

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
(CIVIL DIVISION)**

**Civil Suit No: 1046 of 2017**

**BETWEEN:**

**MARLON MOORE**

**CLAIMANT**

**AND**

**COURTESY GARAGE LIMITED**

**DEFENDANT**

**Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court**

**Dates of Hearing 2020: 5<sup>th</sup>, 24<sup>th</sup> August  
4<sup>th</sup> October  
22<sup>nd</sup> September; 23<sup>rd</sup> December (Written Submissions)**

**Date of Decision: 2020: 8<sup>th</sup> December (Oral)  
2021: 18<sup>th</sup> February (Written)**

**Appearances:**

**Mr. Sean Lewis for the Claimant.**

**Mr. Ramon Alleyne QC with Ms. Richelle Nichols and Mr. Jeremy Brereton,  
of Clarke Gittens Farmer for the Defendant.**

*Consumer Guarantee Act, Cap. 326E - Purchase of motor vehicle – Breach of  
guarantee of acceptable quality - Failure of transmission - Breach of substantial  
character*

*Remedies of Purchaser under Act, sections 19(2) & 19(3) – Purchaser requiring supplier to remedy breach versus right of rejection – Whether purchaser entitled to reject – Exercise of right of rejection.*

*Remedies of purchaser – Sections 19(4) & 19(5) – Damages arising from failure of guarantee.*

## **DECISION**

### **Introduction**

[1] In July, 2013, the Claimant Marlon Moore purchased a 2013 Nissan Juke motor vehicle from the Defendant, Courtesy Garage Ltd., for just over \$91,500.00. The Claimant alleges that the purchase was carried out by an agreement, the terms of which were contained in the Defendant's tax invoice issued to him. The Claimant further alleges that by virtue of the Consumer Guarantee Act, Cap. 326E of the Laws of Barbados ('the Act'), the agreement for purchase of the Juke was subject to certain implied conditions. The conditions implied were that the Juke should be reasonably fit for the purpose for which it was purchased, namely for private use, and that the Juke should be of satisfactory quality.

[2] The Claimant's case is that the Defendant breached these implied conditions of fitness for purpose and satisfactory quality given that (i) the Juke's brakes system; and (ii) its transmission which failed in December, 2015 - were both defective, and the Defendant failed to repair them.

As a result of those defects, the Claimant says that he rejected the vehicle and sought a full refund of its cost as was his right under the Act. The refund not having been provided by the Defendant, the Claimant in July, 2017, filed his claim for a return of the full cost of the Juke (the sum of \$91,569.63), as well as \$15,980, being the cost of renting an alternative vehicle.

[3] The Defendant resists the Claim, alleging in relation to the brakes, that the Claimant failed to adhere to their recommended maintenance schedule and when advised to do so, failed to replace parts of the brake system. The Defendant says therefore that any issues with the brakes on the vehicle occurred as a result of the Claimant's own actions, but more so, due to expected fair wear and tear. In relation to the transmission, the Defendant accepted that the transmission failure amounted to the vehicle's failure to comply with the guarantee of acceptable quality provided under section 6 of the Act. However, the Defendant did not accept that the Claimant was entitled to reject the vehicle and receive a full refund of the purchase price, having had the use and benefit of the vehicle for two and a half years.

[4] Primarily, the Defendant's case was that having selected the remedy of repair under section 19(2) of the Act, the Claimant was obliged to afford the Defendant a reasonable time within which to carry out the repair to the vehicle.

In relation to such repair and the material circumstances, the Defendant says that it successfully repaired the vehicle within a reasonable time, therefore the Claimant was not at liberty to reject the vehicle. Instead, the Claimant was obliged to accept the vehicle as repaired, which was made available to him since January, 2016. Alternatively, if entitled to reject, the Defendant says that the Claimant did not validly exercise his right of repair in accordance with the requirements of the Act. This is the Court's decision on the respective obligations and entitlements of the parties.

### **Factual and Procedural Background**

[5] For purposes of brevity, a minimalist account of the events as they occurred during the material period is outlined. On July 11<sup>th</sup>, 2013 the Claimant purchased a new Nissan Juke motor car from the Defendant in the sum of \$91,569.93. On 7<sup>th</sup> December, 2015 the Claimant's vehicle stalled in traffic and had to be taken by wrecker to the Defendant's garage. The Claimant had already noticed from a few days before, and had informed the Defendant, that the engine was 'sounding louder than normal'. After the vehicle was taken in, (but on that same day), the Claimant was informed by the Defendant that the transmission in the vehicle was bad and needed to be replaced.

The Claimant was also told that as the warranty period (2 years) of the purchase had expired, he would have to bear the cost of replacing the transmission.

[6] The Claimant immediately enquired as to the reason the transmission failed given that the vehicle was still relatively new and was serviced regularly, but says that the Defendant (at that time by their Service Manager), was unable to explain the cause of the transmission failure. The Claimant had also requested a replacement vehicle but was told that no rental vehicles were available. Instead he was told to rent a vehicle from elsewhere and the Defendant would cover the cost of such rental. For the next few weeks, there was communication via email and telephone between the Claimant and the Defendant's Service Manager regarding the course of action to be taken regarding his vehicle. In relation to the cost of replacement of a new transmission, the Claimant was told that the Defendant had to seek approval from Nissan, the manufacturer, about replacing the transmission free of cost, as the warranty period had expired.

[7] The Claimant says that despite his enquiries in this regard he received no answer and as such emailed the Defendant's representative on the 16<sup>th</sup> December, 2015 seeking answers to his queries in relation to the responsibility for the cost of the transmission, as well as regarding his request to be

compensated for the loss of use of his vehicle. The Claimant says the Service Manager telephoned him on the 18<sup>th</sup> December, 2015 but provided no information in relation to the approval for replacement of the transmission. The Service Manager undertook to revert to the Claimant regarding the approval to replace the transmission and the Claimant's request in relation to a replacement rental. Having received no answer, the Claimant emailed the representative on the 20<sup>th</sup> December, 2015 regarding their conversation two days earlier and emailed again on the 22<sup>nd</sup> December, 2015.

- [8] On the 23<sup>rd</sup> December, 2015 the Claimant received an email from the Defendant advising that since the 8<sup>th</sup> December, 2015 they had formally made a request of Nissan for his transmission to be replaced free of cost under a 'goodwill warranty' and had ordered the transmission since then. As of the 23<sup>rd</sup> December however, the Defendant said they were still awaiting Nissan's response regarding the approval of the free replacement of the transmission. On the 30<sup>th</sup> December, 2015 the Claimant emailed the Defendant to indicate a deadline of 8<sup>th</sup> January, 2016 by which time the Defendant was to advise as to a resolution in relation to the failed transmission as well as his compensation for the loss of use of his vehicle.

By this time the Claimant had continued renting an SUV at his own cost having declined the Defendant's offer of a rental car free of cost. By this email the Claimant also made known his intention to seek legal recourse under the Act.

- [9] The Claimant received a response to his 30<sup>th</sup> December, 2015 email from the Defendant's General Manager on the 5<sup>th</sup> January, 2016, however there was still no answer as to whether Nissan had approved the free replacement of the transmission. By response email of the 10<sup>th</sup> January, 2016, the Claimant informed the Defendant that he was exercising his right under the Act, to reject the vehicle and that his attorney would formally write on his behalf. Upon the latter's invitation, the Claimant met with the Defendant on the 19<sup>th</sup> January, 2016 where he restated his rejection of the vehicle and demanded a full refund of the purchase price. The Defendant instead offered the Claimant the reduced value of the vehicle instead of a full refund, which he refused. The Defendant indicated that it would revert to the Claimant regarding his request for a full refund of the vehicle. The Claimant alleges in the round that even after the 19<sup>th</sup> January, 2016 when he agreed to meet the Defendant at their request, he had not been informed whether the transmission was being replaced free of cost.

[10] The Defendant alleges that the Claimant was told on the 19<sup>th</sup> January, 2016 that the transmission would be replaced free of cost, and further alleges that they completed the replacement of the transmission on the 22<sup>nd</sup> January, 2016 and communicated this to the Claimant. By that time however, the Claimant's position was that he had rejected the vehicle and was entitled to a full refund. There was no further movement between the parties. The Claimant declined to uplift the vehicle from the Defendant; he was never compensated for the cost of renting a vehicle; and the matter proceeded to an exchange of lawyers' letters and ultimately the present Claim. The Claimant by his attorney sought a full refund of the purchase price and the Defendant's legal response refuted any entitlement to such. The parties' communications via email were placed before the Court *in toto*, however there is much variance between the parties as to what was said outside of those emails. This variance exists particularly in relation to the timing and notification of the precise position regarding Nissan's approval or not for the transmission replacement to be carried out free of cost.

[11] Procedurally, the matter was a routine one. The Claimant filed his claim in July, 2017 and the matter advanced to trial with the Claimant as the only witness in support of his case. The Defendant's case comprised three witnesses – its Regional After Sales Manager; its Senior General Manager;

and an expert witness, a mechanical engineer. After the conclusion of the evidence in the trial, closing submissions were received in writing on the 22<sup>nd</sup> September, 2020 and orally supplemented on the 4<sup>th</sup> October, 2020. The Court delivered an oral decision on the 8<sup>th</sup> December, 2020 but requested further submissions on two issues relating to remedies and on the issue of costs. Further written submissions were provided in response to the Court's directions. This decision reduces into writing the Court's oral decision and completes the narrow issues of remedies and costs in respect of which further submissions were directed by the Court.

### **Decision Overview**

[12] The Court will first examine the provisions of the Consumer Guarantee Act, Cap. 326E of the Laws of Barbados which are relevant to the case at bar. Thereafter, with the benefit of the material provisions of the Act extracted for ease of application, the Court will then (i) identify the issues which arise for determination having regard to the applicable law; (ii) extract the salient facts upon which the resolution of the matter is to be based; (iii) consider the relevant submissions and legal authorities of Counsel. The decision is set out in the following manner:-

Part A            The Law: Material Provisions of the Consumer Guarantees Act, Cap. 326E - paragraphs [12] – [26]

Part B	Issues - paragraph [27]
Part C	Discussion and Analysis
	C.I Available Remedies – paragraphs [28] – [29]
	C.II Exercise of Remedies – paragraphs [30] – [59]
	C.III Standalone Remedy of Damages– paragraphs [60] – [72]
Part D	Summary of Findings, Counterclaim and Costs – paragraphs [73] – [76]
Part E	Disposition – paragraph [77]

## **Part A – The Consumer Guarantees Act, Cap. 326E**

### ***General Observations***

[13] With respect to the more general provisions of the Act, the formalities giving rise to its application to the case at bar (such as the satisfaction of relevant definitions including ‘acquisition’ of a ‘good’, from a ‘supplier’) were never in dispute and as such do not need to be discussed. The objectives of the Act, however, are usefully set out insofar as they establish the overall context within which the case should be viewed. The objectives are stated thus in the Act’s long title:-

*“An Act to amend the law relating to*

*(a) the guarantees available to consumers upon the supply of goods or services; and*

*(b) the rights of redress against original suppliers and manufacturers in respect of a failure of goods or services to comply with any such guarantees,*

*and for connected purposes.”*

- [14] One can immediately isolate the main objective of the Act to be centered around guarantees prescribed by law in relation to the supply of goods and services, and the redress available to consumers upon failures of goods and services to comply with such guarantees. With respect to the operation of the guarantees and remedies provided, **sections 4 and 50** of the Act provide further context. **Section 4** preserves any right or remedy available under any other enactment or rule of law, unless expressly or impliedly repealed by the Act and in either case, to the extent so repealed. For example, where as there was in this case a contractual warranty, there could have been no dispute as to its validity or applicability (had it not expired), subject of course to the rights under the Act being maintained.
- [15] **Section 50** of the Act, precludes contracting out of the statutory rights and liabilities prescribed under the Act, (unless to the greater advantage of the consumer). A claim arising under the Act can also be compromised (section 50(5)) but there can be no agreement which precludes or limits the operation of the statutory guarantees. In terms of the general provisions of the Act, it is also useful to note that a consumer has the right to make a complaint to the statutorily constituted Consumer Claims Tribunal (established under section 41), however that process is an alternative to pursuing a claim in court. A person is not entitled to pursue both the Tribunal and court processes.

### *Applicable Provisions*

[16] In relation to the factual matrix before the Court, the applicable Parts of the Act are Parts II – Guarantees in Respect of Goods; and III – Redress Against Suppliers in Respect of Goods. Both Counsel have identified the applicable guarantees as those prescribed under sections 6 and 8. Section 6 prescribes a guarantee that goods supplied are of acceptable quality. Acceptable quality is defined by the terms of section 7 which is set out as follows:-

*“7. (1) Goods are of acceptable quality for the purposes of section 6(1) if they are as*

- (a) fit for all the purposes for which goods of the type in question are commonly supplied;*
- (b) acceptable in appearance and finish;*
- (c) free from minor defects;*
- (d) safe; and*
- (e) durable*

*as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to*

- (A) the nature of the goods;*
- (B) the price, where relevant;*
- (C) any statements made about the goods on any packaging or label on the goods;*
- (D) any representation made about the goods by the supplier or the manufacturer; and*
- (E) all other relevant circumstances of the supply of the goods.*

*(2) Where any defects in goods have been specifically drawn to the consumer's attention before he agreed to the supply, then, notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defects, the goods will not fail to comply with the guarantee set out in section 6(1) by reason only of those defects.*

*(3)...(5)”*

[17] Section 8 prescribes a guarantee as to fitness, in that the goods supplied must be reasonably fit for the purpose for which supplied. The Court is not of the view however, that this guarantee as to fitness is applicable in the instant case. The good supplied (the motor vehicle), functioned for over two years for the purpose for which it was supplied. The issue which arose given the failure of a major component part within the time period of just under 2½ years, is as to the quality of the good. The Court therefore considers that the guarantee which falls for consideration is that prescribed and thereafter defined by sections 6 and 7, respectively. In considering the factual matrix before the Court, it is considered that of the five (a-e) elements listed at section 7(1) which comprise the definition ‘acceptable quality’, only the element of ‘durability’ is applicable. This single element however, is itself subject to the qualifying factors thereafter prescribed.

Of the five factors thereafter listed (A-E), the Court considers that only (A) - the nature of the goods, and (B) - the price of the goods, arise for discussion. Subsections (2) to (5) of section 7 do not apply to the case at bar.

[18] Part III of the Act provides for the consumer's rights of redress against suppliers. Section 17 is merely declaratory of the existence of such rights, whilst section 18 does not apply to this case. Sections 19 – 24 however, are applicable and will be examined. The legislation can be regarded as somewhat convoluted, in that it is necessary to refer to different sections in order to obtain the full meaning of any one section, thus sections 19 – 24 are extracted in their entirety as hereinafter follows:-

(i) **Section 19**

*“(1) Where a consumer has a right of redress against the supplier in accordance with this Part in respect of the failure of any goods to comply with a guarantee, the consumer may exercise the following remedies.*

*(2) Where the failure can be remedied, the consumer may*

*(a) require the supplier to remedy the failure within a reasonable time in accordance with section 20;*

*(b) where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time,*

- (i) *have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or*
  - (ii) *subject to section 21, reject the goods in accordance with section 23.*
- (3) *Where the failure cannot be remedied or is of a substantial character within the meaning of section 22, the consumer may*
- (a) *subject to section 21, reject the goods in accordance with section 23; or*
  - (b) *obtain from the supplier damages in compensation for any reduction in value of the goods below the price paid or payable by the consumer for the goods.*
- (4) *In addition to the remedies set out in subsections (2) and (3), the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods) which was reasonably foreseeable as being liable to result from the failure.*
- (5) *Damages referred to in subsection (4) may include a sum in respect of any personal injury, distress, inconvenience, disappointment or vexation suffered as a direct result of the failure.”*

(ii) **Section 20**

- “20. (1) A supplier may comply with a requirement to remedy a failure of any goods to comply with a guarantee*
- (a) *by*

- (i) *repairing the goods, in a case where the failure does not relate to title; or*
  - (ii) *curing any defect in title, in a case where the failure relates to title; or*
  - (b) *by replacing the goods with goods of identical type; or*
  - (c) *where the supplier cannot reasonably be expected to repair the goods, by providing a refund of any money paid or other consideration provided by the consumer in respect of the goods.*
- (2) *Where a consumer obtains goods to replace defective goods pursuant to subsection (1), the replacement goods shall, for the purposes of this Act, be deemed to be supplied by the supplier and the guarantees and obligations arising under this Act consequent upon a supply of goods to a consumer shall apply to the replacement goods.*
- (3) *A refund referred to in subsection (1)(c) means a refund in cash of the money paid or the value of any other consideration provided, or both, as the case may require.”*

(iii) **Section 21**

- “21. (1) The right to reject goods conferred by this Act shall not apply if*
- (a) *the right is not exercised within a reasonable time within the meaning of subsection (2); or*
  - (b) *the goods have been disposed of by the consumer, or have been lost or destroyed while in the possession of a*

*person other than the supplier or an agent of the supplier; or*

*(c) the goods were substantially damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply; or*

*(d) the goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them.*

*(2) In section (1)(a) the term “reasonable time” means a period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to*

*(a) the type of goods;*

*(b) the use to which a consumer is likely to put them;*

*(c) the length of time for which it is reasonable for them to be used; and*

*(d) the amount of use to which it is reasonable for them to be put before the defect becomes apparent.*

*(3) This section applies notwithstanding section 35 of the Sale of Goods Act.”*

**(iv) Section 22**

*“22. For the purposes of section 19, a failure to comply with a guarantee is of a substantial character in any case where*

*(a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or*

- (b) *the goods depart in one or more significant respects from the description by which they were supplied or, where they were supplied by reference to a sample or demonstration model, from the sample or demonstration model; or*
- (c) *the goods are substantially unfit for a purpose for which goods of the type in question are commonly supplied or, where section 8(1) applies, the goods are unfit for a particular purpose made known to the supplier or represented by the supplier to be a purpose for which the goods would be fit, and the goods cannot easily and within a reasonable time be remedied to make them fit for such purpose; or*
- (d) *the goods are not of acceptable quality within the meaning of section 7 because they are unsafe; or*
- (e) *the goods are not unused in accordance with section 11.”*

(v) **Section 23**

*“23. (1) The consumer shall exercise the right to reject goods under this Act by notifying the supplier of the consumer's decision to reject the goods and of the ground or grounds for rejection.*

*(2) Where the consumer exercises the right to reject goods, the consumer shall return the rejected goods to the supplier*

- (a) unless,*

- (i) *because of the nature of the failure to comply with the guarantee in respect of which the consumer has the right to reject the goods; or*
- (ii) *because of the size or height or method of attachment,*  
*the goods cannot be returned or removed or transported without significant cost to the consumer, in which case the supplier shall collect the goods at the expense of the supplier; or*
- (b) *unless the goods have already been returned to, or retrieved by, the supplier.*
- (3) *Where the ownership in the goods has passed to the consumer before the consumer exercises the right of rejection, the ownership in the goods reverts in the supplier when the supplier receives the notification mentioned in subsection (1).”*

(vi) **Section 24**

*“24. (1) Where the consumer exercises the right to reject goods, he may choose to have either*

- (a) *a refund of any money paid or other consideration provided by him in respect of the rejected goods; or*
- (b) *goods of the same type and of similar value to replace the rejected goods, where such goods are reasonably available to the supplier as part of the stock of the supplier;*

*and the supplier shall make provision accordingly.*

(2) *A refund referred to in subsection (1)(a) means a refund in*

*cash of the money paid or the value of any other consideration provided, or both, as the case may require.*

*(3) The obligation to refund cannot be satisfied by permitting the consumer to acquire goods from the supplier.*

*(4) Where a consumer obtains goods to replace rejected goods pursuant to subsection (1)(b), the replacement goods shall, for the purposes of this Act, be deemed to be supplied by the supplier, and the guarantees and obligations arising under this Act consequent upon a supply of goods to a consumer shall apply in relation to the replacement goods.”*

***Sections 19 – 24 unraveled.***

[19] Section 19(1) merely states that the consumer’s remedies for failure of any good to comply with a guarantee are as provided in section 19. The remedies in section 19 are applicable to failure of *any* guarantee in respect of *any* good supplied. Between sections 19(2) and 19(3), it can be seen that a guarantee failure is grouped into two categories to which are attached different remedies. The groupings are (i) where the failure can be remedied; or (iia) where the failure cannot be remedied or (iib) where the failure is of a substantial character within the meaning of section 22. Sections 19(4)&(5) thereafter prescribe a right to obtain damages against the supplier for loss or damage arising from the failure – i.e. the failure of *any* guarantee in respect of *any* good.

The kind of loss eligible for such damages is qualified by section (19)(4)<sup>1</sup> and the damages recoverable are broadly defined by section 19(5). This additional right to damages as provided by subsections (4) and (5) must also be briefly examined.

[20] The remedies available to the consumer under section 19 are set out as numbered I, II and III as hereinafter follow.

I. *Failures which can be remedied*

(i) Failures which can be remedied give the consumer the right to require the supplier to remedy the failure within a reasonable time in accordance with section 20. It is useful therefore to proceed immediately to section 20 in order to ascertain the manner in which the failure is to be remedied;

(a) The words of section 20(1) are that ‘A *supplier* may comply with a requirement to remedy a failure of any goods to comply with a guarantee by...’

- Repairing the goods or curing a defect in title (as applicable)
- Replacing the goods with goods of identical type

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<sup>1</sup> The qualification is that loss or damage through reduction in value is excluded, such loss or damage being already provided for in section 19(3).

- Where it is not reasonable for the supplier to repair the good, by a refund of money or other kind of consideration which would have been provided by the consumer.
- (b) Sections 20(2) and 20(3) speak to clarifications in relation to replacement of goods or refund which need not be addressed.
- (ii) There is an interplay between section 19(2) and section 20(1) which is important. Section 19(2) affords **the consumer** the right to *require the supplier to remedy the failure* in accordance with section 20(1). Section 20(1) by its terms, appears to give **the supplier** the right to select the means by which to remedy the failure. The marginal note (albeit only a guide), states '*options of supplier who has been required to provide remedy*' and for example, by 20(1)(c) it is the **supplier's** determination of whether it will be reasonable to repair or provide a refund. This question of the supplier's options is important, as it would mean that once the consumer has elected to require the supplier to remedy the defect, as long as the supplier acts within a reasonable time, the supplier is entitled to select the option which best suits the supplier. Put another way, the consumer may request, but is not entitled in the first instance, to dictate to the supplier how the latter is to remedy the failure.

- (iii) If however, the failure is not remedied within a reasonable time - whether the supplier refused, neglected or was unable to do so - **the consumer** may then by virtue of section 19(2)(b), either –
- Have the failure remedied elsewhere and recoup all reasonable costs incurred for so doing from the supplier; OR
  - *Subject to section 21*, reject the goods in accordance with section 23.
- (iv) With reference to remedying the failure elsewhere, of the options at section 20(1)(a-c), it is difficult to envisage that any option other than repair can be contemplated; and outside of the options in section 20(1), it is difficult to envisage which option besides repair, could possibly be available to a consumer embarking on the self-help remedy afforded under section 19(2)(b)(ii). The other remedy provided by section 19(2)(b) – the right to reject the goods, can be left for the examination of the right to reject which follows below. It suffices to note at this juncture, that the first opportunity afforded the consumer to reject goods, is by virtue of section 19(2)(b)(ii), which arises only where the consumer has required the supplier to remedy the failure of the guarantee pursuant to section 19(2)(a); **and** the supplier has failed to do so within a reasonable time.

II. *Failures which (a) cannot be remedied; or (b) are of a substantial character*

- (i) Section 19(3), applies to failures which (a) cannot be remedied; or (b) are of a substantial character within the meaning of section 22. A failure which cannot be remedied is self-explanatory but one must refer to section 22, to ascertain the meaning of ‘substantial character’. There are five different ways in which a failure can be of a substantial character, and where applicable it is possible for there to be an overlap amongst those ways. The determination of whether and in what manner a failure can be categorized as of a substantial character, is obviously relative to the nature both of the failure and the goods.
- (ii) The consumer’s remedy where the failure cannot be remedied or is of a substantial character, is rejection subject to section 21 and in accordance with section 23; OR damages for the loss in value of the good, below the price paid. A second opportunity for a consumer to reject goods can thus be recognised, and this is where the failure of the guarantee cannot be remedied, or is of a substantial nature.
- (iii) It has to be noted, that it is possible for a guarantee failure to be of a substantial character, but also be remediable.

In the Court's view, what obtains in relation to this circumstance is that the consumer may choose to pursue his or her remedy under section 19(2) or under 19(3). However, if 19(2) is selected, meaning that the supplier has been required to remedy the failure (which is of a substantial character), the rights and obligations operate in the same manner as if the failure is merely one which can be remedied as opposed to a failure of a substantial character.

III. Right to damages for loss or damage.

- (i) Section 19(4) as further expanded by section 19(5), provides a remedy that is independent of, and in addition to those afforded by sections 19(2) and (3). This third category of remedy is for damages other than the loss of value of the good as provided in section 19(3)(b). The loss or damage prescribed is for both general and special damages arising from the failure of the guarantee. In keeping with the general principles applicable to damages, the loss or damage must be reasonably foreseeable as a result of the failure.
- (ii) Unlike heads of recovery under general damages at common law, the heads of recovery prescribed by section 19(5) are more broadly categorized.

For example, besides for personal injury, damages may be recovered for distress, inconvenience, disappointment or vexation suffered as a result of the guarantee failure.

[21] Thus far, the legislative regime of the remedies provided by the Act is that under section 19, the consumer has two available options depending on the nature of the failure of the guarantee (and this applies in relation to failure of any guarantee in respect of any good). That is, whether the failure is (i) remediable or (ii) not remediable, or of a substantial character. There is an overlap of remedies where the failure is of a substantial character but nonetheless remediable. The full array of remedies available include repair; replacement with an identical type good; refund of monies or other kind of consideration; compensation; and rejection. At this point the remedy of rejection remains to be examined. One must consider what it entails and how it is exercised.

[22] The relevant sections are sections 21 and 23, already extracted above and the Court interprets the sum total of these sections in the following manner:-

- (i) Section 21(1) firstly prescribes four exclusionary factors which restrict the availability of the remedy. Rejection is not available if:-
  - (a) the right is not exercised within a reasonable time. What is a reasonable time is then defined in section 21(2);

- (b) the consumer is responsible for the loss, destruction or disposal of the goods;
- (c) the goods are substantially damaged in a manner not attributable to the supplier (relevant time of assessment being the time of supply);
- (d) the goods have become affixed to real property and cannot be detached without being damaged.

With the exception of (a), all of the exclusionary factors to the consumer's right to reject, arise in relation to the consumer's ability to return the goods more or less, intact.

- (ii) Returning to the question of 'reasonable time' as provided in section 21(1)(a) – section 21(2) prescribes in effect that:-
  - (a) The relevant period from which time for rejection begins to run is 'from the time of supply of the goods';
  - (b) Thereafter, the relevant period is ended by the variable qualification of when 'it would be reasonable to expect the defect to become apparent'. This variable period, is itself to be determined with respect to prescribed factors set out in section 21(2), which are:-
    - The type of goods;

- The likely use intended by the consumer;
  - The reasonable life of use of the goods
  - The amount of use reasonably expected, before the defect would become apparent.
- (iii) The consumer's exercise of his right of rejection within a reasonable time is a condition precedent to the lawful exercise of the right to reject, regardless of the mode by which the right is triggered;
- (iv) The question of whether or not the right has been exercised within a reasonable time within the parameters of section 21(2), is entirely a question of fact;
- (v) The factual indicators are,
- (a) when was the good supplied, as this time is the commencement of the period to be determined as reasonable; and
  - (b) how long after the supply of the goods, could it reasonably have been expected for the defect in the good to have become apparent.
- This latter factor has to be determined by evidence which may, depending on the nature of the good and its defect, require the opinion of an expert.

[23] Having understood that the right to reject is subject to the condition precedent of being exercised within a reasonable time, as such is defined by section 21(2) - one must now consider the circumstances in which the right to reject arise. In other words, when is the consumer entitled to exercise a right of rejection of goods? The Court considers that the right to reject arises in the following four circumstances:-

- (a) In relation to a failure which is remediable, where the consumer has required the supplier to remedy the failure and the supplier has refused, neglected or been unable to remedy such failure within a reasonable time. As will be seen from the discussion of the case law, once the customer elects to have the supplier remedy the failure, the right to reject arises only if the supplier has not remedied the failure within a reasonable time;
- (b) Where the failure cannot be remedied, the consumer has the right to reject;
- (c) Where the failure is of a substantial character, the consumer has the right to reject;
- (d) Where the failure is of a substantial character but is capable of being remedied; and the consumer has required the supplier to

remedy the failure; and the supplier has failed to remedy the failure within a reasonable time - the consumer has the right to reject.

[24] In terms of the actual exercise of the right to reject, this is governed by sections 23 and 24. Section 23 tells us what the consumer is required to do in order to reject and section 24 tells us what the consumer is entitled to receive, having rejected the good. According to sections 23(1) and (2), the consumer is required to do several things in order to reject. These are:-

- (i) Notify the supplier of the decision to reject;
- (ii) Notify the supplier of the grounds upon which the rejection is based;
- (iii) Return the goods to the supplier (subject to the qualifications in section 23(2)).

By section 24, the consumer upon rejection of the good, is entitled to elect to receive either (i) a refund of money paid or other consideration provided in respect of the good; or (ii) replacement of the rejected good with goods of a same type and of similar value, if reasonably available from the supplier's stock. The supplier is obliged to facilitate the consumer's choice except that a replacement must be reasonably available from his stock.

### ***Summary of the Consumer's Rights provided by Part III of Act***

[25] With reference to the case at bar, the range of remedies and circumstances in which these remedies may be properly exercised, are sought to be practically

illustrated in the two tables below. Table A will depict the rights available under section 19 along with the supplier's obligations, and the existence or not of any conditions or qualifications attached to those rights. Table B will depict specifically, the exercise of the right to reject in terms of its limitations or conditions precedent (section 21) and how it is to be exercised (section 23). The consumer's entitlements upon rejection are clearly set out in section 24 and do not need to be similarly illustrated.

**Table A – Section 19 & 20**

<b>Rights/Obligations</b>	<b>Failure of Guarantee can be remedied s. 19(2)</b>	<b>Failure of Guarantee cannot be remedied s. 19(3)</b>	<b>*Guarantee failure of a substantial character s. 19(3)</b>
Consumer	*A. Require supplier to remedy failure s.19(2)(a) <b>OR</b> B1. Remedy failure elsewhere at supplier's cost; <i>or</i> B2. Reject goods	A. Reject goods 19(3)(a) <b>OR</b> B. Damages in compensation for reduction in value	A. Require supplier to remedy failure s.19(2)(a) <b>**OR</b> B1. Reject goods s. 19(3)(a) or <i>or</i> B2. Damages in compensation for reduction in value.
Supplier	**Remedy failure under s.20(1) by – - repair/cure defect of title - replace goods - refund where repair unreasonable	No option to decide remedy	If consumer elects A, supplier must remedy failure under s.20(1)
Additional remedies	Damages for loss or damage arising from failure of guarantee s.19(4)&(5)	Damages for loss or damage arising from failure of guarantee s.19(4)&(5)	Damages for loss or damage arising from failure of guarantee s.19(4)&(5)

Notes	<p><i>*Supplier must remedy failure within a reasonable time failing which consumer entitled to select remedy B1 or B2/Consumer must allow supplier reasonable time to remedy defect before moving on to B1 or B2</i></p> <p><i>**Supplier has right to select remedy</i></p>		<p><i>*Failure of guarantee of a substantial character may be remediable</i></p> <p><i>** Consumer may elect remedy A (s.19(2)) if failure of a substantial character can be remedied; <b>HOWEVER</b> if s.19(2) selected, consumer must allow supplier reasonable time to remedy failure before moving on to B1 or B2.</i></p>
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**Table B – Sections 21 & 23**

When Rejection arises	Loss of Right of Rejection	Meaning of ‘Reasonable time under s.21(1)(a)	Exercise of right of Rejection
Under s. 19(2)(b) upon supplier’s failure, refusal or neglect to remedy failure of guarantee within reasonable time when required pursuant to s. 19(2)(a)	<ul style="list-style-type: none"> <li>- Rejection not exercised within reasonable time; <b>OR</b></li> <li>- Consumer disposes of goods; <b>OR</b></li> </ul>	<ul style="list-style-type: none"> <li>- Time starts to run from date of delivery of goods to consumer</li> </ul>	<ul style="list-style-type: none"> <li>- Notify supplier of decision to reject along with ground of rejection</li> </ul>
Under s. 19(3)(a) where failure of guarantee cannot be remedied <b>OR</b> failure of guarantee of a substantial character	<ul style="list-style-type: none"> <li>- Goods lost or destroyed by person other than supplier or supplier’s agent; <b>OR</b></li> </ul>	<ul style="list-style-type: none"> <li>- *Time expires at a reasonable time [from date of delivery]; [within which it could be expected that a defect should become apparent]; [having regard to</li> </ul>	<ul style="list-style-type: none"> <li>- Return goods to supplier</li> </ul>
Under section 19(2)(b) where failure of guarantee of a substantial character <b>AND</b> consumer elected to require supplier to remedy under s. 19(2)(a) <b>AND</b> consumer entitled to proceed under s. 19(2)(b)	<ul style="list-style-type: none"> <li>- Goods substantially damaged after delivery; <b>OR</b></li> <li>- Goods cannot be returned to supplier without substantial damage s. 21(1); <b>OR</b></li> </ul>	<ul style="list-style-type: none"> <li>(a) the type of goods</li> <li>(b) expected use of the goods</li> <li>(c) reasonably expected length of use of goods</li> <li>(d) amount of use before defect should reasonably become apparent.]</li> </ul> <p><i>* The expiration of time herein is variable, relative to the goods and circumstances of the guarantee failure.</i></p>	<ul style="list-style-type: none"> <li>- Consumer to select entitlement under s. 24.</li> </ul>

[26] Generally speaking, with respect to the remedies available to a consumer, the question of whether a failure of a guarantee was remediable or not remediable, may be the subject of the respective opinions of the consumer or supplier. However, once the matter becomes the subject of a dispute submitted to the court (in pursuance of the Act), the question of failure of a guarantee becomes one of fact for the court to determine, as established by evidence. Likewise, the question of which remedy the consumer (or supplier) was entitled to, or which remedy was exercised, may have been determined by the consumer (or supplier) according to their views of their respective entitlements under the Act, or even without specific understanding of such entitlements. Again however, once the matter becomes a legal dispute under the Act, the court must then make the determination of what remedies were available and whether they were properly exercised, in both cases, according to available evidence as well as the law.

### **Part B - Issues**

[27] Given the legal regime identified and extracted above, the Court will have to consider (I) what remedies were available to the consumer within the factual matrix of the case; as well as (II) whether those available remedies were properly or effectively exercised.

This process must be informed by the following questions, the answers to which have to be extracted from the evidence and the law:-

I. In relation to available remedies:-

- (a) which guarantee/s under Part II has/have been breached?
- (b) was the failure of the guarantee one which could be remedied or one which could not be remedied?
- (c) was the failure one of a substantial character?
- (d) if of a substantial character, was the failure nonetheless one which could be remedied?
- (e) having regard to (b) through (d), which remedy or remedies were available to the Claimant?

II. In relation to the Claimant's exercise of his remedies:-

- (a) which remedy/s did the Claimant select?
- (b) if selected, was the right of rejection effectively exercised?

## **Part C - Discussion and Analysis**

### **CI - The available remedies**

[28] In considering the above questions, the Court will extract facts found from the evidence whilst applying the law as set out in Part A.

Where relevant the Court makes reference to the submissions of respective Counsel, in relation to both the law and evidence.

(a) *Which guarantee under Part II of the Act has failed?*

- (i) The factual circumstances are that the Claimant's relatively new vehicle (almost 2½ years old), a Nissan Juke, suffered a failure of its continuously variable transmission (CVT), resulting in the vehicle being immobilized and necessitating replacement of the entire transmission. The Claimant's case also alleges that there was a failure of guarantee in relation to the brake system of his vehicle, having regard to the rapidity with which and number of times he was required to repair or replace brake parts.
- (ii) In relation to the brakes, the Defendant says that the Claimant's complaint of wear to the brake pads could not be considered a defect to the brake system and that repairs or replacement of brakes were not covered by the warranty. Further, that the wearing of brake pads is influenced by variable factors such as the extent of use as well as driving styles. The Defendant additionally alleges that the Claimant failed to adhere to their recommended service schedule and refused to replace brake parts when advised to do so, resulting in greater wear and tear to the vehicle's brake system.

- (iii) The issue of the brakes amounting to a failure of any guarantee under the Act is rejected by the Court. As a general point however, the Court is obliged to note that even where repair or replacement to brakes is not covered by a warranty, the guarantees under the Act are nonetheless applicable, based on the provisions of section 50.<sup>2</sup> The Claimant offered to the Court only his evidence of having to replace brake pads and rotors at times, in his view too early within the life of the vehicle and too frequently.
- (iv) The Defendant's evidence by its Senior General Manager and its expert witness attributed normal wear and tear to the brakes, exacerbated by the Claimant's lack of adherence to recommended timelines for maintenance and his refusal to approve changes to certain brake parts during routine services. In relation to the issue of adhering to service timelines, the Court finds that the variance in the recommended times and mileage versus the times the Claimant took the vehicle in for service are without more, inconsequential.
- (v) On the other hand, the Court accepts the Defendant's evidence that the vehicle's brakes were subject to normal wear and tear, which itself is variable depending on driving styles, road conditions and

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<sup>2</sup> See paragraph 15 supra

the extent of usage. Further, the Court accepts the Defendant's evidence that the Claimant refused to approve replacement of brake parts when recommended (in November, 2014 and June, 2015) and thereafter the squealing noise reported was due to disc rotors that ought to have been changed when recommended. In the absence of any evidence to the contrary, the Court is unable to accept that the vehicle's brakes presented with any issue other than normal wear and tear, exacerbated by the Claimant's election not to approve replacements recommended by the Defendant.

- (vi) In relation to the transmission, both sides have identified the guarantees of 'acceptable quality' (sections 6 & 7), as well as 'fit for purpose' (section 8) as applicable. As briefly stated before, the Court considers that only the guarantee of acceptable quality is applicable to the circumstances of the transmission failure. The good in question is a motor vehicle and performed as such for just under 2½ years<sup>3</sup>. In the Court's view, the failure of such a major component of a vehicle, namely the transmission, would have had to have occurred within a much shorter period after delivery in order to contravene a guarantee of fitness for purpose.

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<sup>3</sup> The Claimant at paragraph 7 of his witness statement says "*Between July, 2013 and October, 2015 I drove the vehicle in a normal manner as a private vehicle.*"

The Court considers that the failure of the vehicle's transmission just shy of 2½ years subsequent to delivery, speaks to the quality of the good, not its fitness for purpose.

- (vii) With respect to the specific basis of the failure of the guarantee, the Court finds that the only applicable element of the failure of acceptable quality as defined under section 7, is at paragraph (e) – durability. The remaining elements under section 7, for example the appearance and finish, or the safety of the vehicle, did not arise on the evidence. The element of fitness for purpose has already been dismissed in relation to the wider issue of the applicable guarantee which has failed.
- (viii) In relation to the lone element of durability as provided in the definition of 'acceptable quality', the Court further specifies that the factors found applicable relative to the element of durability are (A) the nature of the good and (B) the price. Counsel for the Claimant also identified these factors as those applicable in his assessment of whether the goods were of acceptable quality.
- (ix) The Court's assessment of the durability of the vehicle is in terms that the nature of the good, namely a motor car made by a reputed manufacturer in the market, is such that a reasonable consumer

(fully acquainted with the state and condition of the vehicle, including any hidden defects), would expect a new Nissan vehicle to be durable, in the sense of not developing any major problems, at 2½ years old. Further, a reasonable consumer likewise regarded, would expect a new vehicle purchased at a cost of approximately \$92,000, to be durable, in the sense of not developing major problems, at 2½ years old.

- (x) In the circumstances, the Court agrees with both Counsel that the failure of the Claimant's 2½ year old Nissan Juke's transmission as a result of which the vehicle was unable to be driven, amounts to a failure of the guarantee of acceptable quality, as defined by section 7 of the Act.

*(b) Was the failure one which could be remedied or not?*

*(c) Was the failure of a substantial character?*

*(d) If substantial, was the failure capable of being remedied?*

- (xi) Keeping in mind that the good in question is the motor vehicle and not the transmission, it has to be accepted that the good itself, the vehicle, could be repaired by either repair or replacement of the transmission. Regardless of what the Claimant would have been told or not told about the transmission, the failure of the guarantee of

acceptable quality could be remedied either by means of repairing or replacing the transmission.

- (xii) In relation to the question of the failure being one of a substantial character, Queen's Counsel for the Defendant has conceded that to be so. The Court agrees, but this agreement must be based upon satisfying the criteria prescribed in section 22. Section 22(a) states that '*the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure*'. The nature and extent of the failure are not in dispute – namely – (a) the transmission failed at just under 2½ years from the time of supply of the vehicle; (b) the vehicle could not be driven at all with its failed transmission; and (c) the cost of replacing the transmission (at \$24,000) was a significant amount in and of itself, as well as it amounted to between ¼ and 1/3 of the overall cost of the vehicle.
- (xiii) The Court agrees with both Counsel with little difficulty that a reasonable consumer would not have purchased a new vehicle much less a new Nissan vehicle at almost \$92,000, were it to be known that the transmission would stop working and have to be replaced in just under 2½ years of purchase.

It is important to note however, that the failure albeit of a substantial character, was nonetheless one which was capable of being remedied.

(e) *Which remedies were available to the Claimant?*

- (xiv) The failure in the instant case has been identified by the Court, as one of a substantial character, which was nonetheless capable of being remedied. On the Court's construction of section 19 therefore, the Claimant, as the consumer, had remedies available either under section 19(2) given that the failure was capable of being remedied; or directly under section 19(3), given that the failure was one of a substantial character as defined under section 22. As will be highlighted further on, the Court agrees to a certain extent with Queen's Counsel for the Defendant, that the right to require the failure to be remedied and the right to reject cannot be exercised at the same time.
- (xv) The Court's position however, is that where there is that overlap in that there is a failure of a substantial character which is nonetheless capable of being remedied, the consumer has a direct right of rejection under section 19(3); OR the consumer may still elect to require the failure to be remedied, pursuant to section 19(2).

If however, the consumer elects to have the failure of a substantial character remedied as per section 19(2), the right to reject becomes exercisable no longer under section 19(3), but pursuant to section 19(2)(b) – namely, upon the supplier having failed to remedy the breach (for whatever reason) – within a reasonable time.

[29] To conclude the above, in answer to the question - which remedies were available to the Claimant, the Court states the following:-

- (i) There was a failure of the guarantee of acceptable quality as provided under sections 6 and 7 of the Act;
- (ii) The failure of the guarantee of acceptable quality was occasioned by the failure of the transmission of the vehicle. As determined earlier<sup>4</sup>, there was no failure in relation to the vehicle's brakes;
- (iii) The failure of the transmission was of a substantial character given that the vehicle was incapable of working with a failed transmission and the cost of replacement of the transmission was between  $\frac{1}{4}$  and  $\frac{1}{3}$  the purchase price of the vehicle;
- (iv) Notwithstanding the failure of the guarantee was of a substantial character, the failure was nonetheless capable of being remedied as the vehicle could be repaired by replacing the transmission;

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<sup>4</sup> Supra @ Para 28(a)(i-v)

- (v) As a result of (iii) and (iv) above the remedies available to the Claimant were either (a) to require the Defendant to remedy the failure within a reasonable time under section 19(2)(a); or failing which (b) the ensuing right to self-help or to rejection under section 19(2)(b); or (c) pursuant to section 19(3), a direct right of rejection or compensation for reduced value of the good;
- (vi) In addition to his elective remedies under section 19(2) or 19(3), the Claimant also has the standalone remedy under section 19(4), of damages for foreseeable loss and damage arising from the failure of guarantee.

## C II The exercise of the remedies.

### A. *Which remedy or remedies did the Claimant exercise?*

#### *Repair vs Rejection*

[30] Counsel for the Claimant's position is that the Claimant by his email on the 10<sup>th</sup> January, 2016, rejected the vehicle. It is also the Claimant's position that he was never given sufficient information by the Defendant, in order to make an informed decision as to whether to proceed with the repair of the vehicle. Particularly, the Claimant's position is that:-

- (a) he was never told (to this day), what was wrong with the transmission or why it stopped working;

- (b) he was not told in a timely manner, whether the manufacturer would replace the transmission notwithstanding the expiry of the warranty, or whether the Defendant would be accepting the full (or if only a part), what portion of cost, to replace the transmission;
- (c) he was not given accurate or timely information on the initiation or subsequent progress of the Defendant's decision to repair the vehicle; or the Defendant's actual actions undertaken in repairing the vehicle;
- (d) he was not told when the transmission was actually replaced and confirmed to be working properly.

It is in such circumstances that the Claimant says that he was entitled to and did reject the vehicle. Further, that having done so on the 10<sup>th</sup> January, 2016, his rejection occurred prior to being informed by the Defendant on 22<sup>nd</sup> January, 2016 that the transmission had been replaced and was working properly.

[31] Counsel for the Claimant relied on **Cooper v Ashley & Johnson Motors Ltd.**<sup>5</sup> as authority for the position that a consumer's election to carry out repairs would not prejudice a subsequent right to reject goods, if the consumer had not been provided with sufficient information to make an informed decision as to whether to reject or not.

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<sup>5</sup> [1997] DCR 170

Further, Counsel for the Claimant posits that the Defendant failed to properly abide by the options available to it under section 20 in that it gave the Claimant no assurances as to warranty of the new transmission despite the provision of section 20(2). Also, that the repair could not adequately be said to have been carried out as the vehicle was only inspected by the Defendant's expert in June, 2017, and that expert did not inspect the new transmission, only the vehicle. As a result, the Claimant had no other choice at the material time, but to reject the vehicle.

[32] Notwithstanding his position in relation to the right to repair which was neither properly made available to him, nor properly carried out by the Defendant, the Claimant in any event says that he was entitled, as of right, to reject the vehicle based on the defect being one of a substantial character. (The Court has already determined that the defect is properly regarded as of a substantial character.) Additionally, however, the Claimant's position was that he became entitled to reject the vehicle on December, 8<sup>th</sup> 2015 when he was told that the transmission had gone bad.

[33] Queen's Counsel for the Defendant takes a different view of the Claimant's entitlement to and exercise of remedies, based on facts of the matter. On the evidence, the Defendant's position is that the Claimant elected to have the Defendant to repair the vehicle, thereby exercising his remedy pursuant to

section 19(2)(a) of the Act. Particularly, Queen's Counsel for the Defendant points to paragraph 11 of the SOC, in which it is pleaded that the Claimant delivered the vehicle to the Defendant to carry out repairs to the transmission on December 7<sup>th</sup>, 2015; the Claimant also enquired via email of the status of the repair and confirmed his instruction to install the transmission respectively on the 16<sup>th</sup> and 22<sup>nd</sup> December, 2015. Lastly, paragraph 18 of the Claimant's witness statement speaks to his election to have the vehicle repaired.

[34] As a result of the Claimant's election to have the vehicle repaired, the Defendant's position is that the right to reject the vehicle could only be exercised if the Defendant failed as provided by section 19(2)(b), to remedy the failure of the guarantee within a reasonable time. In support of this position Queen's Counsel relied on **Stephens v Chevron Motor Court**<sup>6</sup>, in which it was held that the rights (in the equivalent of sections 19(2) and 19(3) of the New Zealand legislation) could only be exercised sequentially. In other words, having elected to require the Defendant to repair the vehicle, the Claimant was not at liberty to exercise his right to reject, unless the Defendant failed to remedy the failure of the guarantee in a reasonable time.

[35] In the circumstances of the case, the Defendant contends that the vehicle was repaired within a reasonable time, by virtue of the replacement of the

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<sup>6</sup> [1996] DCR 1

transmission in approximately 6 weeks, during which period, the Christmas season intervened. Further, given that the new transmission was required to be imported from overseas, the period of approximately 6 weeks was sufficient within which to have remedied the failure by means of effecting the repair to the vehicle.

### *Rejection*

[36] As stated before, the Claimant's position alternatively, is that the failure being one of a substantial character, he was entitled to reject the vehicle as of right under section 19(3). Counsel for the Claimant recognized that the right to reject was subject to section 21 which required rejection to be carried out within a reasonable time. Counsel for the Claimant submitted that the time for rejection begins to run from the time the Claimant becomes aware of the nature of the defect. Reference was made to local case of **Kimone Phillips v Courts (Barbados) Ltd**<sup>7</sup>, which was heard by the Consumer Claims Tribunal<sup>8</sup>. Counsel for the Claimant commends to this Court the Tribunal's reliance on *Nesbit v Porter*<sup>9</sup>, to the effect that '*a reasonable time with respect to the right to reject goods, must be one which is sufficient to enable the consumer to become fully acquainted with the nature of the defect; and that a*

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<sup>7</sup> Consumer Claims Tribunal Decision dd June 29<sup>th</sup> 2007.

<sup>8</sup> Vide section 42(2) in which the consumer has a right to seek redress in court or by complaint to the Consumer Claims Tribunal.

<sup>9</sup> [2000] 2 NZLR 465

*defect is not apparent until its cause has been identified and until the buyer knows what has to be done to fix it and what it will cost*<sup>10</sup>.

[37] On this reasoning, Counsel for the Claimant points out that the transmission not being a serviceable part, the defect would not have become apparent during the service schedule recommended by the Defendant. Further, that the Defendant's failure to provide the Claimant with relevant information relating to the cause for the failure of the transmission, prolonged the period during which the Claimant was entitled to reject the vehicle, as he was not afforded the information from which to exercise his right to reject. According to the Claimant, therefore time began to run on his right to reject only on the 8<sup>th</sup> December, 2015.

[38] Queen's Counsel for the Defendant's position was that in accordance with section 21, the time from when the right to reject starts to run is from the time of supply of the good. Thereafter, what amounts to a reasonable time within which to expect the particular defect to have become apparent, is based on the factors prescribed in section 21(2). Queen's Counsel refers to a number of cases to illustrate the application of the section as follows:-

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<sup>10</sup> Nesbit *supra* @ para 39

- (i) **David Douglas v Glenvargill Company Ltd**<sup>11</sup>. – even when dealing with latent defects, ‘*rejection is a relatively short-term remedy and is simply not available when a latent defect manifests itself for the first time more than a year after delivery*’;
- (ii) **Cooper v Ashley & Johnson Motors Ltd**.<sup>12</sup> – rejection after 11 months was considered reasonable, however this period was contrasted with periods of 18 months and 2 years before rejection was sought. In *Cooper*, it was noted to be unlikely that the court would tolerate a lapse of years before this point was reached but certainly several months may well elapse depending upon a number of minor problems and the periods in which the vehicle operates satisfactorily;
- (iii) **Reference No. MVD 217/2009 (Auckland)**<sup>13</sup> – in this case rejection was sought of a vehicle (based on a latent defect in a fuel system) 42 months after delivery. It was held by the Tribunal that common sense suggests that a latent defect in the manner suggested would have become manifest sooner than 42 months, and this was in circumstances where there was a valid 5 year warranty.

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<sup>11</sup> [2010] CSOH 14 @ para 36

<sup>12</sup> [1997] DCR 170

<sup>13</sup> [2010] NZMVD T35 (April, 2010)

- (iv) Aside from the illustrations above which suggest that the time for rejection is a relatively short one, albeit dependent upon the circumstances and nature of defect, Queen’s Counsel for the Defendant also submits that the fact that the transmission failure occurred outside the warranty period is an additional factor which the Court should take into account in assessing the reasonableness of the time sought for rejection. Even further, it was pointed out that the Claimant logged 57,671 kilometers before the transmission failed.

*The Court’s findings on the Claimant’s exercise of his remedies*

[39] The Court’s conclusion in relation to which remedy the Claimant exercised is firstly a question of fact. The Court considers that by his pleadings and evidence,<sup>14</sup> the Claimant in the first instance, plainly required the Defendant to repair his vehicle. Examples of the pleadings and evidence referred to are as follows (emphasis mine):-

Paragraphs 10 – 14 of the Claimant’s SOC

- (i) “10. Under the provisions of the Consumer Guarantees Act...the Claimant was entitled to require the Defendant to repair or replace the good;

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<sup>14</sup> Paras 10, 11, 12, 13 & 14 of the Statement of Claim filed on 13<sup>th</sup> July, 2017; Claimant’s Witness Statement – paras 15, 16, 18, 19, 20, 21, 23, & 25.

11. On the 7<sup>th</sup> day of December, 2015, the Claimant delivered the good to the Defendant and required the Defendant to carry out repairs to the transmission of the good;

12. Accordingly it was the Defendant's obligation to repair the good within a reasonable time...;

13. In breach of that obligation, the Defendant failed to successfully carry out the repairs within a reasonable time;

14. Further, in breach of that obligation the Defendant refused to repair the good free of cost..."

Some examples from the Claimant's witness statement:-

- (ii) Paragraphs 15& 16 – the Claimant engaged the Defendant in relation to the replacement of the transmission;
- (iii) Paragraph 18 – “During the meeting I told Mr. Morris that I would need a vehicle to get around while the vehicle was being repaired...”
- (iv) Paragraph 21 – On the 16<sup>th</sup> December, 2015 I emailed Mr. Morris seeking an update on the status of the repairs of the vehicle having not heard from him since December 8<sup>th</sup>, 2015;
- (v) Paragraph 25 – On December 30<sup>th</sup>, 2015 I emailed Mr. Morris to inform him that I had grown tired of the lack in information and action being taken...In the email I stated that I would give him until January 8<sup>th</sup>; a

full month, to communicate an offer to me on how my transmission would be fixed...”

[40] As a result, the Court finds that the Claimant exercised his right under section 19(2)(a) of the Act, to require the Defendant to remedy the failure of the guarantee of acceptable quality, arising from the failure of his vehicle’s transmission. Based on the Court’s construction of the Act<sup>15</sup>, once required by the consumer to remedy the failure, it became the supplier’s (‘the Defendant’s) option to elect how to do so.

[41] As the events unfolded, the manner in which the parties conducted themselves suggests that up until the Claimant first made reference in his email of 30<sup>th</sup> December, 2015, of his intention to seek redress under the Act, neither party even if aware, was very well versed with their respective rights or obligations under the Act. The degree of knowledge or understanding of the Act notwithstanding, given that the Claimant has pursued his claim against the Defendant under the Act, the Court is obliged to apply the Act in accordance with its proper construction. Within the circumstances of this case, from the conduct of the parties and his pleaded case, the Claimant required the Defendant to remedy the failure of the guarantee of acceptable quality arising from the failure of his transmission.

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<sup>15</sup> Para. 20(II)(iii) supra

In accordance with its obligations under section 20(1) of the Act the Defendant undertook to repair the vehicle by replacement of its transmission.

[42] Insofar as the Claimant alleges that he was not given sufficient information upon which to make an informed choice as to whether to reject or repair, the Court finds that the Claimant unequivocally elected the option of requiring the Defendant to effect the repair. The Claimant cannot on the one hand pursue his Claim under the Act, whilst on the other hand seek to disavow the remedy properly imputed to him under said Act, based on his actions at the material time. In the same vein, having pleaded and by evidence asserted unequivocally that the Defendant failed to remedy the guarantee failure within a reasonable time, the Claimant cannot in his concluding submissions, contend that he was not afforded sufficient information upon which to decide whether to require the repair or to reject. That position is one to have been advanced by way of pleadings.

[43] It is therefore found that within the circumstances, the Claimant clearly required the Defendant to remedy the failure of the guarantee. The Defendant, whether aware of the extent of its obligation or not, selected the option of repair, which the Claimant in the first instance accepted. Again, the Claimant is not entitled to rely on the Act for purposes of exercising remedies whilst at the same time in effect implying ignorance of the implications of so doing.

Lastly, given that the Claimant was told from the outset that the transmission had to be replaced and told how much it would cost, the statutory position, was that the Defendant was entitled to a reasonable time within which to effect the repair having been obliged by the Claimant to remedy the failure.

*Was the right of rejection effectively exercised?*

[44] Given that the Court finds that the Claimant invoked his right under section 19(2)(a) thereby requiring the Defendant to remedy the failure of guarantee of acceptable quality, the Claimant would have been entitled to reject the vehicle only if the Defendant failed to remedy the breach of guarantee within a reasonable time. Even if found that the Defendant did not so remedy the failure within a reasonable time, the Claimant would also have to satisfy the prerequisites of section 21 and to have exercised his right of rejection within a reasonable time as defined by section 21(2) of the Act.

*Was the failure remedied within a reasonable time/Was the Claimant entitled to exercise his right of rejection?*

[45] The question of what is or is not a reasonable time in relation to a supplier's obligation to remedy a failure of a guarantee will always depend on the particular circumstances of the case. In the instant case, the Claimant decreed that one month was a reasonable time to repair the vehicle by means of replacing the transmission.

The Claimant felt that he was entitled to hold this position as he was not given requisite information regarding the Defendant's intentions in effecting the repairs and who was to bear the cost. With respect to the question of reasonableness and the Defendant's actions in effecting the repair of the vehicle, the Court makes the following findings and draws inferences or conclusions as relevant:-

- (i) The Claimant was told on the same day the vehicle was taken into the Defendant that the transmission had failed and that it needed to be replaced;
- (ii) The fact that the Defendant was unable to diagnose a reason for the failure of the transmission was in these circumstances, irrelevant. The required action to repair *the vehicle* was to replace the transmission and this fact was immediately communicated to the Claimant;
- (iii) Based on the parties' communications and the accounts of their meeting of the 19<sup>th</sup> January, 2016, the vehicle was fixed between the 19<sup>th</sup> and 22<sup>nd</sup> January, 2016, which amounted to six (6) weeks after the vehicle was taken into the Defendant with its failed transmission;
- (iv) There was communication between the parties (almost entirely initiated by the Claimant) regarding the repair of the vehicle during the period from 8<sup>th</sup> December, 2015 to January 22<sup>nd</sup> 2016.

The Claimant was however not informed until the 22<sup>nd</sup> January, 2016 that the vehicle had been repaired by replacement of its transmission;

- (v) The Defendant's explanations of requiring approval from Nissan to replace the transmission free of cost; the speed of their inquiries and operations being affected by the Christmas period; the need to acquire the new transmission from overseas which was also affected by the Christmas period; and the time required to install the new transmission and test the vehicle once the transmission was installed, are all accepted as valid reasons which accounted for the time taken to effect the repair of the vehicle;
- (vi) The above factors which caused a delay in effecting the repair of the vehicle were not all communicated to the Claimant.

[46] Based on the above findings, the Court is of the view that the Claimant's obvious frustration regarding the Defendant's inability to immediately provide a firm answer on whether the transmission would be replaced free of cost was justified. Notwithstanding there were valid reasons for the apparent delay in effecting the repair of the vehicle, the Defendant's initial responses to the Claimant (through its Service Manager) were not very transparent in relation to their intended course of action and what was entailed.

The question of whether the Defendant remedied the failure within a reasonable time however does not in the Court's view, hinge on the justification or not of the Claimant's frustration. As interpreted by the Court, once the Claimant had elected to require the Defendant to remedy the breach, it was the Defendant's right to select by which means the breach was to be remedied. In this case the remedy was by way repair (to be effected by replacement of the failed transmission).

[47] In light of the fact that the election to repair was the Defendant's and that the statutory liability for the cost of the repair always rested on the Defendant, the Court is of the view that the ultimate determinant of what is a reasonable time for repair, is primarily referable to the Defendant's circumstances. Further, given that the Claimant for the first time made reference to his rights under the Act in his email of December, 30<sup>th</sup> 2015, for the greater portion of the material time, the Claimant maintained his course of requiring the Defendant to remedy the failure of the guarantee. Therefore, the measure of reasonableness has to be objectively assessed with reference to the Defendant's actions relative to the nature of the failure of the guarantee and other circumstances relevant to the Defendant's capacity and obligation to repair.

[48] The circumstances which have to be objectively assessed in the Court's view are as follows:-

- (i) the transmission was a major component of the vehicle's system, without which it could not operate;
- (ii) the replacement needed to come from overseas;
- (iii) the intervening Christmas period according to common sense and general knowledge would have caused delays to the normal operations of the Defendant. The speed of placement and return of the order would therefore have been delayed;
- (iv) the replacement of the transmission would have required time and expert attention.

[49] Within the circumstances as detailed above, the Court considers that the repair of the Claimant's vehicle by the 22<sup>nd</sup> January, 2016 was within a reasonable time as required by section 19(2)(a). The lack of information does not render the time any less reasonable as the Claimant had clearly elected to have the vehicle repaired. In keeping with this position is the fact that the Claimant's first intimation regarding rejection was on the 10<sup>th</sup> January, 2016. The Court notes that the Claimant was understandably frustrated, however such frustration does not alter the objective assessment of the Defendant having remedied the failure of the guarantee by repairing a major component of the

vehicle within six weeks. The Court's primary position in relation to the Claimant's notification of rejection on the 10<sup>th</sup> January, is that the Claimant was not at that time entitled to do so, as a reasonable time had not yet elapsed from the 8<sup>th</sup> December, 2015, being the date from which the Defendant was required to remedy the failure of the transmission.

### Section 19(3) Rejection

[50] In the event that it might be considered that the Claimant was entitled to reject the vehicle on the basis either that the Defendant had failed to remedy the failure of guarantee within a reasonable time; or, that the Claimant could not be held to have exercised his right to require the failure to be remedied as he was not possessed of sufficient information to do so, the right to reject in either of these cases is subject to being exercised within a reasonable time as defined in section 21(2). The Claimant's authorities of **Kimone v Courts (Barbados)**<sup>16</sup>, based upon **Nesbit v Porter**<sup>17</sup> are not viewed in the same light by this Court. The passage referred to by the Claimant in *Nesbit v Porter*<sup>18</sup> does not quite assist the Claimant when taken within the entire context of the decision. The claimants in *Nesbit* purchased a four-wheel drive, utility vehicle from a licensed motor vehicle dealer.

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<sup>16</sup> Consumer Claims Tribunal, Barbados, June 29 2007

<sup>17</sup> [2000] 2NZLR 465

<sup>18</sup> *Nesbit v Porter* @ para 39; fn 9 *supra*

Five (5) months after purchase issues arose and they were advised of certain defects in the vehicle. In attempting to have the problems repaired there were further defects discovered. The claimants ultimately sought a refund of the vehicle or the cost of repairing the defects. The defendant dealers refused to accede to either and the claimants pursued a multitude of proceedings which finally led to the New Zealand Court of Appeal.

[51] One of the specific questions for determination on appeal was the interpretation of the requirement to exercise the right of rejection within a reasonable period. In that case it was plainly stated that the period from which the reasonable time started to run was from the date of supply of the vehicle and not from the date on which the defect was or ought to have been discovered.<sup>19</sup> In considering the loss of right of rejection, the court alluded to the fact that whilst the ‘defect’ under consideration was that which was giving rise to the right of rejection, the time within which such defect would be reasonably expected to become apparent, was to be considered with reference to objective criteria.<sup>20</sup> In this regard, as is provided by section 21(2) (of the Barbados Act), the criteria requires assessment not of the *particular* good supplied, but of the *type* of goods supplied. The other criteria under section 21(2) are also to be objectively assessed in this manner.

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<sup>19</sup> Nesbit *supra* @ paras 32-34.

<sup>20</sup> *ibid* @ para 35.

With reference to the passage extracted by Counsel for the Claimant<sup>21</sup> the remarks there were prefaced by reference to the fact that (the New Zealand equivalent of) section 22 (failure of a substantial character), is defined with reference to whether the good would have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure.

[52] In the context of a breach of a substantial character, the learned judge expressed that a reasonable time (for rejection), must be one which suffices to enable the consumer to become fully acquainted with the nature of the defect<sup>22</sup>. Therefore, a defect is not ‘apparent’ until its cause has been identified and the buyer knows what has to be done to fix it and how much it will cost. Only then is the buyer in a position to determine whether the defect is ‘substantial’. The Court considers that this statement has to be viewed with reference to the fact that the New Zealand court was speaking to the construction of the Act for the first time and with a view to its general application.<sup>23</sup> More so, that within the particular circumstances of that case, the court accepted the case as being pursued on the basis that the defects were latent and existed at the time of purchase of the vehicle<sup>24</sup>.

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<sup>21</sup> Nesbit @ para39

<sup>22</sup> Ibid @ 38-40

<sup>23</sup> Ibid per Blanchard J @ pg 466

<sup>24</sup> Ibid @ para 11.

[53] After their general exposition on the law and its interpretation, the court returned to the specific case before them, of the plaintiff's (second-hand) vehicle and said as follows<sup>25</sup>:-

*“[48] We consider that in a vehicle of the age and type of this Navara it is reasonable to expect defects of the kind actually encountered by the Nesbits, latent at the time of the supply, to become apparent relatively soon after the supply. (We do not understand there to have been an allegation that there was any concealment on the part of the Porter Motors). In our view the motor vehicle dealer should generally be freed from the burden of having to accept rejection of a vehicle of this age and pedigree after the time for the next mandatory six-monthly warrant of fitness check has passed. If, at the latest, a defect of the kind found in the Navara has not manifested itself on such an inspection, it would be an unfair burden upon the supplier if a buyer of such a vehicle, which must be assumed to have been in daily use, sometimes in rough conditions, should thereafter be able to reject it. Bearing in mind however that most people do not have their vehicles tested until the six month period is expiring, there is a need for some latitude to give time to decide whether to exercise that right...”*

*“[50] Looking at all relevant factors and allowing some tolerance for the time needed to react to the discovery of the combination of the defects in the Navara, we have reached the conclusion that the reasonable time for the exercise of the right of rejection in this case expired by the middle of February, 1996.*

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<sup>25</sup> Nesbit supra @ paras 48-50

*The period is longer than the one set by the High Court, but still ran out before the date of the actual rejection by the Nesbits. Accordingly their right of rejection had been lost and the purported rejection was legally ineffective”*

[54] In considering the dictum in *Nesbit*, both in terms of the statements of general application as well as their application to the specific circumstances of the case as extracted above, it is clearly not appropriate to seek to apply the court’s construction of ‘reasonable time to reject’ verbatim without considering the relevance of the factors therein to each case on its own facts. There will be cases where defects of substantial characters occur in circumstances where the precise discovery of such defects occurs so late, that the timing of the discovery is simply too far removed from the time of supply to engage any discussion of reasonableness. The Court’s interpretation of the *Nesbit* judgment is that where necessitated by the facts, the reasonable time under consideration is to expand or contract having regard to the existence and relevance, of the additional factors referred to therein.

[55] In the instant case, regardless of the Claimant’s repeated inquiry as to the cause of the failure of the transmission, it had been made clear to him from the outset, that the transmission had stopped working and needed to be replaced.

The repair of the vehicle – i.e., the remedy of the failure of the guarantee of acceptable quality - was never going to entail a repair of the transmission – the transmission needed to be replaced and the cost of so doing was also communicated to the Claimant. As a consequence, the nature of the defect and the fact that it was of a substantial character was within the Claimant’s knowledge from the time the defect manifested, on the 8<sup>th</sup> December, 2015. The absence of information regarding the actual cause of the transmission’s failure is therefore not considered relevant to the exercise of the Claimant’s remedies.

*The Authorities – what is ‘a reasonable time’ within which to reject*

[56] In accordance with the Court’s construction of section 21(2) of the Act, the reasonable time for the Claimant’s exercise of his right of rejection, commenced from the acquisition of his vehicle in July 2013. The expiration of such reasonable time depends on the Court’s assessment of the objective criteria prescribed in section 21(2) along with any other factors which may be relevant, as provided in *Nesbit*. The authorities submitted on this issue by both Counsel provide useful illustrations in relation to what has been considered a reasonable time for rejection relative to various kinds of defects in motor vehicles.

However, these authorities cannot be applied with a wide brush given the wide degree to which circumstances will vary in relation to what is to be considered a reasonable time for rejection. The Court examines these authorities and will extract salient points with a view to establishing any parallels with or distinguishing factors from, the case at bar:-

- (i) **David Douglas v Glenvargill Co. Ltd.**<sup>26</sup> – The plaintiffs purchased an Audi motor car delivered to them in February, 2005. Due to faults which developed they sought to reject the car in June, 2007, which would have been 2 years 4 months after delivery. The dealers refused to accept the rejection and the plaintiffs pursued their remedies under similar consumer legislation. The vehicle had developed a major problem in March, 2006 (13 months after supply), at which time it was returned to the defendants to ascertain the problem and effect repair.
- (ii) The vehicle was kept by the dealer for 5 months and thereafter returned, but problems remained and the vehicle was in and out of repair. It was held in this case that the faults ultimately discovered by expert witnesses were major and most likely existed at the time of delivery, so that there was a breach of implied guarantee of satisfactory quality.

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<sup>26</sup> [2010] CSOH 14

It was however reluctantly held that a reasonable time within which the defects should have become manifest was past, by the time the plaintiffs sought to reject the goods, even if taken at their earliest intimation, which was 15 months after delivery.

- (iii) Inasmuch as this decision is attractive in its facts, its direct application is unsuitable. The decision firstly arose out of a Sale of Goods Act, in which there are variances in the nature of the cause of action and exercise of remedies as compared to the Consumer Guarantees Act<sup>27</sup>. There are principles surrounding the consequence of ownership of the goods passing to the purchaser; the specific requirement for a defect to have existed at the time of delivery; and the application of law in relation to latent defects was not statutorily defined and was reasoned based on common law authorities.
- (iv) Further, reference to the consumer law discussed therein spoke of remedies being subject to proportionality and the application arising therefrom being unclear. This is not the ideal basis upon which to apply an authority.

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<sup>27</sup> The consumer law in Scotland is also not comparable to the Barbados CGA, which is modelled closely to that of New Zealand. The consumer law in Scotland and England, discussed in this case was the Sale and Supply of Goods to Consumers Regulations 2002 (enacted to implement EU standards).

With this caution in mind, it is nonetheless acknowledged that the remedy of rejection is described in this case as intended to be a relatively short-term remedy, which as commended by Queen's Counsel for the Defendant herein, is '*simply not available when a latent defect manifests itself for the first time more than a year after delivery.*'

This statement is taken as a useful but not absolute guide, bearing in mind the stated differences in legislation and principles.

- (v) **Cooper v Ashley & Johnson Motors Ltd**<sup>28</sup> - Whilst Queen's Counsel for the Defendant managed to find some part of this authority favourable to the Defendant's case, Counsel for the Claimant relies heavily on this decision as supporting the Claimant's right of rejection. This decision concerned the Consumer Guarantee Act 1993 of New Zealand, which the Barbados Act mirrors, in relation to the guarantees and remedies prescribed.
- (vi) The plaintiff was the second purchaser of a second-hand imported vehicle from the defendant car dealer in June, 1995. At the time of purchase the defendant's salesperson made a representation as to the quality of the vehicle and its mileage. The vehicle was diagnosed with transmission problems as early as 3 days after purchase.

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<sup>28</sup> [1997] DCR 170

That transmission problem was fixed by the defendant at its cost, but the vehicle thereafter continued to malfunction for the next 6 months. The plaintiff carried out the repairs during that time at his own cost and in the course of so doing, was told by a mechanic that the vehicle must have had more mileage than he had been told.

- (vii) The defendant refused to cover the further cost of the repairs that the plaintiff had incurred since the repair of the transmission. For the next several months the vehicle continued to perform poorly whilst the plaintiff engaged different mechanics to diagnose the problem for its poor performance. Finally in May, 1996 – 11 months after purchasing the vehicle, the plaintiff essentially sought to reject the vehicle under the New Zealand Consumer Guarantees Act.
- (viii) In the case at bar, Counsel for the Claimant's reliance on this case was based on the following findings extracted from the decision<sup>29</sup>:–
  - (a) A consumer who elected repair would not lose a right to reject if he had not been provided with sufficient information to make an informed decision whether to reject the good or not;

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<sup>29</sup> Cooper v Ashley & Johnson Motors Ltd. supra @ pg 2

- (b) Time to reject the good would begin to run as soon as it could be said that ‘the goods had a substantial defect’, the substance of which was known by the consumer.
- (c) An understanding of the nature of the fault was relevant as the statute [Barbados’ section 21(a)] referred to a consumer who was ‘fully acquainted with the nature and extent of failure’;
- (d) Where the failure of a substantial character was in the form of a latent defect which can be proved to have existed at the time of sale, time (for the exercise of the right of rejection) would not begin to run until the nature and extent of the defect had been identified in such a way that the purchaser could be said to be ‘fully acquainted with the nature and extent of the failure’. Only when fully acquainted as such, could the purchaser make an informed decision whether to reject or to repair;
- (e) The supplier had an ongoing responsibility to provide the consumer with sufficient information upon which to make an informed decision whether to repair or reject.

- (ix) On the other hand, Counsel for the defendant commended to the Court the statement therein<sup>30</sup> to the effect that the court was unlikely to tolerate a lapse of years in relation to the discovery of a defect in a vehicle which gives rise to a right to reject.
- (x) In the first place this Court takes a different view of the approach that was taken in *Cooper v Ashley* in relation to the consumer's exercise of their right of rejection. The legislation is for material purposes identical. The court's reference in *Cooper v Ashley* that in relation to the consumer's right to reject, 'time begins to run' from the categorisation of the failure of the guarantee as one of a 'substantial character' is viewed differently by this Court.
- (xi) It is agreed, that when the good in question is one such as a motor vehicle, in respect of which knowledge of a defect will not always be within the purview of a consumer, the categorisation of a failure as 'of a substantial character' might be properly reliant on the actions of or information provided by the supplier or a third party. In such a case, the consumer's entitlement to exercise their right to reject<sup>31</sup> will arise only as and when the failure is identified as being of a substantial character.

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<sup>30</sup> *Cooper v Ashley* supra @ 2

<sup>31</sup> The direct right of rejection under section 19(3) as opposed to the section 19(2)(b) rejection arising upon failure or refusal of the supplier to remedy the defect within a reasonable time.

- (xii) The Court does not entirely agree however, with the application of the terminology ‘time begins to run’ with reference to the right of rejection after discovery of the failure as one of a ‘substantial character’. According to the statute, time begins to run in relation to the exercise of a right to reject, *from the time of supply of the good* to the consumer. The expiration of the time to reject is then governed by the list of objective criteria prescribed in section 21(2)<sup>32</sup>.
- (xiii) It is therefore considered, that whilst the right to reject goods based upon a failure of a guarantee being one of a ‘substantial character’ will not *arise* until the consumer has been provided with requisite information as to the nature and extent of the failure, the *exercise* of that right is nonetheless circumscribed, as it is clearly stated to be – ‘subject to section 21’.
- (xiv) The *exercise* of the right to reject is therefore always susceptible to the loss of that right as determined by the mechanism of reasonableness prescribed in section 21(2). The time as prescribed by the legislation, begins to run in respect of the loss of the right to reject, from the time of supply of the goods – and subsists until that time determined by the Court to be the time by which it would have been reasonable to expect

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<sup>32</sup> Namely – (i) the type of goods; (ii) use to which consumer likely to put them; (iii) expected life for use of goods; (iv) amount of use which could be expected before defect becomes apparent.

the defect to become apparent, having regard to the factors prescribed, assessed objectively.

- (xv) This approach was that applied in the New Zealand's Motor Vehicle Disputes Tribunal decision<sup>33</sup> in respect of a claim for a refund under the Consumer Guarantees Act, 2003, of the purchase price of a vehicle purchased by the consumer. This decision issued in 2010, made no reference to *Cooper v Ashley* which as stated above did not address the specific provisions pertaining to the loss of a right of rejection. In this Tribunal decision however, the New Zealand equivalent to Barbados' section 21(1)(a) and 21(2) was examined in the context of arising from a notice to reject and claim for a full refund in that case.
- (xvi) The Tribunal acknowledged (without any reference to how the right to reject arose), that the right to reject would be lost for failure to exercise the right within a reasonable time;<sup>34</sup> that the reasonable time commences from the time of supply<sup>35</sup>; and that based on *Nesbit v Porter*<sup>36</sup>, the defect which is to become apparent would be the same as any defect which gives rise to any failure of the guarantee of acceptable quality as defined earlier in the Act.

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<sup>33</sup> **Anonymous Reference No. MVD217/2009**

<sup>34</sup> MVD239/2009 @ para 45 et seq.

<sup>35</sup> Ibid

<sup>36</sup> [2000] 2 NZLR 465

(xvii) Finally therefore, the Court refers to **Nesbit v Porter**<sup>37</sup> in relation to the issue of the exercise of the right of rejection. The New Zealand Court of Appeal considered for the first time, the interpretation of the Consumer Guarantees Act, 1993, which as agreed by respective Counsel is replicated by the Barbados Act. This case concerned an attempted rejection of a used motor vehicle and specifically addressed the issue of the loss of the right of rejection, as provided under the equivalent of Barbados' section 21(1)(a) and 21(2).

(xviii) The Court of Appeal made the following points<sup>38</sup> which the Court herein considers critical to the issue of the loss of right of rejection:-

- (a) The 'defect' which must become apparent is to be the same as that which would give rise to a failure of acceptable quality under [sections 6 and 7 of the Barbados Act];
- (b) The reasonable time starts to run from the date of supply and not the date on which any defect was or ought to have been detected;
- (c) With reference to the question 'within what time would it be reasonable to expect the defect to become apparent', "*the actual experience of the particular consumer is obviously relevant, but*

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<sup>37</sup> *Supra*

<sup>38</sup> *Nesbit supra* @ pgs 474-477

*the section requires that reasonableness is to be tested against certain objective criteria”;*

- (d) In relation to that objective criteria, the Court of Appeal stated:-  
 “paragraph (a) [meaning Barbados’ section 21(2)(a)], refers ‘*not to the particular article which was supplied but to the type of goods*’; paragraph (b) [meaning Barbados’ section 21(2)(b)] ‘*requires consideration of the use to which **a** consumer (not the actual buyer) is likely to put the type of goods*”
- (e) Further, with respect to the equivalent of Barbados’ section 21(2)(c)&(d), the Court of Appeal continued “*...and paras (c) and (d) require regard respectively to the length of time for which it is reasonable for that type of goods to be used and the amount of use to which it is reasonable for that type of goods to be put before the defect becomes apparent. So the Nesbits’ actual use of the Navara has for this purpose to be considered against the use to be expected from a notional consumer of that type of vehicle”*
- (f) Additional factors which must be considered include whether the good is new or used, as it would be expected that a defect would be sooner apparent in goods that have already been used, as

opposed to new. Also, a factor would be whether or not there was a requirement for regular inspections of the goods;

- (g) Referring to *Cooper v Ashley*, the Court of Appeal acknowledged that given the allowance for ‘a reasonable consumer fully acquainted with the nature and extent of the failure’ in relation to what is a ‘substantial defect’, “a reasonable time under [Barbados’ section 21(1)] must accordingly be one which suffices to enable the consumer to become ‘fully acquainted with the nature of the defect’...”. It was further stated that “*a defect is not ‘apparent’ until its cause has been identified and the buyer knows what has to be done to fix it, and what that will cost, in other words, until the buyer is in a position to determine whether the defect is substantial*”
- (h) The position therefore is not in the Court’s view that ‘time begins to run’ from the time a consumer is able to conclude that a defect is substantial, but that the reasonable time commencing from the date of supply must take into account the consumer’s knowledge of the nature and extent of any substantial defect.

(xix) Based on the authority of *Nesbit v Porter* therefore, the Court must examine the question of any loss of the Claimant's right to rejection, with reference to the time for rejection commencing from the date of supply (July 2013), thereafter with reference to the objective factors prescribed by section 21(2), as well as any other relevant factors having regard to the circumstances of the case.

*Assessment of the reasonable time to reject*

[57] The Court is therefore required to carry out an assessment of the factors listed in section 21(2) and to balance other relevant factors arising from the circumstances of the claim. Firstly, the time from which the reasonableness of the Claimant's rejection of the vehicle began to run was July, 2013 - the date of supply. The defect became apparent on 8<sup>th</sup> December, 2015 as it was known that the transmission failed, that it needed to be replaced, and would cost \$24,000. At such time, two (2) years and five (5) months had elapsed from the date of supply. The objective criteria under section 21(2) are assessed as follows:-

- (i) The type of good is a motor car – of significance in this case is that the vehicle was new, purchased from the dealer with a 2 year warranty;

- (ii) The use to which the consumer (the notional consumer) was likely to put the good – in this case, this factor is unremarkable as the purpose for which purchased by the Claimant would be the same as expected by any purchaser;
- (iii) The length of time the motor vehicle could be expected to be used – as a new motor vehicle it is expected that the vehicle would be in use in excess of 10 – 15 years;
- (iv) The amount of use which it is reasonable for the good to be put before the defect becomes apparent – it is known that the vehicle’s transmission failed after 2 years 5 months of delivery and the contractual warranty had expired. Had the transmission failed within months or even one year from delivery, the Court would have had little difficulty concluding that such time was sufficient for the defect to have become apparent. Given the period in excess of two years, where according to the Claimant, the vehicle was driven with no problems (dismissed complaint as to brakes aside), the Court considers that this final factor under section 21(2)(d) should have been supported by evidence.

- (v) The Claimant points out that the recommended service period in relation to the transmission was 5 years, therefore the failure of the transmission within that 5 years entitled him to reject the vehicle. The Court does not consider that the recommended service period answers the question of how much use could be expected from the vehicle before the defect of the failed transmission became apparent. This is because the evidence is, that it would never have been a question of repair of the transmission, instead, the transmission would always have to be replaced.
- (vi) With reference to the evidence of the Defendant's expert witness who produced a table of Nissan Juke failures in Barbados, the comparators showed failure of transmissions at an average daily mileage ranging from 29 to 66 miles. The Claimant's vehicle was the highest of the five vehicles compared with the difference in range, suggesting that the transmission failures in the other vehicles occurred much earlier relative to the mileage covered. This evidence is not helpful to the Claimant as it suggests that other Juke transmission failures became apparent earlier than the Claimant's failure, and the factor being assessed relates expected manifestation of the defect not in the particular good, but the type

of good<sup>39</sup>. The Court as such is unable to conclude that the Claimant exercised his right to reject to the vehicle within a reasonable time.

*Manner of Exercise of Right of Rejection*

[58] Again, if there is disagreement with the Court's conclusion that the Claimant failed to exercise his right of rejection within a reasonable time in accordance with section 21(2) of the Act, the Court would further consider the manner in which the right to reject was effected. Queen's Counsel for the Defendant contends that the rejection was not effected in accordance with section 23(1) of the Act which required the rejection to be communicated along with the ground or grounds for rejection, and this was not done. By letter dated 10<sup>th</sup> January, 2016 the Claimant stated that he was rejecting the vehicle but indicated that the grounds for so doing would be detailed in a letter from his attorney. The Defendants advised the Claimant at worst on the 22<sup>nd</sup> January, 2016 that the vehicle had been repaired and that the repair was at no cost to the Claimant. The Claimant however, by that time maintained a position of rejecting the vehicle and requiring a refund.

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<sup>39</sup> Nesbit v Porter @ pg 474-475

[59] The grounds for rejection were communicated by the Claimant's attorney in a letter dated 1<sup>st</sup> February, 2016, which was after the Claimant had been notified that the Defendant had repaired the vehicle. In *Nesbit v Porter*, the Court of Appeal stated that the notice of rejection need not be in writing, but that the grounds for so doing must be effectively communicated<sup>40</sup>. In that case, the grounds were not stated in the plaintiffs' notice of rejection but the Court of Appeal held that the Defendant company would have been well aware of the grounds of rejection given that there had been the formal proceedings of the dispute tribunal at which the plaintiffs' complaints had been laid out. In the instant case, the Claimant's letter of 10<sup>th</sup> January, 2016 failed to set out any grounds for rejection and the Court does not consider that the communication between the parties is to be regarded in the same manner as the formal complaint proceedings were in *Nesbit*. The proceedings in *Nesbit* were extraordinary having regard to the several different layers of formal proceedings the plaintiffs went through before their final destination in court under the consumer legislation. The requirement for stating the grounds of rejection under section 23(1) being a statutory requirement, the Court does not accept the Claimant's letter of 10<sup>th</sup> January, 2016 as compliant with section 23(1) of the Act.

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<sup>40</sup> *Nesbit v Porter* supra, @ para 51

*Conclusion re remedy exercised by Claimant*

[60] The Court has concluded that the Claimant elected to have the Defendant repair his vehicle, which was undertaken by the Defendant by means of replacement of the failed transmission. Having so elected the Claimant was obliged to afford a reasonable time to the Defendant for the repair to be effected. The Defendant completed this repair within six weeks from the date of the failure of the transmission, which is found in the circumstances to have been within a reasonable time. As a consequence, the Court has concluded that the Claimant was not entitled to reject the vehicle under section 19(2)(b)(ii). This conclusion notwithstanding, the Court has in the alternative, considered the Claimant's direct right to reject the vehicle under section 19(3)(a), on the basis that the failure of the guarantee (of acceptable quality), was of a substantial character as defined by section 22(a). However, the Court concludes that the Claimant would have failed to have exercised his right to reject within a reasonable time, having regard to section 21(2). Further in the alternative, the Court finds that the Claimant would have failed in any event, to exercise his right to reject in the manner stipulated in section 23(1).

CIII Standalone Remedies under section 19(4)

[61] The Court now considers the Claimant's right to damages under section 19(4) of the Act which applies to foreseeable loss or damage arising out of the failure of a guarantee. The Claimant has claimed the sum of \$15,980 for loss of use of his vehicle, the said sum representing the monies paid for a rental vehicle through April 19<sup>th</sup>, 2016. Queen's Counsel for the Defendant's initial position was that the Claimant had failed to prove his loss of use, as there was no evidence in support of the claim presented to the Court. As such the Claimant should not be allowed to recover the monies claimed. Further, Queen's Counsel pointed out that the Defendant had offered to provide the Claimant with a rental vehicle free of cost up to the 25<sup>th</sup> January, 2016, which offer the Claimant had refused. In any event, the Defendant's obligation to provide alternative transport would have ceased, given that the vehicle was repaired on the 22<sup>nd</sup> January, 2016. As a consequence, the Defendant considers that it owes the Claimant no monies for loss of use of his vehicle.

[62] With respect to whether the claim for loss of use is recoverable under section 19(4), the Court considers that loss of use and cost of replacement transport during the period of repair of the Claimant's vehicle are claims clearly foreseeable and attributable to the failure of the guarantee occasioned in this case.

The Claimant specifically pleaded his claim for loss of use in the amount of \$15,980 but as pointed out by Queen's Counsel for the Defendant, he provided no proof of the monies expended. With respect to the question of recovery, the Court invited further submissions on whether the statutory grounding of the right of recovery in any way affected the requirement for proof in respect of special damages claimed. Counsel for the Claimant did not address this specific question in his further submissions.

[63] Queen's Counsel for the Defendant however, responded to the effect that whilst the existence of the statutory right to damages is clearly established, the Claimant was nonetheless obliged to particularise and prove the loss claimed, and failed to do so. Queen's Counsel relied on the case of **Perestrello v United Paint Co.**<sup>41</sup> insofar as it was therein stated that a plaintiff who bases his claim on a precise calculation must give the defendant access to the facts which make such calculation possible. Queens Counsel supports this point further by reference to **McGregor on Damages**,<sup>42</sup> to the effect that in order to justify an award of substantial damages, a claimant is required to establish both the fact of and amount of damages. Having failed to establish the latter, the Claimant should, if the Court is so minded, be entitled only to an award of nominal damages.

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<sup>41</sup> [1969] 1 WLR 570 CA

<sup>42</sup> 19<sup>th</sup> Ed. Para 10-001

[64] The Court considers that the Claimant's entitlement to claim damages for the loss of use for his vehicle is not in dispute. Also not in dispute, is that the appropriate measure for such loss of use would be the cost of renting an alternative vehicle whilst deprived of the use of his own vehicle. The difficulty arises in relation to the question of proof. The Court agrees with the position put forward by Queen's Counsel for the Defendant in relation to the requirement to prove. The statutory underpinning of the right does not alter the general principle of recovery, as the damages therein are compensatory. The Court considers the following passage from **McGregor on Damages**<sup>43</sup> to aptly represent the situation at bar in relation to absence of evidence of the loss claimed:-

*“Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss.”*

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<sup>43</sup> McGregor on Damages 18<sup>th</sup> Ed. Para 10-004

[65] The Court also accepts the general principle as stated by Queen's Counsel for the Defendant's reference to **McGregor on Damages**<sup>44</sup>, in relation to a requirement to particularise damage claimed which is capable of mathematical calculation. Particularly, that a Defendant is entitled to have access to the basis of such calculation in order to answer the claim. The Court will accept the Claimant's evidence of having rented a vehicle as a result of the breakdown of his vehicle. However, it is considered that the Claimant was obliged to support his claim for loss of use in respect of the amount of monies claimed. There are instances in which the Court may accept a witness' oral evidence in satisfaction of proof of a claim, but given that the rental of a vehicle is an expense in respect of which proof ought to have been readily available, this is not such a case.

[66] The Court accordingly declines to award the Claimant the sum claimed of \$15,980 as loss of use for his vehicle. It is however accepted that the Claimant will be entitled to an award of nominal damages, as the Court has no difficulty accepting the fact of his loss. The Court is however required to make some informed decision in relation to what amount is appropriately awarded as a nominal sum.

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<sup>44</sup> Submitted by Counsel for the Defendant – McGregor on Damages 19<sup>th</sup> Ed. @ paras 50-013 & 10-001.

The Court firstly considers that ‘*nominal damages does not mean small damages*’<sup>45</sup>. Further, relevant factors taken into account in determining the quantum of such nominal award are (i) the Defendant by virtue of the failure of the statutory guarantee was obliged repair the Claimant’s vehicle and by section 19(4) is expressly liable for the type of loss occasioned; (ii) the period for the loss of use is from the 8<sup>th</sup> December, 2015 through the 22<sup>nd</sup> January, 2016; (iii) the Defendant accepted its liability to provide replacement transport for the Claimant immediately (by initially notifying him that they would cover the cost of his rental in lieu of provision of a rental vehicle when they had none available; and thereafter offering the Nissan Almera, which the Claimant imprudently refused). The Court considers that the sum of two thousand dollars (\$2000.00) is an appropriate sum to be awarded by way of nominal damages for the Claimant’s loss of use of his vehicle.

[67] The Claimant additionally sought damages for vexation, frustration or disappointment, pursuant to sections 19(4)&(5) of the Act. On this issue, Counsel for the Claimant referred the Court to some of the email communications between the parties as proof of the Claimant’s frustration.

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<sup>45</sup> **The Owners, Master and Crew of the Lightship "Comet" (The "Mediana")** [1900] AC 113 per Lord Halsbury LC @ 116

Counsel also made reference to **Blackman v BS&T Motors Inc.**<sup>46</sup> in which the Claimant was awarded the sum of \$5000 for loss of use and inconvenience in relation to a claim under the Sale of Goods Act. No figure was suggested by Counsel for the Claimant in relation to the claim for vexation, frustration and disappointment. Queen's Counsel for the Defendant submitted that the Claimant had provided no evidence of actual injury; the Defendant had acted promptly in assisting the Claimant from the time the vehicle broke down; the repair was completed in six (6) weeks; and the Claimant unreasonably refused the Defendant's offer for a rental vehicle at no cost for the repair period. In such circumstances, Queen's Counsel for the Defendant submits that the Claimant should be entitled to an award, if any, of nominal damages only.

[68] The Court firstly acknowledges that the Act expressly enables recovery for the non-pecuniary losses of vexation, frustration or disappointment, where such recovery would not otherwise, or would debatably exist.<sup>47</sup> Given the express provision for recovery, the Court need only consider how such loss is to be proved and quantified. The Claimant did indirectly but sufficiently plead his claim for inconvenience, disappointment or vexation in paragraph 14 of his Statement of Claim.

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<sup>46</sup> Barbados High Court No. 1732 of 2003

<sup>47</sup> See Australia's Consumer Law (ACL) section 267(4) [equivalent to Barbados' section 19(4), but no equivalent to section 19(5)] and decision on recovery of non-pecuniary loss (arising from botched holiday cruise) *Moore v Scenic Tours* [2020] HCA 17.

The evidence consists of the Claimant's oral account of the course of dealings between himself and the Defendant's various representatives, as well as the emails accepted into evidence. The Court finds on the one hand, that the Defendant's categorisation of the assistance rendered to the Claimant accurately reflects the fact that they acted immediately in retrieving the stalled vehicle, communicating the need for the replacement of the transmission and acting promptly to order the said transmission.

[69] On the other hand, the Defendant's categorisation of their keeping the Claimant informed and otherwise providing good service to the Claimant during the time of the repairs is rejected. From the emails submitted into evidence, the Claimant in common parlance was forced to 'run behind' the Defendant to obtain updates on whether the replacement of the transmission would be carried out at no cost to him. Albeit the Court has already ruled that the time taken for repair was not unreasonable, the Court is of the view that the Claimant's frustration was patent and justified, particularly given that the obligation to replace the transmission free of cost was as a matter of law always that of the Defendant. Further, in spite of the initial indication that the Defendant would cover the cost of a replacement rental vehicle in lieu of an available vehicle, the Nissan Almera was not offered until the 18<sup>th</sup> December,

2015 and prior to that, the Claimant had been enquiring to no avail, as to firm arrangements in relation to the cost of the rental.

[70] Also to be considered, the Court finds that it was indeed unreasonable of the Claimant to have refused the offer of the free Nissan Almera on account of insisting on being provided with a vehicle similar to the Juke. This refusal was a failure to mitigate his loss and the Claimant was the author of his own vexation or frustration once he had refused the offer of the Almera. It is found that there is an element owed for disappointment by reason of the breach of the guarantee of acceptable quality. Having been purchased new, the Claimant was entitled to expect trouble free performance from his vehicle for a longer time than materialised. In these circumstances, the Court concludes that the Claimant is entitled to recovery for non-pecuniary loss arising from disappointment of the failed guarantee of acceptable quality in his new vehicle; as well as vexation and frustration from the Defendant's failure to immediately accept their legal responsibility to replace the transmission free of cost.

[71] This entitlement is tempered by the Court's finding that the Claimant failed to mitigate his loss of use when he refused to accept the replacement vehicle of the Nissan Almera; as well as by the relatively short length of time the non-pecuniary loss can be claimed for, which is from the 8<sup>th</sup> December, 2015 to

the 22<sup>nd</sup> January, 2016. The Court agrees with the submission of Queen's Counsel for the Defendant that the circumstances and evidence merit only an award of nominal damages, the concept of which has already been explained<sup>48</sup>. With reference to the Claimant's reliance of **Blackman v BS&T Motors**<sup>49</sup> the Court does not consider this authority to be a suitable guide to the quantum of damages in the case at bar. In **Blackman**, the court awarded the sum of \$5000 for what is termed in the final paragraph, as damages for *'the inconvenience, loss of a vehicle of the quality and kind she was told she would have and the trouble free driving she would have experienced'*.

[72] The claimant's vehicle therein was a Range Rover, purchased new, which developed problems within 3 months of delivery, and over the course of four years manifested a myriad of problems from rust, to transmission failure, warped tyres, electrical faults, faulty brake discs, issues with the fuel pump and seats coming apart. That range of issues is far beyond the Claimant's failed transmission (which is significant) and were spread out over a period of years, which would exacerbate the non-pecuniary loss suffered. The claimant's claim for loss of use therein was disallowed for want of proof; the significant claim for cost of repairs to the transmission was not allowed; and against this position Goodridge J said the following:-

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<sup>48</sup> Paragraphs [63]-[64] *supra*.

<sup>49</sup> Fn 46 *supra*

*“As stated earlier, although there were defects which rendered the vehicle unmerchantable, the evidence adduced did not provide a proper basis for assessment of damages. There is no evidence of the relative values of the vehicle without defects and the vehicle with defects. However, I feel constrained to award some damages which are a little more than nominal. For the inconvenience, loss of a vehicle of the quality...I award the sum of \$5000”<sup>50</sup>*

[73] Based on the above excerpt, the circumstance of the multitude of issues which the vehicle in ***Blackman*** suffered, and the heads of damages refused therein, it appears that the court therein awarded more than merely nominal damages, and for more than the claimant having suffered inconvenience and loss of a quality vehicle. Whilst the transmission failure in the Claimant’s vehicle was obviously a substantial breach of the guarantee of acceptable quality, the greater number of failures in Blackman compounded by the difference in the legislative regime, render the award therein an ill-suited comparator. The Claimant’s vexation, frustration and disappointment are confined to the period of six weeks during which the vehicle was being repaired. The Claimant failed to mitigate his loss when he declined to accept the Defendant’s rental car which was being provided free of cost thereby authoring his own frustration in that regard.

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<sup>50</sup> Blackman v BS&T supra per Goodridge J @ para 48.

The Court therefore awards the nominal sum of one thousand five hundred dollars (\$1500) to the Claimant, for his frustration, vexation and disappointment upon the failure of his vehicle's transmission.

**D. Summary of Conclusions, the Counterclaim and Costs**

[74] The claim arising from the Claimant's purchase of his new Nissan Juke from the Defendants was styled as one for breach of contract, or in the alternative based upon his rights under the Consumer Guarantee Act, Cap. 326E of the Laws of Barbados. The Court summarises its final determinations in the following terms:-

- (a) The Claimant's contractual claim would have been based on the warranty provided to him upon purchase of the vehicle, which had already expired by the time of the breakdown of his vehicle. The Claim is sustainable therefore only for breach of guarantees as provided under the Act.
- (b) The Claimant has established a breach of guarantee of acceptable quality of the said Nissan Juke motor vehicle purchased from the Defendant in July, 2013, in the form of a defect of a substantial character, arising from the failure of the vehicle's continuously

variable transmission (CVT). No defect was found in relation to the vehicle's brakes;

- (c) The defect of a substantial character arising from the failure of the vehicle's CVT was a defect capable of being remedied, as a result of which the Claimant was entitled to seek a remedy under either section 19(2); or section 19(3) of the Act;
- (d) Based on the evidence and pleadings, the Claimant elected to require the Defendant to remedy the defect (the failed transmission) pursuant to section 19(2)(a) of the Act;
- (e) Having been required to remedy the defect, the Defendant was obliged to do so within a reasonable time;
- (f) The Defendant is found to have remedied the defect within a reasonable time by replacing the failed transmission, as a result of which the Claimant was not entitled to the remedy of rejecting the vehicle pursuant to section 19(2)(b)(ii);
- (g) In the alternative, if the Claimant was entitled to the right of rejection pursuant to either section 19(2)(b)(ii) or 19(3)(a), the Claimant failed to exercise his right to reject within a reasonable time within the meaning of section 21(2) of the Act;

- (h) In either case of rejection whether pursuant to section 19(2)(b)(ii) or 19(3)(a), the right to reject was not properly exercised according to the requirements of section 23 of the Act;

[75] The consequence of the Court's determination as summarized above is that having required the Defendant to remedy the defect and the Defendant having done so within a reasonable time, the Claimant is obliged to accept the repaired motor vehicle, which had been made available since the 22<sup>nd</sup> January, 2016. In this regard, the Court is satisfied that the Defendant is able to deliver the vehicle to the Claimant in an acceptable condition, bearing in mind the vehicle having been repaired since January, 2016. By affidavit evidence filed pursuant to the Court's directive, subsequent to the Court's determination of the substantive issue of liability for repair versus rejection,<sup>51</sup> the Court is satisfied that the vehicle has been satisfactorily stored and maintained and has not been utilized within the course of the Defendant's business. With respect to the Claimant's remedies under section 19(4) and (5) of the Act, the Court awards the Claimant nominal damages for loss of use of his vehicle between the period 8<sup>th</sup> December, 2015 and 22<sup>nd</sup> January, 2016, in the sum of two thousand (\$2000).

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<sup>51</sup> Affidavit of Brian Nicholas Mackie filed on 23<sup>rd</sup> December, 2020.

The Court also awards the Claimant nominal damages for vexation, frustration and disappointment, in the sum of one thousand five hundred (\$1500), upon the failure of acceptable quality arising from the purchase of his Nissan Juke motor vehicle in July, 2013.

[76] In relation to the Defendant's counterclaim for storage fees arising from the Claimant's failure to uplift the vehicle, the Court finds this claim to be unmerited. The fees attempted to be charged to the Claimant have no contractual basis and appear to be an attempted penalty which did not materialize until the Claimant signaled his intention to institute legal proceedings. The counterclaim is dismissed. In relation to the issue of costs, the Court acknowledges the general rule that costs follow the event. More particularly, that the unsuccessful party will generally be required to pay the successful party's costs, according to the rules and scales prescribed by law. The Court invited submissions from Counsel on the issue of costs, given its view that the question of 'success' in the circumstances was not a straightforward conclusion.

[77] Counsel for the Claimant was of the view that the Claimant had achieved partial success, and that inter alia, the Court has already categorized the claim as 'not straightforward'; the Defendant was found in breach of a guarantee under the Act, namely of acceptable quality; the Defendant was always

obliged to accept responsibility for the repair of the vehicle and the Defendant's counterclaim was dismissed. Having regard to these circumstances, Counsel for the Claimant submits that each party should bear their own costs. Queens Counsel for the Defendant however alludes to an offer to settle made pursuant to CPR Part 35 and points to the aspects of the Claimant's conduct of the claim as having increased the cost of litigation. Based on the indications of the Defendants, the Court will be obliged to formally hear the parties on the issue of costs.

#### **E. Disposition**

[78] The Court expresses its thanks and gratitude to Counsel for their comprehensive submissions which were of invaluable assistance to the Court, and to the parties for their patience. Save for the issue of costs, the claim is disposed of as follows:-

- (i) The Claimant's claim for a refund of the sum of \$91,569.93 of the Nissan Juke purchased from the Defendants on the 11<sup>th</sup> July, 2013 is dismissed;
- (ii) The Claimant is obliged to accept the Nissan Juke as repaired by the Defendant as of the 22<sup>nd</sup> January, 2016;

- (iii) The Claimant is awarded nominal damages in the sum of two thousand (\$2,000) for loss of use of his vehicle, for the period 8<sup>th</sup> December, 2015 to 22<sup>nd</sup> January, 2016;
- (iv) The Claimant is awarded nominal damages in the sum of one thousand five hundred (\$1,500) for vexation, frustration and disappointment, arising out of the failure of the guarantee of acceptable quality upon the purchase of his vehicle;
- (v) The Court will hear the parties further on the issue of costs.

**SHONA O. GRIFFITH**  
Judge of the High Court