DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
[RAYUAN SIVIL NO. BA-12B-109-11/2020]

ANTARA

SIME DARBY AUTO CONNEXION SDN BHD
(No. Syarikat: 68602-V) **... PERAYU**

DAN

JAGJIT SINGH SARBAN SINGH
(No. K/P: 620917-02-5099) **... RESPONDEN**

[Dalam perkara Mahkamah Sesyen di Shah Alam
Dalam Negeri Selangor Darul Ehsan, Malaysia
[Guaman Sivil No. BA-A52-111-08/2019]

Antara

JAGJIT SINGH SARBAN SINGH
(No. K/P: 620917-02-5099) ... PLAINTIF

Dan

SIME DARBY AUTO CONNEXION SDN BHD
(No. Syarikat: 68602-V) ... DEFENDAN]

GROUNDS OF JUDGMENT

Introduction

[1] This is an appeal by Sime Darby Auto Connexion Sdn Bhd ("**SDAC**") against the decision of the learned Sessions Court Judge ("**SCJ**") after trial.

[2] Jagjit Singh a/l Sarban Singh ("**JS**"), the respondent in this appeal, was the plaintiff in the suit before the Shah Alam Sessions Court. He had purchased a Ford Focus vehicle bearing registration no. W6266X (the "**vehicle**"). JS had brought a suit against SDAC for negligence, misrepresentation, breach of statutory duty and breach of contract.

[3] The SCJ had allowed JS's claim. From para. [82] of her judgment, it is understood that the SCJ had allowed JS's prayer in para. 35(a)(ii) of his statement of claim for damages for loss of money and/or value of the vehicle, which is to be assessed by the Sessions Court; and general damages in the sum of RM15,000.00; and costs in the sum of RM9,000.00. However, with regards to the interest that JS had prayed for in para. 35 (c) of his statement of claim, the SCJ merely stated "(*iii) Prayer (c) is allowed*". She did not state what was the rate of the pre-judgment interest awarded. She also did not state whether the pre-judgment interest was calculated from the date of filing of the writ or some other date up till the date of judgment.

[4] SDAC's appeal against the SCJ's decision is premised on the following grounds:

(a) that the SCJ had erred in law and/or fact by failing to consider the fact that the Manufacturer's Warranty and Extended Warranty were voided by JS's delay in servicing the vehicle. The SCJ had found that SDAC was liable for the breach of contract for service of the vehicle even though the facts and evidence show that it was JS who had breached the terms of the Extended Warranty by his failure to service the vehicle in accordance with the service schedule;

(b) that the SCJ had erred in law and/or fact by failing to consider that the earlier complaints made by JS were separate and distinct from the overheating issue on 25.09.2018;

(c) that the SCJ had erred in law and/or fact by taking into account the "without prejudice" negotiations between the parties; and

(d) that the SCJ had erred in law and/or fact by awarding general damages in the sum of RM15,000.00 on the basis that the vehicle "*was to be fit, reliable and free from any defects*" even though she had found that JS did not purchase the vehicle from SDAC.

[5] Learned counsel for JS had objected to SDAC's grounds of appeal listed in para. [4](a), (b) and (c) above. He submitted that the grounds should be disregarded as they do not appear in and/or deviate from SDAC's memorandum of appeal ("**MOA**").

[6] In this instant appeal, SDAC had filed the MOA before the SCJ had issued her grounds of judgment. After receipt of the SCJ's grounds of judgment, SDAC filed an application in Enc. 22 to amend the MOA and to use the amended memorandum of appeal (the "**Amended MOA**") filed in the *Rekod Rayuan Tambahan II*. This Court had allowed SDAC's application in Enc. 22 on 31.05.2021. All the grounds of appeal listed in para. [4] above are listed in the Amended MOA.

[7] Accordingly, for this reason, the preliminary objection is dismissed.

Salient Facts

[8] SDAC is the sole distributor of Ford vehicles in Malaysia.

[9] JS had financed the vehicle purchase through a hire-purchase agreement between him and Malayan Banking Berhad ("**Maybank**").

[10] The vehicle was registered on 17.4.2014. JS took delivery of the vehicle on 23.04.2014 and was given the following documents with the vehicle: (i) Ford Focus Owner's Manual; (ii) Ford Service

Portfolio (Service Book), which included the Manufacturer's Warranty, the Extended Warranty; and (iii) the Service Program, which consisted of a Thank You Letter dated 17.04.2014, Service Program Letter, and 6 free service coupons.

[11] There were 4 contracts entered in connection with JS's purchase of the vehicle. These contracts are:

(i) **Hire-Purchase Agreement** ("**HPA**") between JS and Maybank. Under the HPA, JS was the hirer and Maybank was the financier;

(ii) **Sales Contract**: Maybank had entered into a sales and purchase contract ("**Sales Contract**") with SDAC, where it had purchased the vehicle from SDAC. Under the Sales Contract, SDAC was the seller and Maybank, the purchaser of the vehicle;

(iii) **Manufacturer's Warranty and Extended Warranty** between SDAC as the distributor and JS as the hirer/user of the vehicle; and

(iv) **Service Contract** for the service of the vehicle between JS and SDAC. Under the Service Contract, JS is required to bring the vehicle for service every 10,000km or every 6 months (whichever comes first).

[12] The warranty period under the Manufacturer's Warranty is for the period of 3 years or 100,000 km (whichever comes first). The extended warranty period under the Extended Warranty is 2 years or 100,000 km (whichever comes first). The terms of the Extended Warranty stipulate:

> 3. The Company's obligation under this policy will be binding for the period of 2 years or 100,000 km (whichever comes first) after the expiry of manufacturer's warranty which is valid for 3 years or 100,000 km

(whichever comes first) commencing from the date of registration.

4. The Company shall be under no obligation under this policy unless the vehicle has been serviced in accordance with the manufacturer's recommended service schedule. There is a maximum allowance of 1,000 km or 30 days, on either side, of the mileage or date stipulated for the various service recommended.

[13] JS had brought the vehicle in for repair under the Manufacturer's Warranty on several occasions since 25.07.2014. It is not disputed that SDAC had repaired and/or rectified the problems and issues relating to the vehicle under the Manufacturer's Warranty.

[14] On 25.09.2018, JS brought the vehicle to SDAC's service centre for overheating ("**final overheating issue**"). SDAC's position was that JS had breached the terms of the Extended Warranty because he had failed to comply with the service schedule under the Service Contract.

[15] As part of negotiations between JS's lawyer and SDAC in respect of the vehicle's final overheating issue, SDAC agreed to repair the vehicle and remedy the issue on a goodwill basis. However, as JS insisted that SDAC conduct a full diagnosis of the vehicle, SDAC asked JS to bear the cost of dismantling the engine of the vehicle. JS refused to bear the dismantling costs. As a result, negotiations relating to the final overheating issue came to an end. JS then filed this action against SDAC at the Sessions Court.

Appellate Intervention

[16] The law is settled that an appellate court should not set aside the decision of a court below unless the judge in the court below made a material error of law and/or was plainly wrong in his findings of fact: see the Federal Court's judgments in *Gan York Chin (p) v. Lee Ing*

Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309 and *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] MLJU 1906; [2014] 9 CLJ 1064; [2015] 1 AMR 575.

[17] The Federal Court in *Ng Hooi Kui & Anor v. Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Hwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67 ("**Wendy Tan**") reiterated that findings of facts by the trial judge may only be reversed if the appellate court is satisfied that the trial judge was "plainly wrong" i.e., that he had arrived at a decision which could not reasonably be explained or justified, and which no reasonable judge could have reached.

[18] In **Wendy Tan**, the Federal Court made it clear that the "plainly wrong" test only comes into play where the trial judge (i) did not make a material error of law, (ii) did not make a critical factual finding which had no basis in evidence; (iii) demonstrably misunderstood the relevant evidence; and (iv) demonstrably failed to consider relevant evidence. In the presence of any of these factors, the appellate court is entitled to set aside the judgment of the trial court without having to consider the "plainly wrong" test. Zabariah Mohd Yusof FCJ held:

> [54] Premised on *Thomas v. Thomas (supra)* and *Henderson (supra)* Lord Reed qualified that the **"plainly wrong" test only comes into play in the absence of the following:**
>
> **(i) material error of law;**
>
> **(ii) critical factual finding which had no basis in evidence;**
>
> **(iii) demonstrable misunderstanding of relevant evidence; and**

(iv) demonstrable failure to consider relevant evidence.

In the presence of any of the above, the appellate court is entitled to set aside the judgment of the trial court without having to consider the "plainly wrong" test. Lord Reed reiterates that these four identifiable errors are however not exhaustive. It appears that the other examples which could be added to this non-exhaustive list, are as listed in *Thomas v. Thomas (supra)* namely:

(i) There is misdirection by the judge;

(ii) There is no evidence to support a particular conclusion;

(iii) There is material inconsistencies or inaccuracies;

(iv) The trial judge fails to appreciate the weight and bearing of circumstances admitted or proved.

[Emphasis added]

[19] As regards material error of law, Her Ladyship held:

[73] Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention**, the other identifiable error of "material error of law" listed by Lord Reed in *Henderson (supra)* can occur when a trial judge erroneously apply legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence.** For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by

> the trial judge in arriving at his conclusions (eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.
>
> [Emphasis added]

Analysis and Findings of this Court

[20] In this instant appeal, I find that the learned SCJ had made several material errors of law and was plainly wrong in her findings of facts. My findings are premised on the following:

(i) Misapplication of the Law of Evidence

[21] The learned SCJ had made a material error of law in her judgment. She had misapplied the law of evidence. She stated in her judgment:

> [57] Although the Plaintiff has to prove his case on a balance of probabilities under sections 101 and 102 of the Evidence Act 1950, the Defendant on the hand, has the duty to prove sufficient evidence to ensure that the probabilities were either equal or tilted in his favour.

[22] It is trite that there is nothing in the law of evidence that places the duty on a defendant to prove "sufficient evidence to ensure that the probabilities were either equal or tilted in the defendant's favour". Sections 101 and 102 of the Evidence Act 1950 read:

> 101. Burden of Proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[23] JS had desired the Sessions Court to give him judgment: hence, the burden of proof is on him the prove on a balance of probabilities the facts he had pleaded in his statement of claim: see *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584; [2015] 5 AMR 497, FC. Moreover, the law is settled that the legal burden of proof does not shift from the party that desires the Court to give judgment as to any legal right or liability: see *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31, FC.

[24] Given these established principles of the law of evidence, it is inexplicable how the SCJ can surmise that SDAC as the defendant had a duty to prove "sufficient evidence to ensure that the probabilities were either equal or tilted in the defendant's favour".

(b) Took into consideration "without prejudice" negotiations between the parties

[25] The learned SCJ had also erred in law by considering and giving weight to the "without prejudice" discussions between JS and SDAC's solicitors as regards the final overheating issue to the vehicle.

[26] In the oft-cited case of *Dusun Desaru Sdn Bhd v. Wong Ah Yu* [1999] 5 MLJ 449; [1999] 2 CLJ 749; [1999] AMEJ 0343 ("**Dusun Desaru**"), Abdul Malik Ishak J had set out the law on "without prejudice" negotiations as follows:

Chang Min Tat FJ (as he then was), delivering the judgment of the Federal Court in *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17, lucidly laid down the law in these words (see p 18 of the report):

> **It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted.** This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

Incidentally, the learned judges in *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 3 MLJ 723 and in *Daya Anika Sdn Bhd v. Kuan Ah Hock* [1998] 6 MLJ 537, also considered the case of *Malayan Banking Bhd v. Foo See Moi*.

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Negotiations to settle disputes may be conducted in many ways: by oral means (face to face), by correspondences, by facsimile communications, by exchanges of telex messages, by courier services or the combination of any one of them. In *Rush & Tompkins Ltd v. Greater London Council & Anor* [1989] AC 1280, **the House of Lords ruled that genuine negotiations with the sole object of settlement are protected from disclosure whether or not the 'without prejudice' label has been expressly**

employed in the negotiations. As I said, exhs A15, A16 and A17 of encl 4 do not carry the 'without prejudice' labels, yet the shield of privilege would apply to them. Lord Griffiths in *Rush & Tompkins Ltd v. Greater London Council*, aptly put it as follows (see pp 1299-1300 of the report):

> **The 'without prejudice' rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence**. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful, they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice', and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.

[Emphasis added]

[27] As stated in para. [14] above, SDAC and JS had entered into "without prejudice" negotiations to settle the final overheating issue with the vehicle. For the reasons stated therein, the negotiations had failed, and JS commenced the action against SDAC at the Sessions Court.

[28] The learned SCJ had considered and referred to the "without prejudice" negotiations in paras. [13] and [14] of her judgment. As held in **Dusun Desaru**, the "without prejudice" negotiations between JS and SDAC are not admissible as evidence. Accordingly, the SCJ

was wrong at law to have taken into account the said "without prejudice" negotiations.

(c) Demonstrable misunderstanding of the relevant evidence

[29] The SCJ had found the Manufacturer's Warranty and Extended Warranty was void against JS because he delayed sending the vehicle for its 7th service by 4 months and 21 days, and for its 9th service by 6 months and 14 days, In para. [51] of her judgment, the SCJ stated:

> [51] For the 7th service, the Plaintiff has missed by four months and 21 days and the mileage was 173km in access. For the 9th service, the Defendant submitted that the mileage was based on the Thank You letter dated 17.4.2014 and six free coupons printed in 2014 which state the service is to be done for every 10,000km or six months. Even if the Plaintiff is relying on the service book, the Plaintiff is still breaching the mileage as the condition in the service book printed in 2012 states that 10,000km or twelve months in which the Plaintiff has breached 15 days. The Thank You letter and six free coupons superseded the service book as the former was the latest printed compared to the latter printed in 2012. **As the Plaintiff has breached the 7th and 9th services, the warranty is void against the Plaintiff.**
>
> [Emphasis added]

[30] However, having found that the Extended Warranty was void because of JS's breach, the SCJ curiously went on to find in para. [54] of her judgment that because SDAC had accepted the vehicle for 7th service, because the vehicle was towed to SDAC's service centre on 25.09.2018, and because SDAC did not prove that the "termination" of the Warranty was communicated to JS, SDAC is obliged to service

the vehicle's overheating problem under the voided Extended Warranty.

[31] The SCJ stated in para. [54] of her judgment, "*It is pertinent to note that the Plaintiff, though had delayed in sending his vehicle, the vehicle was still under the Extended Warranty Period and nothing to prove that the warranty, if terminated, had been communicated to the Plaintiff*." And in para. [55], she wrote "*the Plaintiff has not breached the mileage condition as the mileage of 70,084km was lower than the highest possible scheduled mileage of 81,084km and the lowest possible mileage of 79,084km*."

[32] The SCJ was plainly wrong in finding that SDAC was obliged to remedy the vehicle's overheating problem under the void Extended Warranty because the vehicle was towed to its service centre, because SDAC did not prove that it had communicated to JS that the Extended Warranty was terminated and "*because the Plaintiff had not breached the mileage condition*".

[33] Under the terms of the Extended Warranty, SDAC is under no obligation to repair the vehicle under the Warranty by reason of JS's failure to service the vehicle in accordance with the service schedule. The terms of the Extended Warranty expressly state:

> 4. **The Company shall be under no obligation under this policy unless the vehicle has been serviced in accordance with the manufacturer's recommended service schedule**. There is a maximum allowance of 1,000 km or 30 days, on either side, of the mileage or date stipulated for the various service recommended. [Emphasis added]

[34] It is immaterial whether the vehicle had not reached the mileage threshold at the end of the 6 months. The terms of the Service Contract required JS to bring the vehicle in for service every

10,000km or every 6 months, whichever is earlier. The notes of proceedings of the trial, show that JS was aware that he is required to bring the vehicle for service every 6 months or 10,000km, whichever came first. Under cross-examination by SDAC's counsel, JS said "*I complied with the 6 vouchers for the service of 10,000km or 6 months whichever comes first*." However, the facts show that he did not comply with the service schedule. The SCJ had found that JS was late for the 7th service by 4 months and the 9th service by 6 months.

[35] In *Volkswagen Group Malaysia Sdn Bhd v. Loo Chay Meng* [2016] 9 MLJ 191; [2016] 10 CLJ 748; [2016] AMEJ 0075, Lau Bee Lan J (as she then was) found that the extended warranty was voided because of the defendant's breach of the terms of the extended warranty by his delay in bringing the vehicle in that case for its 3rd service interval. The Court held that the defendant was not allowed to take advantage of the situation by his act or omission. Accordingly, based on the **Volkswagen** case, the Manufacturer's Warranty and Extended Warranty were voided by reason of JS's non-compliance with the service schedule.

[36] The SCJ's finding of fact shows a demonstrable misunderstanding of the terms and conditions of the Service Contract, the terms and conditions of the Extended Warranty and the High Court's decision in the **Volkswagen** case. The SCJ did not appreciate that pursuant to the service schedule, JS was required to take the vehicle for service every 10,000km or every 6 months, whichever came earlier. So even if the mileage of the vehicle had not increased by 10,000km from the last service, JS must bring the vehicle in for service within 6 months from the date of the last service. The SCJ also failed to appreciate that there is nothing in the terms and conditions of the Extended Warranty that stated that unless SDAC informed JS that the Extended Warranty was void (or "terminated" as stated by the SCJ in her judgment). Once the Extended Warranty is voided, JS would have to pay for any repairs to the vehicle.

[37] It is also immaterial that the vehicle was towed and not driven to SDAC on 25.09.2018 because of the overheating. It does not take away from the fact that JS had failed to comply with the terms of the service schedule. Also, the Extended Warranty was not "terminated' as the SCJ had erroneously stated in her judgment. She herself had made a finding in her para. [51] of her judgment that the Warranty was void because of JS's non-compliance with the service schedule. Finally, there is nothing in the Warranty that places an obligation on SDAC to notify JS that the Extended Warranty is void.

(d) Made a critical factual finding which had no basis in evidence

[38] The SCJ found that the vehicle was not fit for purpose. In making this finding of fact, the SCJ took into account complaints posted by members of the public on www.change.org on Ford vehicles in Malaysia that JS had downloaded from the internet (marked as "ID-16"). In para. [66] of her judgment, the SCJ said:

> [66] I have perused ID-16 and find that many complaints were made in three years prior to 2019, not only on Ford Focus (page 421 and 429 Bundle C) but also other Ford vehicles. The evidence supports SD's and SP2's testimonies that Ford Focus vehicle are having technical problems and complaints from the customers which cannot be resolved in Malaysia.

[39] Section 56 of the Evidence Act states that facts, which Courts take judicial notice of, need not be proved. These judicially noticeable facts are listed in section 57 of the Act. Postings on the internet by the public does not fall within the judicially noticeable facts listed in section 57.

[40] Hence, it was clearly wrong for the SCJ to have taken judicial notice of complaints posted by the general public on Ford cars in

Malaysia on the www.change.org website and to conclude that based on these postings that JS's vehicle was not fit for purpose. In *Actmar Sdn Bhd v. Normah Salijan & Another Appeal* [2021] 1 CLJ 247; [2021] 8 MLJ 461; [2020] AMEJ 1364, Alice Loke JC (as she then was) faced a similar situation where the Sessions Court's had accepted the submission of plaintiff's counsel premised solely on information that was downloaded from the internet. Her Ladyship found that the SCJ in that case had made an appealable error in accepting the information from the internet.

[41] The SCJ made a further error in her finding of facts, where she stated in para. [72] of her judgment that the vehicle had yet to be repaired after it was returned after the 9th service "*even though the Defendant has agreed to repair it without costs borne by the Plaintiff.*"

[42] In making the finding that SDAC had agreed to repair the vehicle at no cost, the SCJ failed to appreciate the fact that SDAC in the "without prejudice" negotiations with JS's lawyers had offered to repair the overheating issue on a goodwill basis even though the Extended Warranty is void. JS instead of accepting the offer unconditionally, asked for the whole engine to be dismantled. SDAC then counter-offered by asking JS to pay for the cost of dismantling the engine. JS did not agree to pay for the dismantling of the engine — and the negotiations failed.

[43] It is an elementary principle of contract law that there is no agreement where there is no acceptance of an offer. Therefore, it was plainly wrong both in law and in fact for the SCJ to conclude that SDAC had agreed to repair the vehicle without cost to the Plaintiff.

[44] The SCJ had awarded JS general damages in the sum of RM15,000.00. In para. [82] of her judgment, the SCJ's stated reasons for awarding the said quantum of damages (a) JS's "*expectation that it [the vehicle] was to be fit, reliable and free from any defects*"; (b)

"*the vehicle has fundamental defects after all the unsettled and unresolved problems*; (c) *JS's limited enjoyment and usage of the vehicle and benefit*; (d) "*the trouble faced by the Plaintiff in handling the defective vehicle, sending it to the Defendant for reparation and attending the vehicle's problems; and* (e) SDAC's *"negligence for the loss of vehicle keys and service book"*.

[45] The SACJ had correctly found that the JS had purchased the vehicle from Maybank and not from SDAC based on the Federal Court's decision in *Ong Siew Hwa v. UMW Toyota Sdn Bhd* [2018] 8 CLJ 145; [2018] 5 MLJ 281; [2018] 4 AMR 944 ("**Ong Siew Hwa**"), where it held:

> [47] Applying *Ahmad Ismail*, with the execution of the hire purchase agreement (P5), there is no contract of sale or an agreement to sell as defined in s. 4 of the SGA between the first defendant [the dealer] and the plaintiff [the hirer]. The first defendant [the dealer] did not transfer or agree to transfer the property in the said car to the Plaintiff [the hirer]. Indeed, given the hire purchase transaction in this case, the car was sold by the first defendant [the dealer] to the second defendant [the financier] pursuant to which the property in the car passed to the latter, making it the owner of the car, enabling it to hire it out to the plaintiff [the hirer] ...

[46] The SCJ had acknowledged that the Federal Court in **Ong Siew Hua** had held that the Consumer Protection Act 1999 ("**CPA**") and the Sales of Goods Act 1957 ("**SOGA**") do not apply between the car dealer and the buyer because there is no contract of sale between them as defined under section 4 of SOGA. The SCJ had correctly accepted by reason of the doctrine of stare decisis, the decision of the Federal Court binds the Sessions Court.

[47] However, the SCJ made a material error of law and was plainly wrong in her application of the facts when she decided that even though there was no contract of sale between SDAC and JS, SDAC was liable to pay damages to JS "*who had elected to purchase the vehicle from MBB [Maybank] on the expectation that it was to be fit, reliable and free from any defects*".

[48] The condition as to the quality or fitness of goods is implied in the contract of sale of goods by section 16 of SOGA and section 32 of CPA. As there was no contract of sale between SDAC and JS, SDAC cannot be held liable for any breach of implied conditions in the contract of sale between JS and Maybank. Furthermore, there is nothing in SOGA and CPA that implies into a contract of sale that the goods sold are "*reliable and free from any defects*" as the SCJ had erroneously stated in her judgment. Section 32(2)(a) of CPA states that "*goods shall be deemed to be of acceptable quality if they are free from minor defects*".

[49] The SCJ made a further error of law by stating in para. [32] of her judgment that "*MBB [Maybank] had transferred all its right and title to the Plaintiff [JS] after the Plaintiff [JS] had settled all the loan under the HPA. See section 12 of the Hire Purchase Act*."

[50] Section 12 of the Hire Purchase Act 1957 states:

> (1) The right, title and interest of **a hirer** under a hire-purchase agreement **may be assigned with the consent of the owner**, or if his consent is unreasonably withheld, without his consent.
>
> [Emphasis added]

[51] In this instant case, "the hirer" is JS and "the owner" is Maybank. Therefore, from the normal and ordinary meaning of section 12 of the Hire Purchase Agreement, JS can assign his rights under the HPA to third party with Maybank's consent or if its consent is

unreasonably withheld, without its consent. The words in Section 12 do not mean, as the SCJ had erroneously interpreted in her judgment, that Maybank may transfer all its rights and title under the HPA to JS. She made a further error of law by finding that Maybank had transferred all its rights under the HPA to JS when JS had settled the hire under the HPA.

[52] Furthermore, based on the factors that the SCJ said she took into consideration in awarding JS the quantum of general damages, the SCJ had failed to appreciate the evidence shows that JS had used the vehicle for 4 years and 5 months and had clocked mileage of 78,029km up until the final overheating issue on 25.09.2018. Additionally, she failed to appreciate that the evidence also showed that all of JS's complaints regarding the vehicle were all repaired and/or resolved under the Manufacturer's Warranty and Extended Warranty and that all the earlier complaints made by JS were separate and distinct from the final overheating issue on 25.09.2018.

[53] The evidence shows that SDAC had repaired and rectified all the previous problems relating to the vehicle under the Manufacturer's Warranty and Extended Warranty. Only the final overheating issue was not resolved because the Extended Warranty was voided by reason of JS breach of the terms of the Service Contract. The learned SCJ herself had narrated in para. [8] of her judgment, the facts show that the SDAC had last repaired and rectified the vehicle on 28.08.2017 and that JS had used the vehicle for more than a year before he brought the vehicle back to SDAC for the final overheating issue on 25.09.2018.

[54] I find that the fifth and final ground on which the SCJ said she had considered in awarding the quantum of general damages of RM15,000.00, i.e., SDAC's "*negligence for the loss of the vehicle keys and service book*", not to be a relevant factor for consideration in determining the amount of quantum of general damages. This is because:

(i) the loss of keys and service book did not cause the vehicle to overheat. Also, both incidents occurred after JS had sent the vehicle to SDAC on 25.09.2018; and

(ii) the SCJ did not find that SDAC was negligent in servicing the vehicle.

[55] Additionally, in relation to the lost keys, the SCJ failed to take into account that JS had pleaded in para. 20 of his statement of claim that SDAC had made duplicate keys for the vehicle for him. She also did not take into consideration that SD-1 had testified during the trial that SDAC had replaced the keys, but JS never collected the keys.

Decision

[56] For all the reasons above, I find that the SCJ had made material errors of law in her judgment and was plainly wrong in her findings of fact. I further find that the SCJ in allowing JS's claim against SDAC and in awarding him the general damages, had arrived at a decision that could neither reasonably be explained nor justified, and which no reasonable judge could have reached.

[57] This Court, therefore, finds that the learned SCJ's decision merits appellate intervention and should be set aside.

[58] Accordingly, SDAC's appeal is allowed with costs.

[59] The Session's Court decision of 27.10.2020 is hereby set aside.

Dated: 22 MARCH 2023

(FAIZAH JAMALUDIN)
Judge
High Court of Malaya at Shah Alam

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