time to pay the outstanding balance of \$45,000.00 by a series of post-dated cheques.

[24] Four (4) post-dated cheques were provided. The final one for \$15,000.00 post-dated to March 2019 was dishonored. No replacement cheque has been provided and the sum remains unpaid.

[25] By this time, the Claimant had unsuccessfully sought to have his vehicle exchanged for the new 2019 model.

[26] The 2019 BMW X4's arrived early in January 2019. Shortly thereafter the Claimant contacted the salesperson Mr. Simon to complain of his vehicle's performance and to demand an exchange. In light of his complaints, he was advised that the vehicle would have to be inspected.

[27] On or around 21<sup>st</sup> January 2019, an anonymous caller to the Caribbean Premium Motors Ltd service center demanded that a 2018 X4 be replaced, without any diagnosis or inspection. The following day the Claimant contacted Mr. Simon, acknowledging he had made that call. He was again told that there could not simply be an exchange, but that strictly conditional upon a satisfactory diagnostic test, an arrangement might be possible accounting for differences in price.

[28] Although an exchange was initially contemplated this was not a possibility as the Engineer at Caribbean Premier Motors who conducted a diagnostic test on the vehicle concluded that it had been willfully tampered with. The only persons known to have access since delivery were the Claimant and his wife.

[29] Due to the tampering, a police report was made. The Claimant was invited to a meeting and the findings disclosed. He was informed that an exchange would not be approved in the circumstances. He was given the option of having the vehicle repaired at his cost. He agreed and the repairs were undertaken.

[30] The repairs were carried out by Caribbean Premium Motor technicians and the invoice presented to the Claimant in the sum of \$5,055.58, which he has failed to pay despite demand.

[31] The Claimant has also refused to collect his vehicle notwithstanding his being warned that a storage fee of \$50.00 per day would attach for every day it remained unclaimed from 16<sup>th</sup> May 2019 onwards. The Claimant has failed to make any payment on this storage fee.

[32] The 3<sup>rd</sup> Defendant says that he refused to see the Claimant when he visited his office in January 2019 and that he had absolutely no interaction with the Claimant.

[33] The Defendants say that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have no record of, nor need to engage in fraudulent, deceitful practices to its customers or the wider public, far less to have its officers or agents engage in acts of assault.

[34] In addition to the foregoing the Defendants say that the Claimant knew there were no X4 branded mats in stock upon release of his vehicle in November 2019 and that he requested X3 branded mats in the interim until the X4 mats arrived. The Claimant was also told of the vehicle's use as a promotional tool for which a \$4,000.00 discount would apply. The Defendants deny the claim that there was a swap of vehicles.

[35] As a result of the foregoing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants counterclaims for the following:

- a. \$15,000.00 due and outstanding on sale of a 2018 BMW X4 Identification #WBAXW1204J093093, Engine #A0131894 to Claimant on 18<sup>th</sup> December 2018;
- b. \$5,055.58 being the cost of repairs to the said vehicle;
- c. \$17,750.00 being storage fees accumulated from 16<sup>th</sup> May 2019 to 5<sup>th</sup> May 2020;
- d. \$50.00 per day thereafter as storage fees until removal of the vehicle.
- e. Attorney's collection costs & ABST of 11.5% of the sums listed (a) to (d) above;
- f. Attorney's Fixed Fees on issue of this Counterclaim;
- g. Interest;
- h. Legal costs as prescribed;
- i. Further and such other relief as the Court may deem just.

### **The Defence to Counter Claim**

[36] The Claimant in its Defence to the Counterclaim asserts that Hadeed Motors Ltd is properly joined in these proceedings as it treated with Hadeed Motors Ltd regarding the negotiation, sale and purchase of the motor vehicle through its representative Dylan Simon.

[37] The Claimant asserts that at no time did he discuss or agree to purchase a "limited used" vehicle. In response to the Defendant he says that the only agreement between the parties was that the Claimant/Counter Defendant would purchase a brand-new BMW X4 as was shown to him and which he inspected in the showroom and that the vehicle would be sold to the Claimant/Counter Defendant for \$160,000.00 which would be paid by the trade in value of the Claimant's/Counter Defendant's CR-V, valued at the time at \$15,000.00, plus \$145,000 in cash. He says that it was agreed that the

Claimant would make a \$100,000.00 deposit on 21<sup>st</sup> November 2018 and would pay the balance of \$45,000.00 by postdated cheques for settlement on a monthly basis. In this regard four additional personal cheques were issued.

### **The Claimant's Case**

[38] The Claimant's amended witness statement<sup>1</sup> was admitted as his evidence in chief.

[39] During cross examination the Claimant stated that it was he who proposed the price of \$160,000.00 for the vehicle after he was told another price during the negotiations. He also admitted that the waiver for duty would be sought by the dealership and that upon approval the price would be \$160,000.00.

[40] Under cross examination the Claimant contradicted his witness statement. The Claimant stated that when he inspected the vehicle at the dealership, he did not read the odometer to check the mileage of the vehicle. He also said he did not pay attention to the mileage as the vehicle was new and that on 21<sup>st</sup> November, 2021 he took possession of the vehicle and drove it to his home. He said that upon reaching his home he observed that the odometer read sixty-seven (67) kilometres and that the mats in the vehicle read "X3", at that point he called Mr. Simon to complain about what he observed.

[41] A photograph taken of the odometer of the vehicle was entered into evidence showing that the mileage on the vehicle at the point when the Claimant took the vehicle to his home was sixty-seven (67) kilometres.<sup>2</sup> Having been shown the picture under cross examination the Claimant accepted that he never saw a "0" mileage reading on the odometer.

[42] He said that on 19<sup>th</sup> November 2019 when he inspected the vehicle, he did not look for mats in the vehicle and so did not notice if X3 mats were on the floors.

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<sup>1</sup> Page 12 of TB 2

<sup>2</sup> Page 57 of TB1

[43] The Claimant denied that he agreed to have the Defendants fix the vehicle and he also says that he never agreed to pay the cost of repairs done to the vehicle.

[44] As it relates to his CR-V the Claimant said that the vehicle was never sold but that it was traded in for \$15,000.00 and that this price was applied to the price of the BMW he was purchasing.

[45] At trial the Claimant indicated that cheque #00028 dated 30<sup>th</sup> March, 2019 for \$15,000.00 was not paid by the Claimant's bank on account of the Claimant instructing his bankers to stop the payment.

[46] In his amended witness statement Mr. Ayoub stated at the time he was assaulted by Mr. Hadeed he was being told to leave the premises of Hadeed Motors Ltd by Mr. Simon. He said that when he looked at Andrew Hadeed's mannerism and facial expression, heard the anger in his voice and the coldness of his expression, he felt a sense of what he described as "imminent apprehension of fear". He said that after this Mr. Simon held him by the shoulder and led him unto the main road.

### **The Defendants Case**

[47] The Defendants' first witness was Mr. Lynroy Frederick, his witness statement<sup>3</sup> was admitted as his evidence in chief.

[48] Mr. Frederick testified that at the relevant time he was the Head Technician and that there was a Master Technician at Caribbean Premium Motors (CPM). The Master Technician instructed Mr. Frederick to remove the dashboard from the Claimant's car and instructed him on what to do with the vehicle. In his witness statement, he said that he conducted an extensive diagnostic check and concluded that it had been tampered with by someone who interfered with the heater core coolant hose clip.

[49] Mr. Frederick also acknowledged the presence of a computer in BMW vehicles, highlighting its data collection capabilities. The witness also admitted that the computer in the vehicle is linked and interacts with the computer at CPM and stores information in relation to the vehicle.

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<sup>3</sup> Pg 28 at TB2

[50] Mr. Andrew Hadeed was the Defendants' second witness, his witness statement was entered as his evidence in chief.<sup>4</sup>

[51] Mr. Hadeed maintained the Defendants' stance on the new status of the vehicle to include that every vehicle would have mileage (km) on them, none would ever show "0" mileage. The "0" mileage is a function of the Antigua and Barbuda Transport Board, not a dealership. He stated that the 60 odd km mileage on the meter was because of the limited use of the vehicle from test drives for potential customers, standard movement during shipment and as a result of the vehicle being driven for fueling and cleaning purposes.

[52] Mr. Hadeed indicated that neither the Defendants nor their mechanics would have repaired the vehicle unless so approved by the Claimant. He said he refused to see the Claimant when he came to see him, however he had never used indecent language nor set eyes on the Claimant that day. He also asserted that the Defendants did not sell the Claimant a used car.

### **Issues**

[53] From the evidence and pleadings filed it is apparent that there are seven issues this court must address, namely:

1. Whether the First Defendant is an appropriate party to these proceedings?
2. What were the contract terms agreed between the parties as it relates to the purchase of the 2018 BMW X4 vehicle?
3. Whether there has been a breach of the implied condition of merchantable quality?
4. Whether there was an agreement to sell the Claimant a new BMW 2019 X5 model which was subsequently reneged by the Defendants?
5. Whether the Third Defendant committed an assault on the Claimant?
6. Whether the Counterclaim of the Defendant is viable?
7. What remedies are the successful party entitled to?

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<sup>4</sup> Pg 23 at TB 2

## **ANALYSIS AND LAW**

### **Whether the First and Second Defendants are appropriate parties to these proceedings**

[54] The Defendants contend that the First Defendant is an inappropriate party as 'it was the Second Defendant who negotiated with and sold the Claimant the vehicle.' The payments made to the First Defendant and accepted by the Second Defendant create a discrepancy in the Defendants' argument. If the Second Defendant is claimed to be the proper party, the acceptance of several post-dated cheques issued by the Claimant to the First Defendant which were cashed for several months by the Defendants until the final payment was stopped by the Claimant seems contradictory. Further, an examination of the company documents related to the First Defendant reveals that the main type of business is 'dealers in cars.' Auto dealers are legally authorized to sell vehicles directly to customers. This aligns with the payments being made to the First Defendant. Given the nexus of authorized vehicle sales and payment, I find that there is a sufficient legal basis for the First Defendant to remain as a party to these proceedings.

[55] Whilst the Defendants raised the issue of the First Defendant being an appropriate party in their pleadings, it was only subsequently at the evidentiary stage and in the witness statement of the Third Defendant for and on behalf of the defendants was the issue of whether the second defendant is an appropriate party was raised. The defendants at paragraph 1 of their defence and counter claim pleaded that:

"Save and except that the 3<sup>rd</sup> Defendant and one other are the only common directors and shareholders of the Defendant companies, Paragraph 1 of the Statement of Claim is admitted. The 1<sup>st</sup> defendant is unnecessarily joined herein, as it was the 2<sup>nd</sup> Defendant who negotiated and sold the claimant the vehicle."

[56] Subsequently in the witness statement of the 3<sup>rd</sup> Defendant for and on behalf of the Defendants it was stated that:

"In respect of the claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants I repeat that the first defendant (HML) is unnecessarily joined to this action as the car was sold by an associate company HML Autohas (Autohas) which is the specific dealership for

BMW products in Antigua. If the Claimant is adamant that he dealt with HML then it would appear that Autohas is itself irrelevant to the claim”

[57] The Civil Procedure Rules mandate both parties to disclose all relevant facts that they intend to rely upon to dispute<sup>5</sup> or support<sup>6</sup> the claim. This requirement aims to prevent ambush tactics and ensure clarity about the case at hand. Consequently, the Defendants cannot introduce the argument that the Second Defendant is inappropriate at the evidentiary stage it not having been specifically pleaded earlier.

**What were the contract terms agreed between the parties as it relates to the purchase of the 2018 BMW X4 vehicle**

[58] The main point of contention of the Claimant is that the vehicle received by him did not align with the contract and constituted a breach of contract. Fundamental to this issue is the terms of the contract and whether the agreement for sale related to a new or used vehicle. Given the absence of a specific written contract regarding the purchase and terms of the vehicle, the determination of any breach must be made through careful consideration of all the evidence in this case.

[59] The Claimant contends that at all material times he purchased a new vehicle. Whilst he admitted that he had not previously purchased a new vehicle he stated that it was his expectation that the mileage on a new vehicle would either be 0 or a low single digit number. He agreed that there would be some usage of the vehicle in driving it to and from the port and for cleaning and refueling thereby supporting the idea of limited mileage.

[60] Although the Defendants in written communication prior to legal proceedings suggested that the vehicle was used, at trial the Third Defendant clarified the vehicle was a new vehicle with limited usage. He suggested that the vehicle had been used for promotional events and for test driving. The Defendants dispute the suggestion that they sold the Claimant a used vehicle.

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<sup>5</sup> CPR 10.5(1)

<sup>6</sup> CPR 8.7

[61] Despite the emphasis on mileage during cross examination, the issue of mileage is not the determining factor in categorizing a vehicle as new or used. This is because there isn't a specific mileage threshold that defines a vehicle as used. Relying on mileage alone is subjective and can lead to inconsistencies as demonstrated in this case where the Claimant vacillated in his opinion of what mileage would constitute as a new vehicle. An examination of the title and ownership records provides a clearer and more reliable basis for determining whether a vehicle is new or used.

[62] The Antigua and Barbuda Transport Board Vehicle Registration Certificate issued on 21<sup>st</sup> November 2018 lists the sole owner as the Claimant with the First Defendant having a security interest. Further the mileage is listed as 0, which the Court accepts is an administrative function at that agency to confirm that the vehicle is a new vehicle. The absence of evidence of a prior owner of the vehicle is a clear indication that the vehicle cannot be categorized as a used vehicle. Therefore, the parties had the mutual intention of purchasing and selling a new vehicle.

#### **Whether there has been a breach of the implied condition of merchantable quality**

[63] It having been established that the parties intended to contract for the sale and purchase of a new vehicle, the focus on establishing a breach of contract would require the claimant to demonstrate that he obtained a vehicle that was not fit for use.

[64] The Claimant's evidence is that a mere two months after purchase that the check engine light on the vehicle's dashboard was illuminated with the message '[e]ngine coolant too low. Top up coolant at the earliest opportunity... Risk of engine damage. Attention risk of scalding.' The Claimant further avers that he telephoned the First Defendant and was advised to fill the radiator with coolant and water and bring the vehicle in. He complied with the instruction. On arrival at the 1<sup>st</sup> Defendant he was directed to the service department wherein it was observed that the coolant was leaking from the vehicle like a river. The internal floor mats were also saturated with coolant and water mixture.

[65] On 23<sup>rd</sup> January 2019 a work order was opened in relation to the subject vehicle. The repairs were eventually completed some 21 days later on 14<sup>th</sup> February 2019 and required the complete removal and eventual reinstallation of the dashboard assembly to deal with the issue. The conclusion arrived

at by the Defendants was that the heater core coolant hose clip was tampered with which caused the coolant to leak on the passenger floor. They attributed this tampering to the Claimant. The issue of tampering is a serious allegation and thereby necessitates that this be prioritized over the issue of merchantable quality.

[66] The issue of tampering is significant as if proven it would void the warranty of fitness and sale. This is a serious allegation, and it is expected that aside from the damaged hose clip the Defendants would have presented more cogent evidence of tampering. I take note of the evidence of the Defendants' witness Lynroy Frederick a senior BMW mechanic who has a wealth of experience with BMWs, that BMW vehicles are equipped with advanced computer systems that can monitor and record various aspects of the vehicle's performance. This technology allows the computer to log actions, modifications and or any relevant data providing a comprehensive record when accessed. The witness also confirmed that the Defendants have access to the computer and can access the relevant data in relation thereto. Given BMW's sophisticated computer systems, it is reasonable to expect that the opening of the vehicles dashboard would trigger a record in the associated computer. This record could be accessed by the Defendants to substantiate their claim that the vehicle was opened, and work done by someone not associated with them.

[67] The discrepancies in the record provided by the Defendants such as the inaccurate delivery date and mileage underscore the significance of accessing the vehicle's computer data.<sup>7</sup> The absence of these records which could have substantiated the serious allegation of tampering coupled with the failure to provide any witness that could counter the claimant's evidence that the chief engineer made the statement 'oh shit not that again' when he observed the vehicle leads to the natural inference that the defendants had experienced this issue with this vehicle which they had repaired. Further this vehicle being a new vehicle but with limited use underscores the opportunity for the Defendants to address any potential issues before selling it to the Claimant. Therefore, I find that Defendants have not proved their assertion of tampering by the Claimant.

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<sup>7</sup> The record generated by the defendants identify the delivery date as 18<sup>th</sup> December 2018 and the odometer reading as 1523 miles. The vehicle was delivered on 21<sup>st</sup> November 2018 and the number of miles on the odometer suggested less than 300 miles.

[68] Section 16 of the **Sale of Goods Act**<sup>8</sup> establishes that there is an implied condition that goods supplied under the contract are of merchantable quality. Specifically, section 16 of the Act reads:

16. (1) Subject to this Act and to any other enactment, 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-
- (a) Where the seller sells goods in the course of a business, there is an implied condition that goods supplied under the contract are of merchantable quality, but there is no condition
    - (i) as regards defects specifically drawn to the buyer's attention before the contract is made; or
    - (ii) as regards defects which an examination ought to have revealed, where the buyer examines the goods before the contract is made.'

[69] There is no statutory definition of the term merchantable quality. In the absence of a definition the common law is often relied on to determine the meaning. The concept of merchantable quality has been a recurrent issue leading to a plethora of cases aimed at providing clarity on the definition and application. The judgments cited in this case, with statutory provisions akin to the Antigua Sale of Goods Act offer a solid foundation for addressing the issue of merchantable quality. In the case of **David Jones v Willis**<sup>9</sup>, the claimant purchased a pair of shoes from the defendant who was the retail distributor and not the manufacturer. Whilst walking the heel of the shoe came off causing the claimant to fall and sustain injury. It was determined that the shoes were unmerchantable and didn't fit the intended purpose.

[70] Additionally in the case of **Grant v Australian Knitting Mills**<sup>10</sup> the issue of what constituted merchantable quality was explored. The claimant purchased some woolen underwear from the defendant. The claimant wore the underwear and developed a rash which developed into dermatitis. This was a direct result of small particles of sulphur in the wool from which the underwear was made.

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<sup>8</sup> Cap 393

<sup>9</sup> (1934) 52 CLR 110

<sup>10</sup> [1936] AC 85

The claimant sued the defendant alleging that the goods were not of merchantable quality. The court found that the article sold was not "merchantable" since it was not fit for the purpose for which it was required.

[71] Subsequently in the case of **Henry Kendall & Sons (A Firm) v William Lillico & Sons Ltd and Others; Holland Colombo Trading Society Ltd v Grimsdale & Sons Ltd (Consolidated Appeals); Grimsdale & Sons Ltd v Suffolk Agricultural Poultry Producers Association**<sup>11</sup>, Lord Reid, after a detailed consideration of the term merchantable quality expressed by several often-quoted authorities expressed:

"What subsection (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 goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description.' This is an objective test: 'were of no use for any purpose ...' must mean 'would not have been used by a reasonable man for any purpose ...

Lord Reid further expressed:

'That would produce a sensible result. If the description in the contract was so limited that goods sold under it would normally be used for only one purpose, then the goods would be unmerchantable under that description if they were of no use for that purpose. But if the description was so general that goods sold under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes: if the buyer wanted the goods for one of those several purposes for which the goods delivered did not happen to be suitable, though they were suitable for other purposes for which goods bought under that description are normally bought, then he cannot complain."

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<sup>11</sup> [1969] 2 A.C. 31

[72] In determining whether an article is of merchantable quality is contingent upon specific facts and circumstances surrounding the case. This was endorsed by the case of **Cehave N.V. v Bremer Handelgesellschaft m.b.h. The Hansa Nord**<sup>12</sup> the Court established:

‘That the issue of whether or not an article is of merchantable quality is fact dependent. However as demonstrated in **Rogers v Parish** and **Bernstein v Pamson Motors**...the fact that a defect may be repairable or is under warrant does not automatically mean that the article is of merchantable quality. Where the defect is sufficient and/or significant degree then the item can be viewed as being not of merchantable quality by the mere fact that defects are manifest at the time of delivery does not automatically render the vehicle as being not of merchantable quality and the factors that must be considered and the standards that are to be expected are closely related to the market at which the vehicle is aimed.’

[73] Additionally, the case of **Rogers v Parish**<sup>13</sup> provides helpful insight in understanding the implied condition of merchantable quality. A brief factual and legal summary of the case is as follows. In November 1981 the plaintiffs bought from the defendants for about £16,000 a new Range Rover, a car which, if not at the top end of the market, was well above the level of an ordinary family car. After a few weeks' use, the Range Rover proved unsatisfactory and was replaced with another. The replacement Range Rover faced multiple problems including faulty oil seals and defects in the engine, gearbox and bodywork. Despite attempts at repair problems with the engine and gearbox persisted. In May 1982, after the Range Rover had been driven for about 5,500 miles, the plaintiffs rejected it on the grounds that it was not of merchantable quality. On appeal the court found that in relying on the fact that the defects could be repaired and had not destroyed the workable character of the car, the judge had applied the wrong test. In considering whether a car was of merchantable quality, the court had to consider not merely the buyer's purpose of driving the car from one place to another, but of his doing so with the appropriate degree of comfort, ease of handling and pride in the

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<sup>12</sup> 1975 3 W.L.R. 447 at 468

<sup>13</sup> [1987] 2 All E.R. 232

vehicle's outward appearance. On the facts and bearing in mind the price paid for the car and its description as 'new' and as a 'Range Rover', which would give rise to expectations above those relating to an ordinary family car, it could not be said that the car was of merchantable quality.

[74] Extrapolated from the above authorities, it is expected that a new vehicle of merchantable quality would be free from defects, would operate as expected and remain in good condition for a reasonable duration. According to the work order the issue took 21 days to resolve and was relatively expensive, the repairs exceeding the sum of \$5,000.00<sup>14</sup>. Further the testimony of the Defendant's witness suggests that both the Chief/Master Engineer and he, a senior engineer collaborated to and jointly worked on the vehicle to resolve the issue. The involvement of two senior engineers implies a significant level of complexity in addressing the vehicle's issue. More importantly the problem with the vehicle is directly linked to the engine's capability of the vehicle to stay cool, avoid overheating and operate safely. Given that the vehicle was a newly acquired vehicle from the 2018 fleet, I am of the considered opinion that such problems should not have arisen. Furthermore a 21-day resolution time and such costs indicate a substantial issue with the vehicle. Moreover, in accordance with the principles extrapolated from **Rogers v Parish (supra)**, the repairability of defects doesn't automatically establish that the vehicle meets the implied condition of being merchantable quality. The evaluation of merchantable quality extends beyond the repairability of defects and these factors will be explored further.

[75] In considering this issue I also accept the Claimant's evidence that the then chief engineer made a certain statement in the Claimant's presence which I accept is an acknowledgment of a recurring issue with this vehicle. Considering nature and history of the problem, it leads to the belief that this vehicle did not meet the standard of merchantable quality.

[76] Determining a vehicle's fitness for purpose goes beyond drivability. Factors such as comfort, handling ease and reliability contribute to meeting the standard of being fit for purpose. BMW vehicles are renowned not just for their luxury but for their reputation for reliability. It is therefore not uncommon that many people such as the Claimant would be willing to invest more than the average cost for the assurance of safety and comfort associated with BMWs. Certainly, a buyer investing in

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<sup>14</sup> Invoice from Caribbean Premium Motors Ltd dated 14<sup>th</sup> February 2019 at Page 94 TB 1

a top end vehicle has a reasonable expectation of receiving commensurate value of the significant expenditure. Thus, the reputation of BMWs for luxury and reliability makes it notable that an issue with the engine, crucial to effective operation is the complaint in these proceedings. Particularly as the same issue was identified and remediated without the Claimant's knowledge.

[77] The Claimant's concerns about a warning regarding the engine and a significant coolant leak, akin to a river during transport, are valid indicators affecting reliability and fitness for purpose. Understandably the Claimant raised safety and comfort concerns as impacting his willingness to continue to drive the vehicle which I accept as valid. I am also of the considered belief that had the Claimant been aware of the prior engine troubles this would have significantly influenced the purchase price and perception of the vehicle's technical condition.

[78] Although the Claimant admittedly was aware that the vehicle was the last in stock and I believe accepted a discount for its limited use this does not waive the Claimant's right to expect a vehicle without significant defects. Further there is no indication that the Claimant was told of any prior issues or defects associated with the vehicle. Other than a cursory viewing of the vehicle there is no evidence that the Claimant conducted a thorough inspection or test drive thereby limiting the opportunity to identify any potential defects. In any event the case of **Grant v Australian Knitting Mills Ltd**<sup>15</sup> not only established that goods must be fit for the ordinary purposes for which the goods are used but also emphasized that even in circumstances where the buyer has examined the goods, there still is an implied condition that the goods are reasonably fit for the purpose for which they are commonly sold. Lord Wright expressed that:

"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."

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<sup>15</sup> (1936) AC 85

[79] Further it being established that the vehicle was sold as a new vehicle, the principle of *caveat emptor* typically associated with used items, where the buyer accepts the item in its current condition without warranties, is not applicable in a case of a new vehicle case where there is an expectation that the vehicle is free from significant defects.

[80] Having considered all of the above factors, I am of the considered opinion that the implied condition requiring the motor vehicle to meet the standard of merchantable quality was breached.

**Whether there was an agreement to sell the Claimant a new BMW 2019 X5 model which was subsequently reneged on by the Defendants?**

[81] The parties agree albeit for different reasons that the Claimant no longer desired to continue using the BMW X4, the Claimant because of perceived significant problems and the Defendant because of the receipt of a newer class of model BMWs. However, the Defendant did not at trial challenge the assertion that an agreement was arrived at for the Claimant to pay the sum of \$35,000.00 for a new BMW X5 vehicle. According to the legal principle in the case of in **Browne v. Dunn**<sup>16</sup> if there is contradictory evidence it is crucial that this evidence be presented to the witness in cross examination. This allows the witness an opportunity to respond or comment on any inconsistencies. In that case Lord Herschell stated as follows:

“.....it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might be able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to

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<sup>16</sup> [1894] H.L. 67

him; and, as it seems to me, that it is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.”

[82] Despite the parties reasoning, the uncontroverted evidence is that there was an agreement for the Claimant to purchase a new vehicle for the additional sum of \$35,000.00 which was subsequently reneged by the Defendants when the Claimant attended the offices to pay. The 3<sup>rd</sup> Defendant in his capacity as manager of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ subsequent decision to refuse the Claimant the opportunity to trade in his vehicle and pay the agreed sum constitutes a breach of contract.

### **Whether the 3<sup>rd</sup> Defendant committed an assault on the Claimant**

[83] An assault is a purposeful and direct threat made by one person to another, the effect of which is to put the latter in reasonable fear or apprehension of imminent physical or offensive contact with his person.

[84] The Claimant’s pleaded case is that he demanded to see the Third Defendant who consistently refused. On the final occasion the employee conveyed the Third Defendant’s unwillingness to speak with the Claimant however the Third Defendant made menacing eye contact with him from which he imminently felt a sense of apprehension and fear.

[85] Upon an analysis of the evidence, I do not find that any assault was committed on the Claimant. The Claimant does not appear to be easily intimidated. Indeed, the Claimant’s entire evidence and demeanor suggests that he is a strong and strong-willed person. He is also an experienced businessman who by the nature of his business would be accustomed to dealing with irate customers as he clearly was that day. In the context of his character and professional background a mere look would not likely be sufficient to intimidate him.

[86] Furthermore, there is no evidence of direct threats or comments made targeting the Claimant personally which could give rise to fear of looming danger. In any event the Claimant’s evidence regarding this issue is found not to be credible in this regard and the Third Defendant’s evidence is preferred. Therefore, the cause of action of assault has not been satisfactorily proven before this Court.

### Whether the counter claim of the Defendants is viable?

[87] Given the Court's prior findings of breach of contract related to the sale of the vehicle not meeting merchantable quality, the breach of contract for the sale of a new vehicle the defendant's counterclaim of the outstanding balance, repair costs and storage fees lacks any viability.

### Remedies

[88] The compensatory principle for breach of contract aims to put the innocent party in the position he would have been in if the contract had been performed. In this case the Claimant paid the sum of \$145,000.00<sup>17</sup> for a vehicle with a purchase price of \$160,000.00, a claim for the full \$160,000.00 is excessive. A more reasonable and tenable claim is for the actual amount paid, which is \$145,000.00 reflecting the actual loss suffered by the Claimant.

[89] The Claimant also successfully proved that in addition to him not being provided with a merchantable vehicle that there was a subsequent agreement to purchase a new vehicle which was breached. Whilst it is acknowledged that there is also a breach of contract for the agreement to purchase a new BMW X5 the potential for double recovery is significant given that an award has already been made of the recovery of all monies paid for the vehicle and that no further consideration was made. Thus, a nominal sum as outlined in the principle of **Carlton Greer V Alstons Engineering Sales and Services Ltd.**<sup>18</sup> in the sum of \$2,000.00 is awarded as symbolic recognition of this breach.

### Order

[90] In light of the foregoing, it is hereby ordered as follows:

- a. The Claimant is awarded the sums of \$145,000.00 and the sum of \$2,000.00 making in the aggregate the sum of \$147,000.00 for breach of contract.

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<sup>17</sup> The Claimant stopped payment of the final payment of \$15,000.00

<sup>18</sup> [2003] UKPC 46

- b. The Defendants shall pay the Claimant prescribed costs pursuant to CPR65.5
- c. The Defendants counter claim is dismissed.
- d. Interest.

**Justice Jan Drysdale**

**High Court Judge**

**By the Court**

**Registrar**