In The Supreme Court of Bermuda

APPELLATE JURISDICTION
No. 37 of 2019

BETWEEN:

ROBERT GEORGE PEETS

Appellant

And

AMBER SIMONS

Respondent

JUDGMENT

Date of Hearings:	12 November 2020 and 14 January 2021
Date of Ruling:	25 January 2021
Appellant:	In Person
Respondent:	Ms. Christen Seuss (Wakefield Quin Limited)

Appeal from the Magistrates' Court - Sale of a faulty second-hand car - Contract Law - Misrepresentation of Fact – Rescission of Contract – Whether the Respondent was entitled to a set-off – Causation of Loss - Remoteness of Damage – Mitigation of Loss – Sale of Goods Act 1978 – Complaint of Judicial Bias

JUDGMENT of Shade Subair Williams J

Introduction

1. This is an appeal from the judgment of Magistrate Maxanne Anderson entered in the sum of $14,945.30 in favour of the Respondent.

2. The Appellant, Mr. Robert Peets, operates a business in which he trades second-hand vehicles for profit. The Respondent, both a customer and former personal friend of the Appellant, purchased a second-hand Peugeot 307 model car ("the car" / "the Peugeot") from the Appellant for the negotiated price of $13,000.00.

3. The Appellant now seeks for this Court to reverse the decision of the learned magistrate or to otherwise find that he was entitled to a set-off on the basis that the Respondent enjoyed both the use of the car for an identifiable period of time and a full refund. His pleaded grounds of appeal are as follows:

    1. *Ms. Simons was sold a second hand car without warranty.*
    2. *The case was heard by the same magistrate that denied my judgment in my absence.*
    3. *Ms. Simons modified the car past purchase; it is unjust for me to pay for her modification.*

4. The relief claimed in the Appellant's Notice of Appeal filed on 19 November 2019 is stated as follows:

    1. *To hear my case and reason that I should not have a debt to pay.*
    2. *To uphold one's right to sell an item a[n] item how it stands.*
    3. *To not allow me to have to pay for willfull* [sic] *damages Ms. Simons did to the vehicle.*

5. The Appellant also argued that the Respondent failed in her duty to mitigate her loss by failing to return the car to the Appellant for repairs. Additionally, the Appellant complained that the Magistrate Anderson wrongly placed the burden of proof on him and not the Respondent who was the Plaintiff at trial. While these points are unapparent from the Appellant's pleaded grounds of appeal, this was discernable from the Appellant's written and/or oral submissions.

6. At the close of the hearing I reserved judgment and informed the parties that I would deliver these written reasons.

The Evidence and Trial Issues

7. Ms. Simons gave evidence at trial that prior to the purchase of the Peugeot, the Appellant sent her pictures of various other second-hand cars that he had for sale. She said he reminded her of the benefits of purchasing a car from him, a certified Peugeot mechanic. She said that he could assist her with the car on an ASAP basis, whenever needed. However, under cross-examination the Appellant denied ever having told the Respondent that he was a Peugeot mechanic. He said that he told Ms. Simons that two of his best friends worked at Peugeot. Mr. Peets also contended during his evidence that he never wanted to sell the Respondent the Peugeot car as it was his personal car.

8. Ms. Simons' evidence was that the Appellant gave her a demo of the Peugeot before she bought it. She said the car looked good and that she was keen to purchase it, which she did in March 2017. As a result of this purchase, the Respondent sold her original car for the modest sum of $1,800. On the Respondent's evidence at trial, the Appellant expressly told her that the only thing wrong with the Peugeot was a crack to the windshield. She then drove off with her newly purchased car.

9. The evidence at trial was that the Respondent first experienced a leaking issue with the car approximately one month after she purchased it from the Appellant. During the hearing before me, the Appellant insisted that the car did not start to leak until long after the first month of purchase. However, Ms. Seuss referred to the Court Smart audio recording of the evidence heard at trial on 16 September 2019 (47minutes and 52 seconds into the Court Smart CD) in support of the magistrate's finding that the disrepair occurred less than one month after the purchase of the car. More so, the Respondent exhibited a letter at trial from Mr. Mandela Caesar who wrote:

   "*Dear Sirs,*
   On the afternoon of Monday April 3rd 2017, I had requested a lift home with my colleague Amber Simons. When we arrived to my house and I got out, and noticed a burning smell. I informed Amber to get her transmission checked as it smelled like burning clutch."

10. As a result of this, the Respondent said she telephoned the Appellant who advised her to top up the oil at the gas station. The Respondent also told the magistrate in her evidence that on or around the last week in April 2017 she informed the Appellant of her observations of leaking from the bottom of her car. The Appellant again advised her to return to the gas station, but this time to get her air conditioning liquid topped up. Also in April 2017, the Respondent complained to the Appellant about a knocking noise when turning the steering wheel. The Appellant informed the Respondent that this related to the engine mount and that he had ordered some new parts for the car.

11. Another example provided on Ms. Simons' evidence related to the appearance of a dashboard notice "gearbox faulty". This also occurred in April 2017. The Respondent said that she immediately called the Appellant who told her to turn the car on and off again as she was probably not driving the car in the correct gear. This became a regular occurrence every ten or so days but the Respondent assumed that it was a sign of her adjusting to driving the car which could be driven as stick shift or an automatic car.

12. On 21 July 2017 the Respondent took her car in to the Appellant for a tune-up and to address the continuing faulty-gearbox notices. On 24 July 2017 the Appellant took the car to the Peugeot shop to be seen by a Peugeot mechanic. Having agreed for the car to remain there overnight, the Appellant contacted the Respondent the following day to inform her that she had driven the car some 4,500 kilometers since the initial faulty-gearbox notice, to the point of drying out the gearbox. The Appellant also told Ms. Simons that the oil filter was leaking but that this could be easily rectified. He told her that he could assist her at a service cost of $1,500.00. This all confused the Respondent because, insofar as she was concerned, she had

kept the Appellant in the know on the car issues as they arose and she followed his advice at each step of the way on what was to be done.

13. The Respondent said that she was most unhappy with the prospect of paying the Appellant any more money so soon after having paid him $13,000 for the purchase of the car months prior. This was further aggravated by the fact that the car was incapable of reversing or accelerating at this point. The Respondent told the trial magistrate that she contacted [Noble Automotive (Continental Motors)] and spoke to a senior employee who advised that a gearbox does not dry up and that it was only a question as to whether the gearbox was in need of changing. The Respondent stated in her evidence that she arranged for the car to be examined by three licensed mechanics, all of whom advised that she had been sold '*a lemon*'. She accordingly contacted the Appellant and sought a refund of the $13,000.00. However, the Appellant refused.

14. The Respondent said that she researched the history of the car only to discover that the Peugeot had been sold to the Appellant by the previous owner, a former employee of Peugeot, at a sale price of $2,800.00. The previous owner, Ms. Sakera Spence, sold the car to the Appellant because she was moving to live overseas. By this time, the Respondent was compelled to purchase a bike and to hire taxis for her transport needs which included the transport needs of her 11 year old daughter.

15. The Respondent's case at trial was that the Appellant fraudulently misrepresented that he was a certified Peugeot mechanic and that he knowingly sold her the car in a problematic state. She said that he falsely advertised a 1 year warranty and that he unduly influenced her by using their personal friendship of some 6 years to induce her into purchasing the faulty Peugeot car.

16. The Appellant's case at trial was that Ms. Simons knew the ins and outs of how his company operates and the electrical-based services it provided. Mr. Peets said his company was not involved in the sale of second-hand cars and that the selling of second-hand cars was more of his "hobby". Notwithstanding, it was clear on the evidence called by both sides that Mr. Peets sells second-hand cars for profit and has been doing so for approximately 22 years.

17. Mr. Peets told the trial magistrate that Ms. Simons knew that the person who owned the car prior to Ms. Spence's ownership was Mr. Eugene Walker and that the car had body work issues back then. He explained that he took the interior section of the car owned by Mr. Walker and installed it into the car sold to him by Ms. Spence. He then licensed and insured the car in 2017 and then drove it himself. Mr. Peets said that Ms. Simons knew that he combines the parts of two different cars to form a renewed second-hand car.

18. The evidence at trial was that the Respondent happened to see the Appellant driving the Peugeot while she was sitting inside her original car waiting for it to be towed away as a result of slit tire. On the Appellant's evidence at trial, the Respondent volunteered that she liked the Peugeot and asked the Appellant if he would sell her the car. He responded that he had spent up to $7,000.00 on the car but agreed to her suggestion to sell it to her for $6,500.00. Because she wanted various cosmetic items added, such as a spray job, rims and tint, the parties settled on a total sale price of $13,000.00. He said that he never sold the car with any warranties or guarantees but that he was nevertheless willing to assist where he could.

19. The Appellant's evidence was that he completed this cosmetic work on the car on 31 March 2017, having obtained rims from a dump site and having purchased rain guards, etc. He then sent her a picture of the car which she collected later that same day. The Appellant said that a week later, the Respondent wanted a further 'pop' effect for the car and so he sold her some LED lights to achieve this purpose. He said that the following week she brought the car in to him because of some confusion related to the car radio. When the Respondent complained about a week thereafter about the gear box, the Appellant said that he explained to her what she should do and told her to bring the car in if it persisted beyond that point. Notably, the Appellant denied ever advising the Respondent to take the car to the gas station.

20. The Appellant's case at trial was that the Respondent ought to have brought the car in to him sooner than she did instead of simply ignoring the persisting warning sign about the faulty gearbox. When he finally received the car from her for a tune-up, it was then necessary to take it in to Peugeot for close attention. He also said that he told the Respondent that she would be charged $2,500.00 for the purchase of the relevant car parts if he did not already have them in stock. Ms. Simons then responded; "*second car problems*".

21. The Appellant also told the Court that he saw a Facebook post from the Respondent complaining about the car and stating her desire for a refund. The Appellant said he telephoned the Respondent the following day and informed her that the car was still fixable but that she was devaluing the car by publicly complaining about it. The Appellant also complained that he had a buyer lined up for the car at the sale price of $14,500.00. However, the opportunity was lost as the Court proceedings commenced.

The Relevant Law

The Law on Misrepresentation

22. Unlike English law on contractual misrepresentation, which is governed by the Misrepresentation Act 1967, misrepresentation under contract law in Bermuda is compiled of rules and principles in common law and equity only. (See *Smooth and Easy v Richardson* [2019] Bda LR 75, per Subair Williams J)

23. In my previous judgment in *Capital Security Ltd v Woodruff [2018] Bda LR 46* I considered the common law duty of care which might arise out of a negligent misstatement of fact:

29. Established principles on the law as it relates to a negligent misstatement was surmised by Lord Morris in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 PC at 503:

> *"Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."*

29. Under the old English common law principles, a contractual misrepresentation does not apply to representations which have been built in as a term of the contract.

30. Para 7-004 of Chitty:

"***Misrepresentation and contractual terms***. *Before the Misrepresentation Act was passed, the law relating to misrepresentation was generally concerned solely with misrepresentations made before the contract was entered into, and not to misrepresentations which actually constituted contractual terms. Although word "misrepresentation" is literally applicable to a contractual term which consists of a false statement of fact (as opposed to a promise of future conduct) the term was commonly confined to misrepresentations which did not constitute contractual terms, simply because the law relating to the contractual terms (whether promises as to future conduct or misrepresentations of fact) differed from the law relating to misrepresentations which were not contractual terms. Moreover, there was also some authority for the proposition that if a misrepresentation was made before a contract was entered into, and the misrepresentation was subsequently incorporated into the contract as a contractual term, the law relating to misrepresentation was not applicable, and the case had to be dealt with as one involving a contractual term and nothing else* (ftn *Pennslyvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 ALL E.R. 1167, 1171* and Leaf v International Galleries [1950] 2 K.B. 86)…"

31. Also at common law, rescission is usually the only remedy available for an innocent misrepresentation. An entitlement to contractual damages may, however, arise where the misrepresentation is incorporated as a term of the contract. The authors of Chitty on Contracts Volume 1 (Thirty Second Edition) ("Chitty") [7-001] state:

"…*the position broadly speaking was that a misrepresentation which induced a person to enter into a contract gave the representee the right to rescind the contract, subject to certain conditions, but generally gave him no right to damages unless the misrepresentation was fraudulent, or, in some cases, negligent, or unless the representation amount to a term of the contract*…"

32. However, an innocent misrepresentation will not always give rise to rescission. In *Capital Security Ltd v Mark Woodruff* [para 29] I said:

29. An innocent misrepresentation which has induced the representee to enter a contract must be a material one before the Courts will find that the contract is void and liable to rescission (see Pan-Atlantic Insurance Ltd v Pine Top Ltd [1994] 1 AC 501, at 533). While there are instances where a material misstatement on an opinion may give rise to a misrepresentation on the facts by implication and thereby justifying an avoidance of the contract; traditionally, the misrepresentation must be a false statement of fact, whether it be in relation to the past or present.

The Law on Causation of Loss, Remoteness of Damage and Duty to Mitigate Loss

33. The law on causation of loss was also outlined in the *Smooth and Easy v Richardson* case. In its broadest description, the rule requires the Court to consider whether in all circumstances the Defendant to a claim can reasonably be deemed to be responsible for the type and extent of loss which occurred. (See *Transfield Shipping Inc. v Mercator Shipping Inc*. [2009] 1 AC 61 at 73G, per Lord Hope and *Knight v Warren* [2010] Bda LR 73, per Kawaley J).

34. In *Nixon Jawahir v Isabella Shillingford [2019] ECSC J0114-2* the High Court of Justice in the Eastern Caribbean Supreme Court described the rule on remoteness of damage in the following terms [para 16]: "…*The foreseeability and remoteness of damage rule depends on the degree of relevant knowledge held by the defaulting party at the time of the contract. The defendant will only be held liable for the claimant's losses if they are generally foreseeable…"* (Also see *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] EWCA Civ 7)

35. There is always a duty on a plaintiff who has suffered loss to take all reasonable steps to mitigate avoidable loss. This is explained in McGregor on Damages (sixteenth edition) [para 285]:

"*The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss*."

The Law of Bias

36. In the consolidated appeals before the Privy Council in *Millar v Elgin* and *Payne et al v Procurator Fiscal, Dundee* [2001] UKPC D4 the Judicial Board were concerned with the subject of judicial bias. Citing *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 Lord Bingham of Cornhill said [para 17]:

"*In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of the individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.*

Any judge…who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible

grounds for objecting to the trial of the case by that judge…or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

37. Where the appearance of bias is alleged, the question is whether, on the objective viewpoint of a fair-minded and informed observer, there is a real possibility or real danger of bias on the part of the judge (See *Porter v Magill* [2002] 2 AC 357). Lady Justice Arden (as she then was) in *Mengiste & Anor v Endowment Fund for the Rehabilitation of Tigray & Ors* [2013] EWCA Civ 1003 described the appearance of impartiality in these words: "…*Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially...*"

38. In *Kenneth Williams v Fiona Miller* [2020] SC (Bda) 37 App (28 August 2020)[1] case I considered the role of an appellate judge faced with a complaint of bias in a Court of first instance [para 75-77]:

"*Yet there remains some legal elasticity in the task of assessing judicial bias through the rear view image afforded to an appellate Court, more so in civil proceedings than in criminal proceedings. The central question is whether the proceedings were nevertheless fairly conducted in the round. Such a notion was recognized by Lord Clyde in his concurring judgment of the Privy Council's decision in Millar v Elgin and Payne et al v Procurator Fiscal, Dundee [para 81]:*

> "*As matter of generality a lack of independence in the tribunal may not necessarily be fatal to the validity of a hearing. The recent decision of the House of Lords in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389 provides one example where in the particular context of town and country planning an overall fairness in the process may be achieved despite a lack of independence in one of the stages. In such cases the global view of the whole proceedings may make it possible to conclude that overall there was a fair trial. But it is important to notice that the impartiality of the tribunal in criminal cases is not a matter which can be*

[1] The decision in *Kenneth Williams* was over-turned by the Court of Appeal on the ground of trial delay. The Court of Appeal did not reverse or express any disapproval of the reasoning underlying the dismissal of the complaint related to judicial bias.

cured by the existence of a right of appeal to a court which itself satisfies the requirements of article 6(1) (De Cubber v Belgium (1984) 7 EHRR 236. In Findlay v United Kingdom (1997) 24 EHRR 221 the Court held that the lack of independence of the tribunal in court-martial proceedings was not remedied by the presence of safeguards, which included an oath taken by the court-martial board, and stated p 246 (para 79):

> *"Nor could the defects…be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as 'criminal' under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of article 6(1)."*

…

In a jurisdiction as small as Bermuda it is an accepted reality that magistrates and judges are sometimes called upon to conduct trials involving a defendant previously tried by the same bench. This is particularly so in the case of repeat offenders well known to the Courts. In such instances, the Court is expected to adjudge each case on the evidence and merits of the case. Such judicial maturity is a must in small jurisdictions which cannot reasonably be expected to have the resources to provide a new tribunal for every occasion that such an offender reappears before the Court for a new matter."

The Sales of Goods Act 1978 ("the 1978 Act")

24. Section 2 of the 1978 Act gives a statutory meaning to the term "contract of sale of goods". It provides:

"*Sale and agreement to sell*

2 (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

25. Section 4 of the 1978 Act, like the common law position, provides that a contract of sale may be made in writing or by oral agreement:

"*Contract of sale, how made*

4. Subject to the provisions of this or any other Act, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties…"

26. Section 14 applies to the implied undertakings that arise by operation of law when goods are sold under a contract for sale. Subsections (1)-(4) are of particular relevance:

"*Implied undertakings as to quality or fitness*

14 (1) Except as provided by this section and section 15, and subject to the provisions of any other Act, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods-

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied;

(b) appearance and finish;

(c) freedom from minor defects;

(d) safety; and

(e) durability.

(2C) The term implied by subsection (2) does not extend to any matter making the quality of goods unsatisfactory-

(a) which is specifically drawn to the buyer's attention before the contract is made;
(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal; or

(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

(3) Where the seller sells goods in the course of a business and the buyer expressly or by implication makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment.

(4) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a contract of sale by usage."

27. Under section 35(2) of the 1978 Act there is a deeming provision on the acceptance of goods sold and delivered to the buyer:

"*35(2) Where goods have been delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) until he has had a reasonable opportunity of examining them for the purpose-*

(a) of ascertaining whether they are in conformity with the contract; and …

(3) Where the contract of a sale is a consumer contract, the buyer cannot lose his right to rely on subsection (2) by agreement, waiver or otherwise.

(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(5) The questions that are material in determining for the purposes of subsection (4) whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2).

(6) The buyer is not by virtue of this section deemed to have accepted the goods merely because –

(a) *he asks for, or agrees to, their repair by or under an arrangement with the seller; or…*"

28. Section 65 provides that the term "reasonable time" shall be a question of fact:

"*Reasonable time a question of fact*

65 Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact."

29. Section 64 outlines the parameters on exclusion clauses. Of particular relevance, subsection (4) has the effect of voiding any clause which unfairly exempts a seller from the obligations imposed by section 14 relating to the implied undertakings as to the quality and fitness of the goods in question. Section 64:

"*Exclusion of implied terms and conditions*

64 (1) Where any right, duty or liability would arise under a contract of sale by implication of law it may be negative or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract; but the foregoing provision shall have effect subject to the following provisions of this section.

(2) An express condition or warranty does not negative a condition or warranty implied by this Act unless inconsistent therewith.

(3) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 12 of this Act shall be void.

(4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14 or 15 shall be void in the case of a consumer sale and shall, in any other case, not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.

(5) In determining for the purposes of subsection (4) whether or not reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case and in particular to the following matters —

> *(a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;*
>
> *(b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;*
>
> *(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);*
>
> *(d) where the term exempts from all or any of the provisions of section 13, 14 or 15 if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;*
>
> *(e) whether the goods were manufactured, processed or adapted to the special order of the buyer.*

(6) Subsection (5) shall not prevent the court from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any of the provisions of section 13, 14 or 15 is not a term of the contract.

(7) In this section "consumer sale" means a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods —

(a) are of a type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

(8) The onus of proving that a sale falls to be treated for the purposes of this section as not being a consumer sale shall lie on the party so contending.

(9) Any reference in this section to a term exempting from all or any of the provisions of any section of this Act is a reference to a term which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of that section, or the exercise of a right conferred by any provision of that section, or any liability of the seller for breach of a condition or warranty implied by any provision of that section.

(10) It is hereby declared that any reference in this section to a term of a contract includes a reference to a term which although not contained in a contract is incorporated in the contract by another term of the contract.

(11) This section is subject to subsection (6) of section 70."

30. Section 70(3) of the 1978 Act is a specification that the common law rules on misrepresentation, *inter alia*, apply to contracts for the sale of goods.

31. Interest and special damages is also expressly contemplated under section 54 of the 1978 Act:

"*Interest and special damages*

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

Findings by the Magistrate at Trial:

32. Magistrate Anderson provided a written judgment dated 5 November 2019. In that judgment she held [paras 8-12]:

"*Findings*
8. After hearing the evidence, I find that the Defendant sold to the Plaintiff, the vehicle in question during the course of his business which he admitted in court as taking cars destined for the dump and fixing them up to sell. This court also finds that the Defendant had full knowledge of the mechanical issues of the vehicle sold to the Plaintiff.

Reasons
9. I prefer the evidence of the Plaintiff to that of the Defendant. It is clear from the evidence that the Plaintiff trusted her friend and decided to purchase a second vehicle from him acting in the course of his business. However, when the Plaintiff was no longer prepared to pay the Defendant additional monies for the recently purchased car, the relationship broke down.

10. The Defendant on more than one occasion during the trial, tried to "throw shade" on the Plaintiff's character; once by making reference to a "sexy" video sent by the Plaintiff to the Defendant and on a second time by alleging that the Plaintiff was involved in selling her old Hyundai car to a Mr. Jah Jah Robinson who had contacted the Defendant with complaints about the Hyundai. This Court after a request to see the "sexy" video found that the video only relayed information with nothing sexy about it. The Plaintiff in rebuttal to the allegation made about the Hyundai provided a signed letter from Mr. Jah Jah Robinson disputing that he has ever had any issues with the Hyundai car.

Decision
11. In consideration of the above mentioned paragraphs, I find as a fact that the Plaintiff has proven on a balance of probabilities that the Defendant is liable as he sold the Plaintiff a vehicle which he knew had major issues and would not be fit for purpose.

12. It follows in the circumstances that the Plaintiff's claim for $13,000.00 for the cost of the car, $290 for car lights, $1,296.20 for car license, $309.10 for car insurance and $50 for court fees succeed. I therefore grant judgment to the Plaintiff for the sum of $14,945.30. The Defendant must organize the collection and removal of the vehicle within 7 days of the date below."

Reasons for Decision:

33. The restrictive role of an appellate Court tasked to review the facts found by a tribunal of first instance was observed in my previous judgment in *Safiyah Talbot v Fiona Miller* [2020] SC (Bda) 40 App (17 September 2020) [24]:

"*As a matter of general and established principle, this Court, in the exercise of its appellate jurisdiction, will be reluctant to go behind a magistrate's findings of facts drawn from an*

assessment of witnesses' oral evidence given at trial. This is because the magistrate, who would have had the sole advantage of observing the demeanour of those witnesses, is best positioned to evaluate the truthfulness of the evidence. It is with that logic that I would proceed with trepidation before interfering with findings of facts which were formed by the trial magistrate..."

34. In finding that Mr. Peets sold Ms. Simons a vehicle which "*he knew had major issues and would not be fit for purpose*", it is implicit that the magistrate also found as a fact that the Respondent was not fairly made aware of these mechanical issues when she agreed to purchase to the car.

35. Whether or not an agreement was recorded in writing, Mr. Peets and Ms. Simons clearly had a contractual relationship which qualifies as a contract for sale under the Sale of Goods Act 1978. This means that the implied undertakings under section 14 of the 1978 Act applied to Mr. Peets when he sold the car. Specifically, there was an implied term that the car, when sold, was of satisfactory quality. The test for determining whether the car was of satisfactory quality is objective. The Court must consider whether in all relevant circumstances the state and condition of the car meets the standard that a reasonable person would regard as satisfactory. In resolving this issue, the magistrate was duty bound to consider whether the car was fit for its common purpose. The answer is factually straightforward: was the car safe and mechanically sound i.e. was it fit for regular driving on the roads of Bermuda?

36. In my judgment, the learned magistrate correctly found that the car was not fit for its purpose. Magistrate Anderson properly observed that the faulty gearbox issues in addition to the leaking and the burning smell of the car all occurred within less than one month of purchase of the car. The level of disrepair was such that the car was incapable of reversing without mechanical attention. The magistrate would have also taken into consideration the impressive appearance and finish of the car as would have been seen from the photograph exhibited at the trial and also the fact that the Respondent paid a total sum of $13,000.00 for a finished product.

37. Without the cosmetic finishes, the Appellant offered to sell the car for $7,000.00. One may reasonably infer from this that the $7,000.00 offer marked the Appellant's description of the mechanical functionality of the car. One may also conclude that an honest mechanic would not agree to add $6,500.00 worth of cosmetic accessories to a car which he knew to be mechanically sub-standard to the point of being unfit for its purpose. Additionally, one can only infer that the Respondent would not have agreed to spend an additional $6,500.00 on a car if she knew that the same car would be destined for disrepair weeks following the sale.

38. Given the narrowness of the time frame between the sale of the car and the first signs of mechanical disrepair together with the complaints made to Mr. Peets, I find that the evidence did not suggest that Ms. Simons accepted the car in this condition for the purpose of section 35 of the 1978 Act or the doctrine of *caveat emptor*.

39. Mr Peets relied on an "as is" condition of the sale. It was his case that he sold the car "as is". However, section 64(4) of the 1978 Act voids any clause which attempts to unfairly exempt a seller from the implied undertakings under section 14. I, therefore, find that the Appellant's

attempt to sell his car to the Respondent for $13,000.00 with the risk that it was not fit for purpose was statutorily impermissible. This is because in this case, the magistrate found that in entering the agreement to purchase the car, the Respondent was not made aware of any such mechanical failures. In my judgment, the evidence did not support any averment made the Appellant that Ms. Simons ought to have known of the "as is" clause or that she ought to have known that the car was mechanically dysfunctional.

40. It is clear on the evidence before the Court that the Appellant misrepresented the material facts to Ms. Simons and that she was induced into entering the contract for sale on a reasonably formed belief that she was purchasing a functional second-hand car. The magistrate accepted the Respondent's evidence and stated in her judgment that she preferred Ms. Simons' evidence over that of the Appellant. Ms. Simons' evidence was that the Appellant expressly told her, when delivering the newly purchased car, that the only thing wrong with the Peugeot was a crack to the windshield. Her evidence was that she informed the Appellant of the car issues as they arose and she followed the Appellant's instructions at each step of the way. This Court has no basis to go behind or reject that evidence.

41. Further, I see no reason to interfere with the magistrate's assessment of the credibility of the witnesses on the stand. I must, therefore, reject the Appellant's contention that the Respondent failed to address these car issues in the way he directed because such a contention contradicts the Respondent's evidence at trial. (In this regard I also reviewed the exhibit of the text exchanges between the parties on 25 July 2017 on page 35 of the Appeal Record). Additionally, I find that the Respondent cannot be fairly faulted for continuing to drive the car between March 2017 and July 2017. This marks the first few months of the purchase of the car. For these reasons, the Appellant's claim that the Respondent failed to mitigate her loss is rejected.

42. It was perfectly reasonable for the learned magistrate to find that Ms. Simons was entitled to rescind the contract for sale. This is consistent with the Bermuda law position on contractual misrepresentation. Ms. Simons was also entitled to be compensated with special damages under section 54 of the 1978 Act. I, therefore uphold Magistrate Anderson's decision to grant the Respondent's claim for $13,000.00 for the cost of the car and the additional sums to recover for her loss in respect of the car lights, the cost of licensing and insuring the car and related court fees. Arguably, Ms. Simons would have also been entitled to recover for the costs of the taxi fare while the car was in its state of disrepair. However, I make no additional order in this respect.

43. In relation to the complaint of judicial bias, I find that this ground is wholly without merit. The Appellant's case is that Magistrate Anderson previously granted judgment in default against him and then subsequently refused to set aside her judgment. On 9 April 2019 Assistant Justice Kiernan Bell reversed Magistrate Anderson's decision and remitted the matter for trial. The Appellant contends Magistrate Anderson ought not to have tried this matter against that background. I my judgment, this submission is flawed. Magistrate Anderson engaged these proceedings in her judicial capacity. Her decision to grant judgment in default was on the grounds of the Appellant's original non-appearance at trial. This was not a decision reached on the merits of the cause. There is nothing unfair or out of the ordinary in a matter being

determined on its merits by the same judge who previously dismissed the action for want of prosecution.

44. For these reasons this appeal fails on all grounds.

Conclusion:

45. Appeal dismissed.

46. Unless either party files a Form 31TC within 14 days of the date of this judgment to be heard on costs, I award costs on standard basis in favour of the Respondent, to be taxed by the Registrar if not agreed.

Monday 25 January 2021

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT