

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2020/0149

BETWEEN:

GENEVA GEORGE

Claimant

and

ANTIGUA MOTORS LIMITED

Defendant

Appearances:

Mr. Lawrence Daniels for the Claimant
Mr. Kwame L. Simon for the Defendant

2023: March 22
May 11

JUDGMENT

[1] **BYER J:** By Claim Form filed on the 21st May 2020 the Claimant brought this action against the Defendant seeking the following relief:

- (1) Damages to be assessed for negligently selling the Claimant a defective motor car A47261 and/or failing to replace the Claimant's vehicle with a new vehicle within the warranty period.
- (2) Damages for a breach of contract and/or refund of the purchase price in the sum of \$74,800.00.
- (3) Prescribed costs.
- (4) Interest at a rate of 5% per annum pursuant to Section 27 of the Eastern Caribbean Supreme Court Rule Cap 143.
- (5) Any other relief this Honourable Court deems fit.

[2] The claim was supported by the witness statement of the Claimant filed on 17th December 2021.

- [3] The Defendant filed a defence on the 22nd June, 2020 and filed the witness statements of Paul Ryan and Garfield James on 21st January 2022 and 8th April 2022, respectively.
- [4] The trial of the matter came on for hearing on 22nd March 2022 with the Claimant, Paul Ryan and Garfield James providing evidence to the court.
- [5] From the evidence and pleadings filed it is apparent that there are five issues which this court must address:
- (1) Was there attached to the contract an implied condition as to merchantable quality;
 - (2) Was the vehicle of merchantable quality;
 - (3) Whether any such condition amounted to a warranty under the Sale of Goods Act, Cap 393;
 - (4) Did the Claimant reject the vehicle within a reasonable time to avail herself of the right to repudiate the contract;
 - (5) What if any remedy is available to the Claimant.
- [6] Having heard the evidence and having read the pleadings of both parties, this court accepts the following as the necessary background to the claim:
- (1) The Claimant entered into an agreement with the Defendant to purchase a 2016 Honda HR-V at the purchase price of EC\$74,800.00.
 - (2) The Claimant then secured a loan at the First Caribbean International Bank which covered all expenses for the purchase of the motor vehicle. The Claimant purchased the vehicle on 2nd December 2016 and took possession of same upon full payment.
 - (3) The bank draft used to pay for the Claimant vehicle was negotiated on 16th December 2016 at which time the Government of Antigua and Barbuda implemented a three-day tax relief by reducing the Antigua & Barbuda Sales Tax rate from 15% to 5% as is customary during the holiday season. As a result, the sale price of the vehicle was reduced from EC\$74,800.00 to EC\$66,907.37¹ and the Defendant refunded the Claimant the difference of EC\$7,892.63 on 28th December 2016.²
 - (4) Within a year of purchase, namely on 9th October 2017 the Claimant reported to the Defendant that she observed rusting to the right front fender, door hinges and under the bonnet of her vehicle. In response

¹ ABST invoice dated 16th December 2016 reducing the sale price of the vehicle from \$74,800.00 to \$66,907.37 at page 13 TB 3.

² Payment Voucher dated the 28th December 2016 confirming refund of \$7,892.63 to Geneva George at page 14 TB 3.

to the Claimant's report and in accordance with the warranty³ coverage the Defendant inspected the vehicle and undertook repairs and replacement as needed and the motor vehicle was returned to the Claimant.

- (5) The rust later re-appeared and on 27th September 2018 the Claimant made a further report to the Defendant of rusting to the left front fender, tailgate, and inner front wheel panel of her motor vehicle, however the Claimant declined the Defendant's offer to initiate further rust repairs.
- (6) On 30th January 2019 the Claimant reported rusting to the lower radiator support, the hood panel and the right front fender which had reportedly previously been replaced. In view of the reoccurring rust and in an effort to find a solution, the Defendant escalated the issue with the vehicle's manufacturer, American Honda.
- (7) By letter dated 21st May, 2019⁴ the Claimant wrote to Mr. Paul Ryan, the Defendant's General Manager, documenting her concerns regarding the vehicle and requesting a refund of the purchase price or replacement Honda HR-V.
- (8) By letter dated 15th July 2019⁵ American Honda responded to the Claimant's request for a refund or a replacement vehicle by offering to extend the warranty coverage for the replacement and/or repair of rust affected parts on the Claimant's vehicle for a period of eight years from the date of purchase. On 21st October 2019, the Claimant accepted this offer by signing a warranty extension agreement⁶.
- (9) Having however not come to a final resolution by the extension of the warranty period American Honda by letter dated 29th January 2020⁷, wrote to the Claimant offering to pay 3 months of the Claimant's car note beginning in January 2020, with payments to be made by the Defendant on behalf of American Honda. On 12th March 2020, the Claimant signed the letter accepting this offer.⁸ The Defendant made car note payments for the months of January and February 2020 directly to the Claimant.
- (10) In March 2020, Mr. Ryan met with the Claimant on behalf of American Honda to explore her interest in obtaining a replacement HR-V. The

³ Page 15 of TB 3

⁴ Pages 8 and 9 of TB 3

⁵ Page 37 TB 3

⁶ ibid

⁷ Page 38 TB 3

⁸ ibid

parties could not reach an agreement and the final car note payment was made to the Claimant in June 2020.

(11) Prior to the final car note payment and on the instructions of American Honda, Mr. Ryan e-mailed the Claimant on 7th May 2020 to propose a trade-in of her vehicle which was then valued at EC\$51,127.00 for a new 2020 Honda HR-V valued at EC\$99,500.00.⁹ Under the proposed arrangement, the Claimant would be responsible for 40% of the trade in difference in the amount of EC\$19,349.20 with American Honda responsible for the remaining 60% of the trade in difference in the amount of EC\$29,023.80. Further, American Honda would cover 50% of the Claimant's bank fee associated with acquiring the new vehicle and the full cost of licensing the vehicle. The Claimant rejected the offer and requested direct dialogue with American Honda.

(12) On the 21st May 2020, the Claimant commenced these proceedings against the Defendant for damages for breach of contract and a refund of the purchase price on the basis that the Defendant had sold her a defective vehicle. The Defendant maintains that the 2016 Honda HR-V sold to the Claimant in December 2016, was new and fit for purpose and that the rust perforation sustained to certain parts of the Claimant's vehicle since its purchase, was and continues to be covered by the extended warranty signed by the Claimant and which provides for repair and/or replacement of affected parts free of charge for a period of 8 years from the date of purchase which meant that the same would expire in 2024.

[7] The court will now consider whether the Claimant has made out her case at all and if so to what extent.

Was there attached to the contract an implied condition as to merchantable quality.

[8] In Antigua and Barbuda, the commercial sale of goods is governed by the **Sale of Goods Act, Cap. 393**, ("SGA"). Section 3(1) of the SGA defines a contract for the sale of goods as a contract "whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".

[9] Section 3(3) of the SGA defines a sale as "where under a contract of sale the property in goods is transferred from the seller to the buyer..." Under the SGA "goods" include all chattels personal other than things in action and money.

[10] Where parties to a commercial contract have not made provision for certain essential terms of the contract, the SGA contains default, or fallback, provisions which will be implied into the contract. In the case at bar, the parties entered into a commercial contract for the sale of a 2016 Honda HR-V, but there were no express

⁹ Email dated 7th May at page 39 TB 3

terms governing the sale except for the core terms of price, payment and delivery. Importantly, there were no express terms in the Purchase Agreement or the manufacturer's warranty relating to merchantable quality. In this instance, it is the SGA that must be considered to determine whether it imposed implied terms on the parties in the absence of express terms in their commercial contract.

- [11] Under section 16(1)(a) of the SGA, provision is made for the implication of terms regarding quality and fitness and states that " ...where the seller sells goods in the course of a business, there is an implied condition that goods supplied are of merchantable quality..."
- [12] In applying section 16(1)(a) of the SGA to the present case, two conclusions may be drawn. Firstly, that the Defendant, as the seller, is under a duty to provide the Claimant with a vehicle of merchantable quality. Secondly, the Defendant's duty is classified as a condition which is implied into the commercial contract.

Was the vehicle of merchantable quality

- [13] Having found that there was an implied condition that the vehicle was to be of merchantable quality, the court must now address the issue of whether this was the state of the vehicle when it was delivered to the Claimant. A definition of the term 'merchantable quality' would be an appropriate place to start.
- [14] In the Australian case of **Grant v Australian Knitting Mills Ltd. and Others**¹⁰ the Privy Council examined the meaning of "merchantable". The action was brought under a provision of the South Australia Sale of Goods Act which is identical to section 14 of the UK Sale of Goods Act 1893 upon which the defendant in the case rested their defence.¹¹ It must be noted that there is no difference between the meaning of the word "merchantable" as used at common law and in the UK 1893 Act. Lord Wright writing for the court stated:

"...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."
(my emphasis added)

- [15] The House of Lords in **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**

¹⁰ [1936] A.C. 85

¹¹ It is important to note that the sale of goods legislation enacted in the various jurisdictions of the Commonwealth Caribbean including Antigua is based closely on the UK Sale of Goods Acts of 1893 and 1979. Section 16 of the Antigua Sale of Goods Act is similarly worded to Section 14 of the UK Sale of Goods Act.

Producers Association¹², cited with approval the definition of “merchantable quality” in **Cammell Laird & Co Ltd v The Manganese Bronze & Brass Co Ltd**¹³ and **Grant v Australian Knitting Mills**¹⁴. Lord Reid, on behalf of the court, reformulated the definition of “merchantable quality” to now mean:

“...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’**” (my emphasis added)

Lord Reid explained further that:

“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.”

- [16] In **Debarros v Quality Auto Sales Ltd**¹⁵ the plaintiff, B, purchased from the defendant, Q, a Suzuki motor car, which B later discovered to have spots of rust on its exterior and a rear window which leaked when it rained. In deciding whether or not the car was of merchantable quality within section 16(b) of the Bahamas Sale of Goods Act, Ch 337¹⁶, Gonsalves-Sabola CJ, in the absence of any definition of ‘merchantable quality’ in the Bahamian Act, adopted the statutory definition approved by Lord Denning in **The Hansa Nord**¹⁷. In the instant case, no fault had been found with the car in ‘locomotive respects: the engine was good’, and the vehicle ‘ran flawlessly as a motor vehicle’. Referring to a previous judgment under the UK Sale of Goods Act, where a Range Rover was held not to be of merchantable quality, Gonsalves-Sabola CJ stated as follows:

“Mustill LJ [in deciding a previous case concerning the unmerchantable quality of a Range Rover car] was dealing with a motor car of obviously higher class than the bottom-of-the-line Suzuki which would not induce in a

¹² [1969] 2 A.C. 31

¹³ [1934] A.C. 402

¹⁴ *Supra* n11

¹⁵ (1990) Supreme Court, The Bahamas, No 1227 of 1983, unreported [Carilaw BS 1990 SC 18].

¹⁶ Similarly worded to section 16(1)(a) of the Antigua Sale of Goods Act, Cap 393

¹⁷ [1976] 1 QB 44

purchaser the same range and level of expectations. **The question to be answered is: was the Suzuki at the time of its purchase, with the latent defects which later manifested themselves, as fit for the purpose for which it was bought as the purchaser could reasonably expect?** On the case made by the plaintiff, I cannot place his now unwanted Suzuki motor car within the 'congeries of defects' cases. Applying the authorities cited above to the facts before me, I do not conclude that, at the time of purchase of the motor car, it was not of merchantable quality, therefore the defendant has not been in breach of that implied condition under section 16(b) of the Act. (my emphasis added)

- [17] In the present case the evidence of the Claimant is that she used the vehicle for a period of 2 years and 5 months before indicating that she wished to have the vehicle replaced or the price thereof refunded. There is no evidence from the Claimant that the car exhibited any mechanical issues which affected her use of it during that time. In fact, the Claimant's evidence at trial was that she continues up to the date of trial to use the vehicle. Having heard the evidence of the parties and seen photographs of the rust which affected the Claimant's vehicle¹⁸ it is the court's view that the Claimant's claim that the Defendant sold her a "defective vehicle" has been greatly exaggerated.
- [18] The finding of the court is that the vehicle ran as a motor vehicle should, the engine was good and there was no fault to be found with the car in locomotive respects. There was however cause for complaint given the appearance of rust a mere ten months following the Claimant's purchase of the vehicle, however in this court's mind, that state of the vehicle does not amount to a breach of the implied condition that the vehicle must be of merchantable quality. What the court must however now determine, is whether these flaws, which appeared later, now give rise to a right to repudiate the contract or some other remedy.

Whether the condition amounted to a warranty under the Sale of Goods Act, Cap 393

Did the Claimant reject the vehicle within a reasonable time to avail herself of the right to repudiate the contract.

- [19] In considering these two issues, the court must consider whether in fact the Defendant has however breached any other implied condition by the appearance of the rust on the Claimant's vehicle at a later date, having already found that there was no breach of the implied condition of merchantable quality.
- [20] In considering that, it is imperative to determine whether there existed any other implied condition into this commercial contract between the Claimant and the Defendant or whether there were any other implied terms that would potentially afford the Claimant a right of action.

¹⁸Pages 40-51 TB 3

- [21] The Learned Author of Commonwealth Caribbean Contract Law¹⁹ states that “[t]he classification of terms is an important question when determining what remedies are available upon the breach of a contractual term. Terms may be classified as conditions, warranties or intermediate terms.”
- [22] “A condition is a term of a contract which the parties regarded as essential, in respect of which one party either promises to perform an obligation or promises the accuracy of a statement. In the event of a breach of a condition, the innocent party is entitled to rescind the contract, treating himself as discharged from further performance. This is so, even if the innocent party has not suffered any loss because of the breach. The innocent party may also affirm the contract if he so chooses. In addition to the right to rescind or affirm the agreement, the innocent party may in either case claim damages for any losses suffered.”²⁰
- [23] Whereas “[t]he essential feature of a warranty is that it is a subsidiary, non-essential term, breach of which gives rise only to an action for damages by the innocent party...Breach of a warranty entitles the innocent party to damages only.”²¹
- [24] Section 13 of the SGA provides clarity as to when a contract term which is classified as a condition should be treated as a warranty. Section 13(3) provides that “...[w]here a contract of sale is not severable and the buyer **has accepted** the goods, or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect”. (my emphasis added)
- [25] In the case at bar, the only condition that could have been implied was the one of merchantable quality. I have found that that condition was not breached by the Defendant at the time the vehicle was supplied. However, in any event, the Claimant having accepted the vehicle this condition would have become a warranty for which the Claimant may have only been entitled to damages.
- [26] In order for the Claimant to have sought to repudiate the contract she would have had to have done so within a reasonable time not to have fallen afoul of section 36 of the SGA which states that “the buyer is deemed to have accepted the goods when he *intimates to the seller that he has accepted them*, or when the goods have been delivered to him, and he does any act in relation to them ***which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.***” (my emphasis added)
- [27] In this court’s mind that reasonable time would have had to have been before the two years and five-month period when the Claimant had the vehicle before she

¹⁹ Gilbert Kodiliyne and Maria Kodiliyne at page 67

²⁰ Ibid

²¹ Ibid at page 76; **Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 2 QB 26

made her first intimation that she wished to repudiate the contract. By her failure to make such intimation within a “reasonable time” the Claimant’s acts amounted to acceptance.²² Rather if this Claimant had attempted to return the vehicle even at the first sign of rust in 2017, less than a year after purchase the court could have possibly considered that to have been a reasonable period.

[28] Having failed to take the necessary steps earlier, this court is of the opinion that the Claimant has long lost her entitlement to repudiate, and the prayer as sought for the refund of the purchase price and for the replacement of the vehicle must fail.

[29] This court has therefore thus far found that the condition for unmerchantable quality has not been breached and that the Claimant is not entitled to repudiate the contract having lost that right by her actions, it must now finally consider whether the Claimant is entitled to any remedies at all.

What if any remedy is available to the Claimant

[30] It is without question that the Claimant suffered great inconvenience with what this court would consider to be the cosmetic imperfections of her investment. However, it must not be forgotten that the Claimant during the entirety of the process up until May 2019 and thereafter in 2020 did several things that amounted to the acceptance of compensation.

[31] These were i) the delivery of the vehicle to the Defendant for repair/replacement in May 2018, ii) acceptance of the extended warranty in October 2019 (after having written seeking to repudiate the agreement and seeking refund or replacement) and iii) accepting payment of the loan instalments in January, February and June 2020.

²² **Mitchell v Petroleum Products Ltd** BS 1998 SC 48 per Georges J. The plaintiff in **Mitchell** purchased a 1986 Chevrolet Celebrity motor vehicle and upon delivery on Monday 27th October 1986 the plaintiff noticed that the car had several issues namely, it had no hubcaps, it was dirty, there was hardly any gas in the tank, it had no horn, the cigarette lighter was missing, when the car was started the dashboard shorted and the paint on the vehicle lacked gloss. The plaintiff drove the car back to the dealership that day and was told to return the car the next day to have these matters attended to. She returned the vehicle on Tuesday as instructed. On Wednesday the plaintiff’s son discovered that the odometer was not working, the windshield wiper did not operate at the intermittent setting and the paint job was oxidized and faded quite a bit even though a light compound was applied the day before to polish the vehicle, there was also a dent in the right rear side of the trunk area which had rust. On Friday evening the plaintiff and her son had a meeting with the Managing Director of the defendant company to make it clear that the plaintiff did not wish to keep the vehicle because of the defects. The following Monday the plaintiff returned the car to the dealership and asked for a refund of the money she paid. The court considered the issue of whether or not the plaintiff accepted the car in the condition in which it was delivered. The court found that the period for which the plaintiff retained the vehicle was not unreasonable. Between noontime on Monday and Friday evening when the plaintiff made clear she was dissatisfied and wished to hand back the car she had not had it for more than two full days as the vehicle was in the garage for long periods on Monday, Tuesday and Wednesday being prepared for delivery and the use on Thursday revealed further defects. As a result, the plaintiff was not deprived of her right of rejection and was entitled to a full refund of the purchase price of the vehicle.

[32] In this court's mind the actions of the Defendant and the ultimate acceptance of the Claimant to those actions which were never pleaded must in this court's mind amount to a sufficient remedy for the Claimant in all the circumstances.

[33] Although some attempt was made to proffer that there may have been a diminution in the value of the vehicle as a result of the cosmetic issues, this court is satisfied that the Claimant has not proven on a balance of probabilities that any such issue has led to a diminution in the value of her vehicle. She did not present any valuation to that effect, nor did she bring any witness to say so or to admit to that and this court is satisfied that the Claimant is not entitled to any measure of damages in any event.

Conclusion

[34] The order of the court is therefore as follows:

1. The Claimant's claim is dismissed in its entirety.
2. Prescribed Costs to the Defendant on an unvalued claim pursuant to Part 65.5 CPR 2000

Nicola Byer

High Court Judge

By the Court

Registrar