BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

NO. 988 OF 2002

BETWEEN

CALDRIC NASH **PLAINTIFF**

AND

McENEARNEY QUALITY INC. **DEFENDANT**

Before The Honourable Mr. Justice William J. Chandler, Judge of the High Court

2007: February 12

2004: July 1, 2 and 3

Mr. Chester L. Sue for the Plaintiff

Ms. Zarina Khan in association with Ms. Karen Perreira for the Defendant

DECISION

INTRODUCTION

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[1] This matter involves the sale of a Ford Courier motor vehicle by the defendant to the plaintiff which developed problems in the operation of its four wheel drive functions. The resulting issues revolve around the ***Sale of***

***Goods Act* Cap 318** of the **Laws of Barbados**, and, in particular, the implied conditions of merchantability and fitness for purpose. A further issue is whether there was been a misrepresentation that the vehicle was new within the meaning attributed to that term by the law.

BRIEF FACTS

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[2] The plaintiff purchased a Ford Courier vehicle from the defendant on 13 January 2000. A warranty agreement between himself and the defendant was signed on 24 January 2000 when the purchase price was paid in full. At the time the plaintiff bought the vehicle it was represented by the defendant as new with air conditioning. Subsequently it was discovered that work had been carried out on the vehicle prior to it being sold to the plaintiff. In addition, the front differential of the vehicle became seriously damaged after the plaintiff engaged the 4 x 4 facility whilst stuck in the mud at Dover Beach.

[4] On 21 April 2001, some fifteen (15) months after purchasing the vehicle, the plaintiff then left the motor vehicle on the defendant's premises. A more in depth look at the facts will be made on analysis of the issues which arise for determination.

[5] The issues for determination are:

1) Was there a misrepresentation to the plaintiff that the vehicle was "new" when it was sold to him?

2) (a) Whether there were any defects in the vehicle at the time of its delivery to the plaintiff to warrant the said vehicle not fit for the purposes for which it was bought and/or not of merchantable quality.

(b) If there were any such defects, whether they amounted to a breach of warranty or a breach of condition so as to allow the plaintiff to rescind the contract.

3) Had the plaintiff accepted ownership of the vehicle within a reasonable time so as to deprive him of the right to rescind the contract?

DETERMINATION OF ISSUES

Was there a misrepresentation to the plaintiff that the vehicle was "new" when it was sold to him?

[6] The plaintiff alleges that the defendant represented to him that the Ford Courier vehicle was new with air conditioning. In November 1999, prior to the vehicle being purchased by the plaintiff, certain works were carried out on it. The issue is whether these works were of a nature to deem the vehicle not "new".

[7] The works were carried out 16 February 1999 and 26 November 1999 and included the Pre--delivery inspection, installing, repairing and fitting the canopy, painting, de-waxing and other minor works. There is no evidence of work carried out to the engine. Mr. Hamilton, the defendant's Chief Executive Officer, described the work as insubstantial and referred to the practice in the automotive industry of replacing parts which have been removed and placed on other vehicles and repainting the same among other things.

[8] The pre-sale history of the vehicle also revealed that the canopy was repaired in November 1999, repaired sections repainted on the 24^{h} November 1999 and damage to the canopy was again repaired on the 16

November 1999. The right left corner of the front tray was also painted on the 18 March 1999.

[9] The plaintiff's evidence is that he only discovered that the vehicle was a 1998 model, after he made complaints about the operation of the 4 x 4 facility, and was shown its pre-sale history which revealed that it was a manufactured in 1998. The Court notes that the sales invoice of the vehicle and other invoices for service to the vehicle which were tendered into evidence do not show the year of manufacture.

[10] The defendant contends that the vehicle was purchased directly from the Ford Motor Company, the manufacturers of the vehicle and that, prior to its sale to the plaintiff; it had never been owned by anyone else or registered with the Licensing Authority. This evidence was given my Mr. Mark Hamilton, the current Chief Executive Officer of the defendant company and there is no evidence to the contrary.

[11] In support of its contention that the vehicle was "new", Counsel for the defendant relies on **Morris Motors Ltd. v. Lilley [1959] 1 W. L. R 1185** where it was held that the test for as to whether a vehicle is "new" is:

> "….that it remains new, even when it leaves the manufacturer's hands, until it is made the subject of a retail sale by a distributor or dealer, it is registered with the local county council, number plates are put upon it and it is driven away by the purchaser."

[12] In ***R v. Ford Motor Company Limited*** **(1974) 59 Cr. App. R. 281** it was held that:

> "If the damage which the new car after leaving the factory has sustained is, although perhaps extensive, either superficial in character or limited to certain defined parts of the car which can be replaced by new parts, then provided such damage is in practical terms perfectly repaired so that in truth it can be said after repairs have been effected that the car is as good as new, then it would not be a false description to describe such a car as new."

[13] In light of the above decisions, it may very well be that the repairs carried out on the vehicle, prior to its sale to the plaintiff, did not prevent the vehicle from being described as new within the meaning of ***R v Ford Motor Co*** *(supra*). However, whilst the decision in ***R v Ford Motor Company*** is of assistance to the Court, I feel constrained to say that, on the peculiar facts of this case and in the context of Barbados when a purchaser wishes to purchase a new vehicle, he is, in most cases, referring to a vehicle of the current year and not to a vehicle which is two years old. The age of the vehicle, its model and any work done on it affect the value of the vehicle at the point of sale and resale.

MISREPRESENTATION

Model of vehicle

[14] I will now deal with the issue of the model of the vehicle and the year of its manufacture as they impact on the question of misrepresentation. In this case Mr. Nash's evidence is that he told Mr. Maingot that he did not want anyone to mess around with his money since he had had problems with a car dealer before. Mr. Maingot told him that it was a brand new vehicle which had only been put into the showroom with its canopy to advertise the canopy. No mention was made of the year of manufacture.

[15] The vehicle was subsequently discovered to be a 1998 model. The year of manufacture was also confirmed by Mr. Hamilton in his evidence in chief.

[16] There is no evidence that he volunteered any information about the year of manufacture to the plaintiff which could be the subject matter of a misrepresentation. Perhaps the answer to the problem here lies in the difference

between the year of manufacture and the term “current model” as described by Mr. Mark Hamilton when he said that this vehicle was the current model at the time even though manufactured two years earlier. It cannot be said, in the absence of a duty to disclose the year of manufacture that Mr. Maingot misrepresented the year of the vehicle. The evidence is that the plaintiff continued to use the vehicle after discovering that it was a 1998 model. He therefore waived his right to rescission on this ground and accordingly that matter is now of little practical interest.

[17] With respect to the pleadings in this matter, the statement of claim does not make it clear whether the plaintiff alleges that the misrepresentation was innocent, negligent or fraudulent. It is trite law that a pleading of negligent or fraudulent misrepresentation must contain particulars upon which the plaintiff relies to ground the misrepresentation alleged. This is even more essential where the allegation is one of fraud. Fraud must be specifically pleaded and strictly proved. No particulars are set out in the pleadings.

[18] It is noteworthy that in his pre-trial brief, Counsel for the plaintiff sets out his claim of misrepresentation in a very general way and then broadly notes that; “*an innocent misrepresentation is a false representation made honestly and without carelessness. The remedy is rescission and an indemnity or compensation. Innocent misrepresentation may become negligent or fraudulent if the party that made the representation does not correct the false representation where possible.”*

[19] This is an incorrect statement of the legal principles in relation to negligent and fraudulent misrepresentation as distilled from the cases of ***Headley Byrne & Co v Heller and Partners*** **(1963) 2 All E. R. 575** and ***Doyle v Oldbury (Ironmongers) Ltd*** **(1969) 2 All E. R. 119** respectively.

[20] For the purposes of this judgment, it is unnecessary to set them out here since, in the absence of a clear pleading and evidence in support of such pleading, the plaintiff will not be entitled to relief under this head. The nature of a misrepresentation as either innocent, negligent or fraudulent has to do with the state of mind of the representor not whether he corrects the representation or not. An innocent misrepresentation cannot become negligent or fraudulent due to failure to correct it. A failure to correct a misrepresentation of whatever nature affects the measure of damages only.

[21] No attempt was made to link the three (3) heads of misrepresentation to the evidence adduced. Furthermore, after discovering that the vehicle was a 1998 model and not a 2000 model, and was not air-conditioned, the plaintiff consented to have the air-condition installed afterwards and did not exercise his rights to rescind for any form of misrepresentation. It is clear, therefore, that as far as misrepresentation is concerned, the plaintiff waived his right to rescind on this ground.

Issue of Air Conditioning

[22] It is, perhaps, convenient here to deal with the issue of the air-conditioning of the vehicle since this is one of the bases upon which the plaintiff claims that there was a misrepresentation. In relation to the air conditioning, it was not in dispute that, at the time of the sale to the plaintiff, there was no air conditioning in the vehicle. The plaintiff’s evidence is that, prior to the sale Mr. Maingot, an employee of the defendant who showed him the vehicle, told him that it was air conditioned. After the sale, when he turned the air conditioning on, he realised that the vehicle was not air conditioned. However, the plaintiff requested that it be installed after discovering that there was no air conditioning and it was in fact installed with his consent.

[23] A misrepresentation is an untrue statement of fact which is made prior to the parties entering into the contract and for the purposes of inducing the party to whom it was made to enter into the contract. While not forming part of the contract, the party to whom a misrepresentation is made may avoid the contract after subsequently discovering its untruth (**see *Hedley Byrne & Co v Heller and Partners*** **(1963) 2 All E. R. 575)**.

[24] If the representee, after discovering the misrepresentation, does any act which shows that he affirms the contract, he waives his right to rescission of the contract. Although the statement that the vehicle had air-conditioning could have amounted to a misrepresentation, the Plaintiff's request that it be installed subsequently is clear evidence that he waived any right he then had to repudiate for the fact that the vehicle did not come fitted with air conditioning. There was consensus ad idem vis-à-vis the installation of the air conditioning unit.

FITNESS FOR PURPOSE

2a. Whether there were any defects in the vehicle at the time of its delivery to the plaintiff to warrant the said vehicle not fit for the purposes for which it was bought and/or not of merchantable quality.

2b. If there were any such defects, whether they amounted to a breach of warranty or a breach of condition so as to allow the plaintiff to rescind the contract.

[25] The plaintiff alleges that the defects in the vehicle amounted to a breach of condition so as to entitle him to rescind his contract with the defendant. He also alleges that the front differential of the vehicle was defective thus making it unsafe to drive. He further alleges that he made numerous complaints to the defendant in relation to this.

[26] The detailed service history of the vehicle (Exhibit "CN3") reveals that two lubrication services were performed on the vehicle. The first was April 6, 2000 and the second was June 23, 2000 when the stop was lubricated. Russell Norville inspected the vehicle and gave evidence in court. He was accepted as an expert motor vehicle examiner after giving evidence of his qualifications. In his report dated October 15th 2001 (Exhibit "CN4") he said:

> "The vehicle's front differential seal had been damaged and the pinion shaft bearing was completely shattered. The damaged bearing also resulted in damage to the bearing cage and housing from the shattered bearing. The technician at McEnearney's informed me that on dismantling the differential, he noticed that the unit lacked sufficient oil to operate safely. It is my opinion that this oil was lost after the bearing had failed, causing damage to the oil seal thus allowing the natural escape of oil. I do not believe that this vehicle was operated with a low oil level. Normally when the oil levels are low or non existent, the meshing components of a unit e.g. gears reach extreme temperatures due to the lack of lubrication and cooling, this results in the overheated components showing a blue coloration. This was not the case with this vehicle."

[27] He concluded that the damage to the vehicle was caused by the failure of the bearing but that it was difficult to determine what caused the bearing to fail. There was no damage to the underside of the carriage so that impact was ruled out.

[28] In its Defence and Amended Counterclaim, the defendant contends that the damage to the front differential was caused solely by the negligence of the plaintiff in failing to provide proper care and maintenance of the said vehicle. The particulars of negligence are:-

(a) The plaintiff failed to comply with the terms and conditions of the warranty for maintenance as accepted by him in the delivery letter of the 24 January, 2000 (the letter);

(b) The plaintiff failed to deliver the said motor vehicle for service at the scheduled intervals to permit routine checks under the warranty by the defendant;

(c) The plaintiff failed to have the vehicle serviced by the defendant at the recommended intervals as set out in the delivery letter of 24 January, 2000 or at all; and

(d) The plaintiff failed to maintain the said motor vehicle as agreed or at all and used it in a reckless and careless manner resulting in the alleged damage to same.

[26] With respect to the particulars lettered (a), (b) and (c), whilst the evidence reveals that the vehicle was not serviced at the recommended intervals as contained in the letter, Mr. Nash's evidence was that he would call Mr. Maingot or the defendant Company in order to schedule times for maintenance and that on several occasions his calls would not be returned in a timely manner thus accounting for the failure to service on time.

[27] Mr. Hamilton gave evidence that the practice of the defendant Company, at the time, was that customers would call the operator who would put them on to the relevant department in order to have the service scheduled. Having heard and seen the plaintiff give his evidence, I have no doubt of the truth of his assertion that he would call Mr. Maingot to have the services scheduled. It would appear from the evidence that Mr. Maingot was his first point of contact and remained his contact person throughout. In this case the company's procedures as indicated by Mr. Hamilton did not accord with the practice established between Mr. Maingot and the plaintiff.

[28] When regard is had to the evidence of Mr. Norville, above outlined, it is clear that the failure to service the vehicle at the recommended times did not in any way contribute to the failure of the bearing in the differential since he found no evidence that the vehicle was being used with low oil levels.

[29] With respect to the particular lettered (d), there is no evidence that the vehicle was used by the plaintiff in a reckless and careless manner. The plaintiff admitted to having been stuck in the sand and engaging the 4 x 4 to get the vehicle from the sand but stated that he observed the procedures outlined in the manual for engaging the 4 x 4. He also gave evidence that he had heard the "cronking" noise before when he engaged the 4 x 4 facility. He did not have reason to use the 4 x 4 because he was always on the road. When he eventually engaged it the noise was amplified and when he engaged the 4 x 4 facility at Dover Beach, he heard the noise coming from the front.

[30] The Court saw and heard the plaintiff both in examination in chief and in cross-examination. He did no appear to vacillate nor was he shaken in his testimony. He appeared to be a witness of truth and the Court accepts his evidence as true. In the premises, the Court is of the opinion that the damage sustained was as a result of a defect in the bearing which was not the fault of the plaintiff since impact to the underside of the carriage was ruled out by Mr. Norville.

[31] Having regard to the evidence of the plaintiff that the vehicle developed a growling noise within two months of purchase which intensified with later use and the fact that he reported the same to the defendant who attempted to repair it unsuccessfully, it would appear that the vehicle contained a defect which was not discernible by ordinary inspection by the plaintiff. This has implications with respect to the issue as to whether or not the plaintiff accepted ownership of the vehicle so as to deprive him of the right to rescission of the contract and will be dealt with later in this judgment.

[32] **Section 15** of the ***Sale of Goods Act***, **Cap. 318** provides as follows:

"15. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any purpose of goods supplied under a contract of sale, except as follows, that is to say –

(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be

reasonably fit for such purpose:

Provided that in the case of a contact for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for that purpose;

(b) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

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

[33] In ***Grant v. Australian Knitting Mills Ltd.*** **(1933) 50 CLR 387** (a case approved by the Privy Council), the term "merchantable quality" was defined by **Dixon J** at page 418 as follows:

> "The goods should be in such a state that the buyer, fully acquainted with the fact, and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and without special terms."

[34] There is a strict duty to provide goods which are of merchantable quality and which are reasonably fit for the purpose that they are being sold. Goods should be merchantable at the time of sale, but the fact that goods deteriorate soon after purchase may be evidence that they were not or merchantable quality at the time of sale. ***Crowther v. Shannon Motor Co.*** **[1975] 1 W.L.R 30**.

[35] It is trite law that a breach of condition in a contract for sale affords the buyer the opportunity to treat the contract as discharged and rescind the agreement. He is also entitled to sue for damages.

[36] A condition is a fundamental term of a contract, the breach of which entitles the other party to repudiate the contract and sue for damages whilst a warranty is a subsidiary term, the breach of which does not entitle the innocent party to repudiate but to sue for damages only. Where a breach of condition occurs, the innocent party may elect to treat it as a breach of warranty and to sue for damages only.

[37] The combined evidence of the defendant and Mr. Norville, his expert witness is a strong indication that there was a defect in the vehicle. The question therefore is whether this defect rendered the car not merchantable.

[38] In ***Bernstein v. Pamson Motors (Golders Green) Ltd*** **[1987] 2 All ER 220**, **Rougier J.** noted that when determining whether any particular defect or feature rendered a new car unmerchantable the court had to consider the following factors:

i. Whether the car was capable of being driven in safety,

ii. The ease or otherwise with which the defect could be remedied,

iii. Whether the defect was of such a kind that it was capable of being satisfactorily repaired so as to produce a result as good as new, taking into account not only the part or parts at the site of the defect but also any other potential damage,

iv. Whether there was a succession of minor defects to be taken into consideration, and

v. In appropriate cases, any cosmetic factors.

[39] In addition, it was noted that although the buyer does not reject the contract at the first sign of trouble, but tries to have the matter put right, he should not be debarred from rescinding the contract so long as he is not deemed to have accepted the car.

[40] In ***Rogers et al v. Parish (Scarbourough) Ltd et al*** **[1987] 1 Q.B. 933** it was held that goods which were defective on delivery were not to be taken to be of merchantable quality by reason only of the fact that the defects had not destroyed the workable character of the goods, and it was not relevant to whether the goods had been of merchantable quality upon delivery that the defects had subsequently been repaired; that in respect of any passenger vehicle the purpose for which goods of that kind were commonly bought would include not only the purchaser's purpose in driving it but that of doing so with the degree of comfort, ease of handling, reliability and pride in its appearance appropriate for the market at which the vehicle was aimed; that the defects which might be acceptable in a second hand vehicle and which would not render it non-merchantable were not reasonably to be expected in a vehicle sold as new.

[41] **Sir Edward Eveleigh** noted at page 947:

> "Whether or not a vehicle is of merchantable quality is not determined by asking merely if it will go. One asks whether, in the condition in which it was on delivery, it was fit for use as a motor vehicle of its kind. The fact that the plaintiff is entitled to have remedial work done under the warranty does not make it fit for its purpose at the time of delivery."

[42] It was also noted that the fact that a defect is reparable does not make the goods merchantable if the defect is of a substantial degree: ***Lee v. York Coach Marine*** **[1977] R.T.R. 35.**

[43] It remains to apply ***Bernstein and Rogers*** *(supra)* to the instant case. The defendant is an automobile dealer and for the purposes of section 15 of the Act, a seller dealing in goods of the description purchased by the plaintiff, namely a motor vehicle. It is common ground between counsel for the plaintiff and the defendant that, having regard to the business of the defendant and its contract with the plaintiff, that the provisions of the ***Sale of Goods Act*** **Cap 318** are applicable to this contract.

[44] Accordingly, there was implied into this contract, a condition that the plaintiff's vehicle bought from the defendant would be of merchantable quality. In addition, it was obvious that the vehicle was needed for driving so that there was an implied condition that the vehicle would be fit for this purpose. The fact that the vehicle was purchased as a four by four vehicle also is of importance.

[45] It is common knowledge that four wheel drive vehicles should be capable of being driven in the most difficult of terrains including a sandy beach. This vehicle was noisy when this facility was engaged and, furthermore, it was unable to be driven out of the sand on Dover beach where it had become stuck after the plaintiff engaged the 4 x 4 facility. The plaintiff was the project engineer on the South Coast Sewerage Project working in the Dover Beach

area. It must be noted that there is no evidence that, at the time of sale and purchase, the plaintiff made his occupation or area of work known to the defendant.

[46] The plaintiff pleaded in his statement of claim that the vehicle was unsafe to drive as a result of the defect in the front differential. This is supported by the report of Mr. Norville. The plaintiff made numerous complaints about this although these are not contained in the defendant's history of the vehicle. The plaintiff's evidence that he was told that there was no history of complaints about the vehicle when he spoke to the employee at the defendant's workshop and he told him that could not be so since he made complaints was uncontraverted and the Court accepts it as true.

[47] The vehicle was subject to a number of inspections following its delivery and during one such inspection the defendant sought to remedy the problem by lubricating the steering stop. However, the problem persisted and the plaintiff took the vehicle back to the defendant. It is instructive that Mr. Norville in his report made no reference to a problem with the steering stop which the defendant assigned as the reason for the growling noise.

[48] From Exhibits "MH6" and "MH7" which are letters from the defendant to the plaintiff, it is clear that there was a problem with the differential as it had to be replaced at a cost of $5,754.69.

[49] In addition, during these inspections, there were other defects to be rectified including painting of the roof and the left front door of the vehicle, adjusting the handbrake, replacing the upholstery in the roof and wiring of the rear cab light. Some of these were done prior to the sale of the vehicle to the plaintiff.

[50] In ***R v Ford Motor Company Limited*** (previously cited) the Court referred to damage to a vehicle leaving the factory which could be repaired by the replacement of new parts. Herein lies the distinction with the instant case. The defendant not only replaced new parts but it repaired damage to the tray and canopy. Repainting was necessitated as a result of rusting even though the vehicle's history showed that it had been rust proofed prior to delivery yet rusting still occurred. This is the evidence of Mr. Hamilton and these are relevant considerations when looking at the merchantability of the vehicle and its fitness for purpose.

[51] In applying ***Rogers case*** (above cited), not only did the plaintiff purchase the vehicle for the purpose of driving from one place to another and to and from work, but he purchased it for its comfort, reliability, its ease of handling as well as its appearance. These are the ordinary purposes for which one purchases a vehicle described as new. He was deprived of these as a result of the defects apparent in the vehicle, notwithstanding the fact that these defects could be repaired.

[52] The fact that the differential had to be replaced is in itself evidence that the vehicle could not be driven safely with the defect even though Mr. Hamilton said that it was replaced so that the vehicle could be moved around the storage area so as not to create an obstruction. It would leave much to the imagination to find that the defendant would replace the differential for this purpose and it take it back out to reinstall a repaired differential as to return the vehicle to the plaintiff.

[53] The damage to the bearing not only caused damage to the front differential but to the pinion shaft as well as the bearing cage and housing thus making it unsafe to drive. In addition, the cost of repair and labour as seen in Exhibit "MH6" is expensive and more likely than not lengthy. It is as much a question of inference as it is a question of common sense that the damage was extensive requiring replacement.

[54] With this combination of defects, I am of the opinion and I find that the plaintiff's vehicle was not fit for the purpose for which it was bought; secondly, given the defect in the front differential and its overall effect on the vehicle I find that at the time of delivery of the car to the plaintiff it was not of merchantable quality and was not fit for the purpose for which it was bought.

[55] As a result of the foregoing breaches of condition, the plaintiff was entitled to rescind the contract of sale between himself and the defendant. The answer to the two questions posed at 2a and 2b above must therefore be answered in the affirmative.

3. Had the plaintiff accepted ownership of the vehicle within a reasonable time so as to deprive him of the right of rejection?

[55] As a result of the beaches of condition the plaintiff was entitled to reject the vehicle. Having bought the vehicle in January 2000, he sought to reject it on 21 April 2001. On that date he brought the vehicle to the defendant's premises and left it there. To date he has not returned to retrieve the vehicle. The question to be dealt with is whether the plaintiff had accepted ownership of the vehicle and had thereby lost the right of rejection?

[56] **Section 35** of the ***Sale of Goods Act***, **Cap 318** provides:

> "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 them without intimating to the seller that he has rejected them."

[55] In ***Grimoldy v Wells*** **(1875) L.R. 10 CP 391** at 395 Brett J. said in relation to the methodology of rejection:

> "The buyer may in fact return the goods or offer to return them, but it is sufficient, I think, and the more usual course is to signify his rejection of them by stating that the goods are not according to contract, and that they are at the vendor's risk. No particular form is essential. It is sufficient if he does any unequivocal act showing that he rejects them."

[56] **Section 55** of the Act provides that what is a reasonable time is a question of fact. In ***Berstein*** (supra) it was held that in considering whether the buyer had had the goods for a reasonable time thereby losing his right to reject them, the nature of the defect and when it was discovered were irrelevant since section 35 of the **1979 Act** (identical to section 35 of the local Act) was directed solely to what was a reasonably practical interval between the buyer receiving the goods and his ability to return them.

[57] In that case, the plaintiff had had the car for three weeks and had driven it 140 miles; he had had a reasonable time to examine it and had therefore lost his right to reject it.

[58] The plaintiff, in this case, alleged that he made several complaints to the defendant regarding the vehicle. He continued to drive the vehicle for some 15 months before rejecting it. He however, informed the defendant of the defect in the operation of the 4 x 4 facility of the vehicle and tried to have it repaired by the defendant.

REASONABLE TIME

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[59] What is a reasonable time within which the buyer ought to reject the goods is a question of fact to be determined from all the circumstances of the case. In this regard, one must also bear in mind the plaintiff's evidence that he noticed the cronking noise within the first two months of its purchase. He drew it to Mr. Maingot's attention and he promised to see what he could do about it. He took it to the defendant's place of business and left it there. He subsequently collected it but did not engage the 4x4.

[60] When he did engage it again he got the same noise. He again called Mr. Maingot and told him the vehicle was not performing up to standard and that he (Maingot) was not living up to his words that the defendant was not "that type of company" and that they looked after their customers and their vehicles. He gave further evidence that nothing was done after he spoke to Mr. Maingot the second time.

[61] The plaintiff further gave evidence that on one occasion when notified Mr. Maingot about the "cronking" noise, he threatened to drive the vehicle up to the defendant's place and leave it there but Mr. Maingot told him that he did not have to do that since he had already booked a date. When an employee of the defendant got in the vehicle and it was driven and the noise again detected he was told that it was the steering stop. There is also evidence from the plaintiff that apart from 2001, he threatened to take the vehicle to the defendant's workshop and leave it there that he was in dialogue with Mr. Maingot who assured him he would have everything resolved.

[62] Thereafter the plaintiff did not have much use for the 4x4 since he was on the road thus, according to his evidence, he did not engage it. When he did eventually engage it he got the same noise only amplified. He called Mr. Maingot three times but he did not return his calls.

[63] The plaintiff then had a meeting with Mr. McKenzie, the CEO of the defendant at the time. He averred that Mr. McKenzie told him that if he heard a noise from part of the vehicle and heard the same noise six months afterwards, he would not be able to differentiate where the noise was coming from. The vehicle was returned to the defendant for two days and sometime afterwards, when the 4x4 was engaged the same noise was heard again.

[64] The plaintiff's uncontroverted evidence is that, after the last episode with the cronking noise, he was told by a Mr. Crawford, an employee of the defendant, that the seal for the differential had been damaged.

[65] It is clear, therefore that the plaintiff was actively engaged in finding an amicable resolution of the problem and that the defendant was participating in this exercise; that Mr. Maingot's assurances that the problem would be looked at and the constant efforts by the plaintiff to have the problem resolved contributed to the delay of some fifteen months which elapsed between purchase and return of the vehicle.

[66] In ***Scholfield v Emerson Brantingham Implements*** **(1918)43 D.L.R. 509** it was held that a representation by the seller that the vehicle would be all right in time, or if not, then the seller would make it right will extend the time for rejection.

[67] Similarly in ***Finlay v Metro Toyota*** **(1977) 82 D.L.R. (3d) 440** where a buyer retained possession of a vehicle for six months giving the seller every opportunity to correct defects in it and attempting to use it for the purpose for which he bought it, the right to reject the goods for breach of a fundamental term was held not to be lost.

[68] Rescission is an equitable remedy given at the discretion of the Court. In looking at the impact of delay on this right one must also pay due regard to the conduct of the seller with respect to its obligations under the contract. It cannot be said that the plaintiff did not try to have the vehicle repaired. He gave evidence that he made several complaints about the functioning of the vehicle even though he could not put a figure on the number of complaints, yet the defendant failed:

(1) To properly diagnose the nature of the problem; and

(2) Having diagnosed it, to execute the necessary repairs at their own expense.

[69] The defendant's Chief Executive Officer gave evidence that a repair estimate was prepared and sent and that the Plaintiff would not sign it, there is no evidence that the defendant was willing to undertake this cost itself. Indeed the defendant, in its pleadings is of the opinion that the damage was caused solely by the negligence of the plaintiff and required him to pay the repair costs which he refused. Having regard to all of the evidence in this case, I am of opinion that the period of 15 months between the purchase of the vehicle and the plaintiff's leaving it at the defendant's premises, is not unreasonable in the particular circumstances of this case. The plaintiff tried to have the defect properly diagnosed and repaired and ought not to be penalised for the defendant's failure to respond in a timely manner.

[70] The defendant ought to have investigated the source of the noise when it was reported since they were aware of the prior problems the plaintiff had experienced with another dealer and Mr. Maingot had assured him that the defendant was not "that kind of company." The court also finds it unacceptable that the plaintiff made complaints

about the vehicle yet no such complaints were recorded in the vehicle's detailed service history. It was also unacceptable for Mr. McKenzie to tell the defendant that if he heard a noise and then heard it six months later, he would not be able to say where the noise came from.

[71] It was the defendant's duty to discover the source of the noise and to correct the problem. The manner in which the defendant handled the plaintiff's complaint was totally unacceptable. The defendant repeatedly promised to have the problem rectified, yet failed to do so. This court is of the opinion that it would be inequitable to allow the defendant to take advantage of its own wrong by allowing the plaintiff to continue in possession of the vehicle on the strength of its promise to have the problem rectified whilst taking no serious steps to discover the source of the problem and rectify it.

REJECTION OF THE GOODS

[72] The plaintiff claims to have rejected the goods and thus to have validly repudiated the contract. The defendant in paragraph 9 of its defence denies that the vehicle was rejected or the contract rescinded or that it had received any notice of rejection or rescission.

[73] The letters from the plaintiff's Attorney-at-Law which have been tendered into evidence do not use the classic language of rejection or rescission. The letter of Mr. C. Lindsay Bolden (now Mr. C. Lindsay Bolden Q.C.) dated 27 April 2001 details the problems associated with the vehicle and states that if there was no favourable response to the letter, he would commence an action in Court. The letter of 8 February 2002 from Mr. Olson DeC. Alleyne, Attorney-at-Law notes "*When one takes account of the facts outlined in the previous correspondence by Mr. Bolden and the findings of Mr. Norville, there is a strong inference that the vehicle which was sold to my client had a significant defect and in such circumstances, my client is entitled to reject the vehicle and recover the purchase price. This matter has remained unresolved for several months and it appears as though the jurisdiction of the High Court will have to be invoked to have my client's rights vindicated. However, my client and I are prepared to meet with you to further discuss this matter before resorting to such action.*"

[74] Mr. Alleyne never said that his client was rejecting the goods. In looking at rejection, it is not enough to merely have regard to the correspondence. The plaintiff after several months with a vehicle whose problems were unresolved left the vehicle on the defendant's premises and did not return for it. He had thereby shown that he no longer wanted the goods and had rejected them (see **Brett J.'s** reasoning in ***Grimoldy's* case** above cited).

[75] In addition, on the 16 May 2002, he filed a writ in the High Court of Justice claiming, inter alia, a declaration that he had validly rescinded the contract and damages for breach of contract. He had therefore exercised his right of repudiation of the contract. It must be remembered that rescission is a remedy which the Court may give. It is not a right vested in the buyer. He may opt to terminate the contract by repudiating it but only the Court may order rescission of the contract.

[76] Thus the failure of the plaintiff's counsel to mention that the plaintiff rescinded the contract is not fatal to right to reject the goods himself as he did by delivering the same to the defendant. In these premises, I hold that the plaintiff had not accepted the goods but had validly rejected the same.

DAMAGES

[77] The plaintiff's claim is for damages for breach of contract. Under paragraph 8 (1) he claims reasonable loss of use (3 weeks at $35.00 per day = $735.00). No evidence has been led to substantiate this claim whether by way of receipts or by evidence that this sum would be a reasonable sum for loss of use. Neither has any evidence

been led to substantiate the period of time for which the loss of use is claimed and in the circumstances, the Court cannot award any damages under this head.

[78] **Surveyor's Report** – the claim for this is $100.00 and it refers to the report of Mr. Russell Norville which has been tendered into evidence. This sum is allowed under this head.

GENERAL DAMAGES

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[79] The sum paid by the plaintiff for the vehicle was $60,485.60 inclusive of handling charges. Since I have held that the contract is rescinded, the plaintiff will be allowed this sum as General Damages.

[80] In summary, the Plaintiff is awarded:-

(1) General damages in the sum of $60, 485.60 plus

(2) Special damages of $100.00 for the Surveyor's Report

General damages will bear interest at the rate of 8% per annum from today until payment and special damages will bear interest at a rate of 4 % per annum from the date of filing of the writ until today and thereafter at a rate 8% per annum until payment.

[79] I must note that the evidence led does not provide any basis upon which there could have been any assessment of damages under the alternative claims of damages for breach of contract. The plaintiff will have his costs to be taxed if not agreed.

COUNTERCLAIM

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[80] The defendant's counterclaim is for the sum of $27,700.00 being the amount due and owing as storage charges for the vehicle from 8 May 2001 until the 24 May 2002 at $100.00 per day and continuing until the vehicle is removed from the defendant's premises. This is predicated upon its averment in paragraph 10 of its defence that the vehicle was delivered for the purposes of having repairs executed. That these were in fact done and the plaintiff neglected to approve same.

[81] Further that the plaintiff accepted possession of the vehicle or, alternatively, affirmed the contract and was precluded from rescission. Further and in the alternative that the alleged rejection of the vehicle was unjustified and there was no breach of the implied conditions of fitness and quality of the vehicle (paragraph 15). If there was such a breach, it was a breach of warranty for which damages would be the appropriate remedy.

[82] Having regard to my findings that there was a breach of the implied conditions as to fitness for purpose and merchantability, and to my findings that the plaintiff did not cause the damage to the vehicle as alleged in the defence, the defendant's counterclaim must be dismissed as being without foundation. The plaintiff will have his costs on the counterclaim to be agreed or taxed.

WILLIAM J CHANDLER

JUDGE OF THE HIGH COURT