GEGARAN POTENSI SDN BHD

v.

SIME DARBY AUTO BAVARIA SDN BHD

SESSIONS COURT, SHAH ALAM
ISHAK BAKRI SJ
[CIVIL SUIT NO: BA-B52NCvC-1-01-2017]
20 FEBRUARY 2018

CONTRACT: *Warranty - Terms of warranty - Vehicle mileage - Whether exceeded warranty limit - Whether warranty coverage no longer in effect - Whether owner of vehicle liable for costs arising from service - Whether authorised repairer under obligation to notify owner of vehicle regarding warranty status - Whether vehicle under custody, care and control of vehicle owner - Whether vehicle owner should have greater awareness of warranty*

CONTRACT: *Agency - Principal and agent - Vehicle sent by driver for servicing - Whether driver acted as agent - Whether driver had sent vehicle on all prior occasions for servicing - Whether driver implicitly imbued with sufficient authority by principal to deal with matters incidental to servicing - Repairer informed driver of expiry of warranty and payment due for servicing - Whether as good as notifying principal directly*

CONTRACT: *Claims - Claim for services rendered - Vehicle sent for servicing - Refusal of owner to pay costs of servicing vehicle - Right of repairer to withhold release of vehicle - Whether satisfied conditions for specific lien - Whether repairer has lien over vehicle - Contracts Act 1950, s. 123*

EVIDENCE: *Adverse inference - Failure to call witness - Vehicle sent by driver for servicing - Warranty coverage no longer in effect - Liability of owner of vehicle for costs of servicing vehicle - Authorised repairer notified driver of vehicle regarding warranty status - Whether driver acted as agent of owner of vehicle - Failure to call driver as witness in court - Whether adverse inference drawn - Evidence Act 1950, s. 114(g)*

The plaintiff, the registered owner of BMW X5 motor vehicle, sent the vehicle for normal service at the defendant's authorised BMW service centre where a bill of RM1,173.10 was issued by the defendant to the plaintiff. When the plaintiff refused to pay the bill, the defendant withheld the surrender of the vehicle until payment was made. The plaintiff only collected the vehicle after 326 days *ie* after more than ten months. Subsequently, the plaintiff filed a claim

against the defendant for (i) RM812,000 for damages arising from wrongful detention of the vehicle; (ii) RM150,000 for general damages arising from loss of reputation and loss of income; and (iii) RM150,000 for aggravated damages and exemplary damages for the defendant's conduct in wrongfully detaining the vehicle. The defendant filed a defence and counterclaim against the plaintiff claiming for the charges arising from the normal service performed on the vehicle amounting to RM1,173,10 and bay utilisation fees of RM50 per day.

Held (dismissing plaintiff's claim; allowing defendant's counterclaim in part):

(1) Had the vehicle mileage exceeded 60,000km and/or the service date taken place more than three years after the vehicle registration date, then the warranty would cease to apply and the customer would therefore be liable for costs arising from any service performed by the defendant on the vehicle. The mileage of the said vehicle had indeed exceeded the warranty limit at the point when the plaintiff's representative sent the vehicle to the defendant's service centre for normal service on 6 June 2016. Hence, the warranty coverage was no longer in effect at the material time. The defendant was therefore, within its rights to charge the plaintiff the fees and costs ordinarily associated with the normal service performed on the said vehicle at the plaintiff's request. (paras 26, 27, 31 & 32)

(2) The contractual relationship *vis-a-vis* the warranty existed between the plaintiff and Wheelcorp Premium Sdn Bhd, from whom the plaintiff initially purchased the vehicle. The defendant was not party to the contract - being merely an authorised repairer of BMW Malaysia Sdn Bhd, the local vehicle distributor - there existed no term in the said contract which placed an obligation on the defendant to notify the plaintiff of the said vehicle's warranty status. It was the plaintiff itself that should have greater awareness of the vehicle's warranty status as the vehicle had always remained under the custody, care and control of the plaintiff and/or its agents. (paras 33 & 34)

(3) Chong was, at all material times, acting as an agent for the plaintiff insofar as it related to the servicing of the vehicle. Chong was employed as PW1's driver and had, on all prior occasions, sent the vehicle for servicing. This was consistent with what had happened on 6 June 2016. As the plaintiff's

representative, Chong was also authorised to sign the RATC form and signed the job card when he collected the car after servicing. It was thus, entirely reasonable for the defendant to infer that Chong had been implicitly imbued by his principal with sufficient authority to deal with matters incidental to the servicing of the vehicle. Hence, representations made by the defendant to Chong, including informing him of the expiry of the warranty and the need to pay for the service requested was as good as notifying the plaintiff directly. (paras 44, 45, 50 & 51)

(4) The plaintiff's failure to produce Chong as a witness in court was detrimental to its claim as it was Chong who was directly involved in the exchanges which took place between the plaintiff and the defendant. In Chong's absence, the evidence tendered by PW1 was not more than mere hearsay. The specific failure to produce such a material witness led to adverse inference being drawn against the plaintiff under s. 114(g) of the Evidence Act 1950. (paras 53 - 55)

(5) There was no evidence that Chong requested for a cost estimate or quote for normal service. Neither was there any evidence to prove that Chong, in any way, instructed the defendant to refrain from servicing the vehicle pending confirmation from his principal. Therefore, it was reasonable for the defendant to infer from Chong's action/inaction that consent had been duly obtained from an individual authorised to act on behalf of the plaintiff. In the circumstances, the plaintiff's claim that the defendant acted unilaterally in performing the service without obtaining further instruction or confirmation from the plaintiff was rejected. (paras 58 - 60)

(6) The absence of an initial quote does not invalidate a service rendered from being chargeable. The defendant had, on multiple occasions, sought payment from the plaintiff and therefore, the plaintiff could not plead ignorance that the sum demanded was consideration for the service performed on the vehicle. Further, the plaintiff had never sought to dispute that normal service had indeed been performed on the vehicle by the defendant. Therefore, the service estimate issued by the defendant was a valid final bill, with the sum RM1,173.10 stated therein being consideration for the work performed by the defendant on the plaintiff's vehicle. (paras 62-64 & 67)

(7) In determining whether the defendant had any right to withhold the release of the vehicle subject to the plaintiff settling its outstanding service bill, the conditions must be satisfied to attain a specific lien: (i) he ought to have exercised his labour or skill in respect of the goods bailed; (ii) the bailee must have continued possession of the goods bailed; and (iii) the bailee must have a right to retain the goods until he had been paid. The defendant had satisfied the first and second conditions. The usage of the term 'bill' in the plaintiff's pleadings indicated that the plaintiff knew that the service estimate was a valid claim by the defendant against the plaintiff and therefore, the third condition was also satisfied. Hence, the defendant had a specific lien pursuant to s. 123 of the Contracts Act 1950 and did not unlawfully detain the vehicle throughout the period that the amount due for its services remained outstanding. (paras 76, 78 - 80 & 86 - 88)

(8) There was no valid evidence tendered to substantiate the claim for loss of use by the plaintiff, valued at RM2,500 per day for 326 days. Further, the detention period extended to 326 days because of the plaintiff's decision to not collect the vehicle from the service centre despite multiple notifications from the defendant. Hence, the claim was unsubstantiated and was also aggravated by the plaintiff's own inaction. (paras 89 & 92)

(9) The property of the company which is a going concern belongs to it and not to its members individually or collectively. Generally, an individual member of the company has no property, legal or equitable, in the assets of the company even if the members own all, or substantially all, of the company shares. Given that the vehicle was registered in the name of the plaintiff, PW1 as such had no *locus* to claim any damages on behalf of himself. Conversely, the plaintiff also had no *locus* to claim for any damages arising from 'discomfort, inconvenience', extra expenditure, distress, anxiety and severe embarrassment. Therefore, the plaintiff's claim for 'general damages for the loss of reputation and loss of income' could not be entertained. (paras 93 - 95)

Case(s) referred to:
Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor [2010] 6 CLJ 681 HC ***(refd)***
Goh Hooi Yin v. Lim Teong Ghee & Ors [1975] 1 LNS 44 HC ***(refd)***
Kayat & Anor v. Lim Yew Seng [1971] 1 LNS 46 HC ***(refd)***
Sethia Financial Services Ltd v. Nicholas Chu Fai Hung & Mak Siau King [1985] 1 LNS 111 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 71, 123, 135, 140
Evidence Act 1950, s. 114(g)

For the plaintiff - Simon C K Hong; M/s Josephine, L K Chow & Co
For the defendant - Steven CF Wong; M/s Arifin & Partners

Reported by S Barathi

JUDGMENT

Ishak Bakri SJ:

Introduction

[1] The plaintiff is the registered owner of a BMW X5 motor vehicle with the registration number W484W ("vehicle") and the defendant is a company which owns a BMW service centre in Sungai Besi, Selangor.

[2] On 6 June 2016, the plaintiff sent the vehicle for normal service at the defendant's authorised BMW service centre in Sungai Besi, where a bill of RM1,173.10 was subsequently issued by the defendant to the plaintiff. However, the plaintiff refused to pay this bill.

[3] Upon the plaintiff's refusal to settle this bill, the defendant withheld the surrender of the said vehicle until payment was made for the normal service performed by the defendant on the vehicle. However, the plaintiff only collected said vehicle on 28 April 2017, at which point it had been under the custody of the defendant for 326 days ie more than 10 months.

[4] By way of writ and statement of claim filed in January 2017, the plaintiff claims against the defendant a sum of RM812,500 for damages arising from wrongful detention of the said vehicle; RM150,000 for general damages arising from loss of reputation and loss of income, and RM150,000 for aggravated damages and exemplary damages for the defendant's conduct in wrongfully detaining the said vehicle.

[5] The defendant then filed a defence and counter-claim against the plaintiff, claiming for charges arising from the normal service performed on the said vehicle on 6 June 2016 amounting to RM1,173.10 (the original bill which remains unsettled) and bay utilisation fees of RM50 per day from 29 June 2016 until the date of actual collection of the said vehicle on 28 April 2017.

[6] During the trial, the plaintiff called two witnesses, namely Dato' Hong Wai Chun (PW1) and Chan Tai Ann (PW2) to testify for the plaintiff while the defendant called three witnesses, namely Jeyaraj a/l Balan (DW1), Azman Shariff (DW2) and Annissa Tasya Tukiman (DW3) to testify for the defendant.

[7] After hearing and considering submissions from both the plaintiff and the defendant, the court found that the plaintiff had failed to prove, on balance of probabilities, its case against the defendant. Therefore, the court made a decision to dismiss the plaintiff's claim against the defendant with costs.

[8] The court also decided to allow part of the defendant's counterclaim against the plaintiff amounting to RM1,173.10, being the outstanding charge for normal service performed on the plaintiff's vehicle by the defendant, with interest of 5% per annum from the date of the filing of the suit until the date of full payment. The cost of the trial is fixed at RM10,000 payable by the plaintiff to the defendant.

[9] Dissatisfied with the decision of the court, the plaintiff appealed to the High Court. The following are my grounds for dismissing the plaintiff's claim against the defendant and allowing the counter-claim by the defendant with costs.

Facts Of The Case

[10] The brief facts of the case are as follows.

[11] It is not in dispute that the plaintiff had bought the said vehicle from the vehicle dealer Wheelcorp Premium Sdn Bhd. The vehicle in question was covered by a warranty provided by the dealer and the vehicle's local distributor, BMW Malaysia Sdn Bhd.

[12] The salient terms of the warranty are as follows:

(a) Two years of manufacturer warranty with unlimited mileage from the initial registration date of the vehicle, and

(b) Three years or 60,000km mileage for BMW Service + Repair Inclusive ("BSRI") whichever comes first from the initial registration date of the vehicle.

[13] This vehicle was bought by the plaintiff for the use of its director, Dato' Hong Wai Chun (PW1). On 6 June 2016, PW1's driver, Chong Swee Fatt ("Chong") sent the said vehicle to the defendant's service centre in Sungai Besi for a normal service.

[14] Upon the completion of the normal service, the defendant had issued to the plaintiff a service estimate no. 6043 dated 7 June 2016 for the sum of RM1,173.10, being the charge for normal service which was performed as per the plaintiff's request.

[15] I note that the plaintiff never disputed that normal service had indeed been performed by the defendant on the vehicle; however, the plaintiff's main point of contention was that the service should have been free under the vehicle's warranty policy.

[16] Given the plaintiff's refusal to pay for the normal service performed, the defendant withheld the vehicle until it was collected by the plaintiff *via* its two representatives, Hee Chung and Goh Cheng Kooi, on 28 April 2017. The defendant subsequently sought to impose on the plaintiff bay utilisation fees of RM50 per day starting from 29 June 2016 until the date the vehicle was collected on 28 April 2017.

Plaintiff's Case

[17] The plaintiff contended that there was an existing contractual relationship between the plaintiff and defendant, giving rise to a duty for the defendant to inform the plaintiff that the vehicle's warranty coverage had expired at the time that said vehicle was sent to the defendant's service centre on 6 June 2016.

[18] The plaintiff further contended that the defendant failed to discharge its duty to inform the plaintiff of the expiry of said warranty coverage and that payment was required for the normal service performed on 6 June 2016.

[19] Moreover, the plaintiff alleged that it was not informed upfront of the cost for normal service when the vehicle was dropped off at the service centre and that the amount chargeable was only disclosed after the service had been completed.

[20] Although the defendant had indeed issued the plaintiff with service estimate no. 6043 which stated the amount payable by the customer for the service performed on the vehicle, the plaintiff claimed that this document was not a valid or final bill.

[21] The plaintiff also alleged that the defendant's withholding of the said vehicle constituted an act of illegal and unlawful detention.

Defendant's Case

[22] The defendant contended that the mileage of the said vehicle already had exceeded the warranty coverage limit of 60,000 km when PW1's driver Chong sent the said vehicle to the defendant's service centre in Sungai Besi for normal service on 6 June 2016.

[23] As the vehicle had exceeded its warranty mileage threshold by the time it reached the service centre, the defendant claimed that it was within its rights to charge the plaintiff fees and costs ordinarily associated with the normal service performed on the said vehicle.

[24] Furthermore, the defendant also contended that on 6 June 2016 itself it had informed Chong of the need for the plaintiff to pay for the normal service requested by the plaintiff for the said vehicle. According to the defendant, Chong may be construed as an agent of the plaintiff and notifying Chong of the said charges for the normal service is tantamount to notifying the plaintiff.

[25] The defendant also claimed that the sum quoted in service estimate no. 6043 of RM1,173.10 was genuine.

Decision Of The Court

Whether The Warranty Over The Said Vehicle Had Expired As At 6 June 2016

[26] Pivotal to this decision was the warranty status of the said vehicle at the point that it was admitted to the defendant's service centre on 6 June 2016. Had the vehicle mileage exceeded 60,000km and/or the service date taken place more than three years after the vehicle registration date, then the warranty would cease to apply and the customer would therefore be liable for costs arising from any service performed by the defendant on the vehicle. This interpretation is in accordance with the salient terms of the warranty provided by the vehicle dealer, Wheelcorp Premium Sdn Bhd, and the said vehicle's local distributor, BMW Malaysia Sdn Bhd.

[27] In this case, the court found that the mileage of the said vehicle had indeed exceeded the warranty limit of 60,000km at the point that the plaintiff's representative Chong sent the said vehicle to the defendant's service centre in Sungai Besi for normal service on 6 June 2016.

[28] This was determined based on the evidence that Jeyaraj a/l Balan (DW1) had recorded the mileage of the said vehicle as 65,111km in the reception at the car form ("RATC form") when the vehicle was first sent in by Chong on 6 June 2016. The RATC form was produced by DW1 upon the vehicle's arrival at the service centre (ie prior to the performance of the normal service) and signed in acknowledgement by Chong on the same day.

[29] During cross-examination, DW1 testified that he had informed the plaintiff's representative, Chong, that the warranty of the said vehicle had expired as its mileage of 65,111km on 6 June 2016 had exceeded the warranty coverage threshold, and that the plaintiff was therefore required to pay for the normal service requested.

[30] This was further repeated in the defendant's letter issued to the plaintiff's director, Dato' Hong (PW1), dated 9 June 2016. During cross-examination, PW1 himself admitted his knowledge of the warranty conditions ie that the warranty was only valid up to 60,000km.

[31] Given that the actual mileage on the vehicle at the point of its admission to the service centre on 6 June 2016 had exceeded the warranty limit of 60,000km, I deem that the warranty coverage insofar as it pertained to BMW Service + Repair Inclusive ("BSRI") was no longer in effect at the material time.

[32] Therefore, the defendant was within its rights to charge the plaintiff the fees and costs ordinarily associated with the normal service performed on the said vehicle at the plaintiff's request, amounting to RM1,173.10 as contained in the defence and counter-claim filed by the defendant.

Whether The Defendant Owed A Duty To Inform The Plaintiff That The Vehicle's Warranty Had Expired When The Said Vehicle Was Sent To The Service Centre

[33] In determining whether the defendant owed a duty to inform the plaintiff that the vehicle warranty had expired, I note that the contractual relationship *vis-à-vis* the warranty exists between the

plaintiff and Wheelcorp Premium Sdn Bhd, from whom the plaintiff initially purchased the vehicle. As the defendant was not party to the contract - being merely an authorised repairer of BMW Malaysia Sdn Bhd, the local vehicle distributor - there exists no term in the said contract which places an obligation on the defendant to notify the plaintiff of the said vehicle's warranty status.

[34] Moreover, an examination of the facts of the case yields the conclusion that it was the plaintiff itself that should have greater awareness of the vehicle's warranty status. This is because it had never been denied throughout the proceedings that the vehicle had always remained under the custody, care and control of the plaintiff and/or its agents since its initial purchase, making the plaintiff best-placed to have knowledge on the mileage and warranty status of its own vehicle.

[35] In particular, it is judicial notice that most vehicles - particularly those purchased brand-new, including the vehicle in question - would come with a logbook or owner's handbook which contains a maintenance schedule specifying the interval and nature of servicing which needs to be performed to maintain the vehicle in optimal condition. Failure to comply with the maintenance schedule would typically void the warranty coverage, and this is both a fact and term of contract which is widely known.

[36] I hereby construe that it is entirely reasonable to expect that the vehicle owner itself should take steps to keep itself informed of the mileage and warranty status of its own vehicle, and it is not the duty of the defendant as a service centre to notify vehicle owners if their warranties had expired - particularly as it is the owners who are more familiar with the day-to-day operations of a vehicle.

Whether The Defendant Nonetheless Notified The Plaintiff's Representative, Chong, Of The Need For The Plaintiff To Pay For Normal Service

[37] Nevertheless, notwithstanding whether the defendant owed the plaintiff a duty to inform the latter of its vehicle's warranty status, I must also determine as a matter of fact if the defendant did indeed notify the plaintiff's representative, Chong, on 6 June 2016 of the need to pay for the service requested.

[38] In determining this, I refer to the evidence tendered during cross-examination, where DW1 testified that he had informed the plaintiff's representative, Chong, on 6 June 2016 that the warranty of the said vehicle had already expired given that its mileage of 65,111km at that time had exceeded the warranty limit.

[39] DW1 also testified that he had informed Chong at the same time that the plaintiff had to pay for the normal service requested, and further indicated that payment was required from the customer for the said service by ticking the payment column in the RATC. Chong had later signed the RATC on behalf of the plaintiff on 6 June 2016.

[40] Three defendant's witnesses, namely DW1, Azman Shariff (DW2) and Annissa Tasya Tukiman (DW3) further testified that Chong had said "Mestilah, service mesti mau bayar maa," in front of them, thus indicating that Chong was aware of and acknowledged the need that this particular service was not free and would need to be paid for.

[41] Given the evidence, it is clear to me that Chong - in his capacity as the plaintiff's representative - had indeed been informed by the defendant on 6 June 2016 of the need for the plaintiff to pay for the normal service requested for the vehicle in question, as the warranty coverage had already expired. Moreover, Chong also demonstrated his knowledge of the required payment by signing the RATC form and verbally attesting that the service needed to be paid for.

[42] Therefore, I find that the plaintiff is in no position to disavow knowledge of its responsibility to honour this payment, particularly as Chong himself had not been brought in to appear as a witness throughout these proceedings. Without testimony from Chong, who was physically present at the material time, the testimony of the plaintiff's witness PW1 *vis-à-vis* the exchanges between Chong and DW1 on 6 June 2016 cannot be relied upon as it is merely hearsay.

Whether Chong Was An Agent Of The Plaintiff

[43] In determining whether Chong was an agent of the plaintiff, I draw upon the testimony of the plaintiff's witness, Dato' Hong ie PW1.

[44] As stated previously, PW1 was a director of the plaintiff and Chong was employed as his driver. PW1 admitted that on all prior occasions it had always been Chong who had sent the vehicle in question for servicing. This was consistent with what happened on 6 June 2016, when Chong sent the said vehicle to the defendant's service centre for normal service and handed over the key to the vehicle to DW1 on behalf of the plaintiff.

[45] As the plaintiff's representative, Chong was also authorised to sign the RATC form which contained an indication of the need for the service to be paid for by the plaintiff ie the tick in the payment column made by DW1.

[46] The following day, on 7 June 2016, Chong returned to the defendant's service centre in Sungai Besi to collect the said vehicle. On 9 June 2016, Chong again went to the same service centre to collect several items from the said vehicle; on this day, Chong also signed job card no. 12938 dated 6 June 2016.

[47] In determining whether Chong was an agent of the plaintiff, I refer to s. 135 of the Contracts Act 1950 which states:

> An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'.

[48] Section 140 of the Contracts Act 1950 also states:

> An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

[49] In the case of *Kayat & Anor v. Lim Yew Seng* [1971] 1 LNS 46; [1972] 1 MLJ 26 the High Court had held that:

> ... where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner. I think the rule is so laid down because in the course of human conduct whether or not the driver is the servant or agent of the owner or whether or not there is connection between the driver and the owner should be within the knowledge of the owner of the car. In the case here, it is admitted that the defendant was the owner of the car. The presumption is raised that the driver was his servant or agent. It is for the defendant to rebut the presumption by proof of the actual facts. Since he has chosen to remain silent, the irresistible conclusion is that the driver was his servant or agent. I therefore find the defendant liable.

[50] Given the evidence, it is clear that Chong was at all material times acting as an agent for the plaintiff insofar as it relates to the servicing of the vehicle in question.

[51] Furthermore, given prevailing circumstances, it was entirely reasonable for the defendant to infer that Chong had been implicitly imbued by his principal with sufficient authority to deal with matters incidental to the servicing of the said vehicle. In other words, the defendant was within its rights to transact with Chong in his capacity as an agent of the plaintiff. Therefore, representations made by the defendant to Chong, including informing him of the expiry of the warranty and the need to pay for the service requested on 6 June 2016, is therefore as good as notifying the plaintiff directly.

[52] Indeed, it was the plaintiff which had failed to prove, on balance of probabilities, that Chong was not its agent at all material times, particularly when delivering the said vehicle to the defendant's service centre on 6 June 2016. The plaintiff has therefore failed to "break the link" between itself and Chong, particularly when pleading ignorance regarding its vehicle's warranty status and the need to pay for the service performed by the defendant.

Plaintiff's Failure To Produce Chong As A Witness In Court

[53] At this juncture, I would like to note that the plaintiff's failure to produce Chong as a witness in court was detrimental to its claim as it was Chong who was directly involved in the exchanges which took place between the plaintiff and the defendant on 6, 7 and 9 June 2016 respectively.

[54] I reiterate that, in Chong's absence, evidence tendered by PW1 in relation to the exchanges between Chong and the defendant on those three dates may not be regarded as anything more than mere hearsay without Chong's testimony to corroborate or contradict it - particularly as PW1 himself was neither present nor participated in the exchanges.

[55] Moreover, this specific failure to produce such a material witness led me to draw an adverse inference against the plaintiff under s. 114(g) of the Evidence Act 1950 *vis-à-vis* the presumption that if the omitted evidence was produced, it would have been adverse to the plaintiff's case. This was indeed one of the key factors which led me to dismiss the plaintiff's claims against the defendant.

Whether The Defendant Unilaterally Serviced The Plaintiff's Vehicle

[56] I refer to the following extract from the plaintiff's pleadings:

> ... Pusat Servis tersebut telahpun secara sesendiri menjalankan Servis tersebut, tanpa mendapatkan arahan selanjut daripada plaintif dan/

atau wakil plaintif dan seterusnya, defendan telahpun mengenakan satu bayaran terhadap Plaintif, melalui No. Servis Anggaran (Service Estimate) 6043 bertarikh 7 Jun 2016, sebanyak RM1,173.10 (selepas ini dirujuk sebagai "Bil tersebut") ke atas Plaintif untuk Servis tersebut.

[57] In essence, the plaintiff contended that, on 6 June 2016, it was not informed by the defendant of the amount payable before the vehicle was serviced and that the defendant acted unilaterally in performing the said service without obtaining further instruction or confirmation from the plaintiff.

[58] However, there was no evidence that Chong - whom at the material time was acting as an authorised agent of the plaintiff - requested for a cost estimate or quote for normal service. Furthermore, the plaintiff did not tender any evidence to prove that Chong in any way instructed the defendant to refrain from servicing the vehicle pending confirmation from his principal before leaving the car at the service centre.

[59] Therefore, it is reasonable for the defendant to infer from Chong's action (or inaction) on 6 June 2016 that consent had been duly obtained from an individual who was authorised to act on behalf of the plaintiff - particularly as he had signed the RATC - and that nothing was stopping the defendant from proceeding with performing the requested normal service on the said vehicle.

[60] I, therefore, reject the plaintiff's claim that the defendant acted unilaterally in performing the said service without obtaining further instruction or confirmation from the plaintiff.

Whether The Service Estimate Is A Valid And/Or Final Bill

[61] The plaintiff also contended that the service estimate was not a final and/or valid bill or invoice. In reply, the defence pointed out that the plaintiff's own pleading (as per the extract above) referred to the service estimate as a bill, indicating the plaintiff's awareness and knowledge that the document was indeed a bill.

[62] Moreover, even if the plaintiff disregarded the service estimate, the defendant had on multiple occasions sought payment from the plaintiff *via* letters dated 9 June 2016, 28 June 2016 and 18 July 2016 respectively, and the plaintiff cannot plead ignorance that the sum demanded was consideration for the service performed on the said vehicle.

[63] It is of particular importance that the plaintiff has never sought to dispute that normal service had indeed been performed on the said vehicle by the defendant, merely whether the plaintiff should have been liable to pay for it.

[64] Indeed, the absence of an initial quote does not invalidate a service rendered from being chargeable, the same way a patient seeking treatment from a general practitioner will only discover the cost of his treatment after the consultation process.

[65] I hereby refer to s. 71 of the Contracts Act 1950 which provided that:

> Obligation of person enjoying benefit of non-gratuitous act
>
> S. 71. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[66] I draw particular attention to Illustration (a) in s. 71 of the Contracts Act 1950:

> (a) A, a tradesman, leaves goods at B's house by mistake B treats the goods as his own. He is bound to pay A for them.

[67] Since we have established that the warranty had indeed expired as at 6 June 2016, and that the defendant had indeed rendered its services to the plaintiff in the form of the normal service performed on the said vehicle, and the defendant did not act unilaterally in contravention of the plaintiff's instructions in doing so, then I rule that the service estimate issued by the defendant is a valid final bill, with the sum of RM1,173.10 stated therein being consideration for the work performed by the defendant on the plaintiff's vehicle.

Whether The Defendant's Counter-Claim Of RM1,173.10 Is Valid

[68] Once it has been established that the service estimate is a valid bill, this matter may be easily addressed by examining the facts.

[69] It is indisputable that the said vehicle was delivered by Chong, an agent of the plaintiff, to the service centre owned by the defendant on 6 June 2016 where he was received and processed by

DW1, an employee of the defendant, who notified him that the warranty over the vehicle had expired and that payment would be necessary for the normal service requested on that day. This was emphasised in the RATC form signed by Chong where DW1 had ticked the payment column, and further corroborated by Chong's verbal acknowledgement that the service needed to be paid for ie not free.

[70] The next day, on 7 June 2016, a copy of service estimate no. 6043 which contained the amount payable for the service of RM1,173.10 was generated and issued to Chong - a fact admitted by the plaintiff *via* PW1's testimony.

[71] While the plaintiff contended that it should not be liable to pay for the normal service as it should have been covered under the warranty, it is a matter of fact that the warranty had indeed expired by the time the car reached the service centre on 6 June 2016 - and the plaintiff did not tender any evidence to prove otherwise - which meant that the vehicle was no longer entitled to free services at the material time.

[72] Given that the plaintiff has failed to prove that the vehicle was still covered under its warranty as at 6 June 2016, and it did not tender any evidence to prove that the defendant acted unilaterally without consent in proceeding to service the vehicle, then the fact remains that a non-gratuitous service had indeed been performed by the defendant to the plaintiff's benefit and the former is entitled to be enumerated for it.

[73] Given these facts, I hereby rule that the defendant's counter-claim of RM1,173.10 is valid.

Whether The Defendant Unlawfully Detained The Plaintiff's Vehicle

[74] In a letter from the defendant to the plaintiff dated 18 July 2016 - which was one of three letters sent by the defendant to this effect - the defendant explicitly stated the following:

> We would like to follow up with you on your Vehicle's collection as we have completed the necessary repair/work as authorised to your Vehicle. We look forward to receive the payment prior releasing the Vehicle to you the soonest.

[75] However, despite several written notices from the defendant to the plaintiff, it was the plaintiff which decided not to bother to collect the said vehicle.

[76] Nevertheless, in determining whether the defendant had any right to withhold the release of the vehicle subject to the plaintiff settling its outstanding service bill, I refer to s. 123 of the Contracts Act 1950 that had provided that:

> Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain the goods until he receives due remuneration for the services he has rendered in respect of them.
>
> Illustrations
>
> (a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.
>
> (b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

[77] I also refer to the case of *Sethia Financial Services Ltd v. Nicholas Chu Fai Hung & Mak Siau King* [1985] 1 LNS 111 with regards to the attainment of a specific lien pursuant to s. 123 of the Contracts Act 1950.

[78] The High Court found that a bailee (in this case, the defendant) must satisfy three conditions to attain a specific lien. First, he ought to have exercised his labour or skill in respect of the goods bailed. In this case, the defendant had fulfilled this condition by performing normal service on the said vehicle - a fact which is not contested by the plaintiff.

[79] Second, the bailee must have continued possession of the goods bailed. In this case, the defendant had shown that the said vehicle remained in its continued possession from 6 June 2016 (the date when it was first delivered to the service centre) until it was collected by the plaintiff's representatives on 28 April 2017.

[80] Third, the bailee must have a right to retain the goods until he has been paid. This is where the positions of the plaintiff and defendant diverged.

[81] The plaintiff contended that the defendant had no right to receive any remuneration from the former as the defendant proceeded to perform normal service on the vehicle without consent and/or agreement from the plaintiff, and that the service estimate does not constitute a valid claim for monies against the plaintiff. Therefore there is no sum due or payable by the plaintiff to the defendant.

[82] I hereby refer to para. 6 of the plaintiff's statement of claim, which pleaded that:

> Pada 6 Jun 2016, seorang wakil Plaintif telah menghantarkan Kenderaan tersebut ke Auto Bavaria Sungei Besi (selepas ini dirujuk sebagai "Pusat Servis tersebut") … bagi menjalankan servis biasa ke atas Kenderaan tersebut (selepas ini dirujuk sebagai "Servis tersebut"), atas kepercayaan bahawa Kenderaan tersebut masih adalah dalam liputan Jaminan Kenderaan tersebut dan Servis tersebut akan dilakukan tanpa pembayaran.

[83] The plaintiff further pleaded in para. 7 of its statement of claim that:

> Namun pada kesemua masa yang berkenaan, Pusat Servis tersebut dan/atau defendan telah gagal, enggan dan/atau cuai untuk memaklumkan plaintif dan/atau wakil plaintif bahawa Jaminan Kenderaan tersebut telahpun luput pada masa Kenderaan tersebut dihantar kepada Pusat Servis tersebut untuk menjalankan Servis tersebut akibat perbatuan (mileage) Kenderaan tersebut telah melebihi 60,000 kilometer.

[84] From these pleadings, it is clear that the plaintiff's alleged cause of action arose from the purported failure of the defendant to notify the plaintiff and/or its representative that the warranty had already expired at the material time and the service requested would not be free of charge.

[85] The plaintiff further alleged in para. 8 that the defendant acted unilaterally in performing the said service on the vehicle without obtaining consent and/or agreement from the plaintiff beforehand:

> Sebaliknya, Pusat Servis tersebut telahpun secara sesendiri menjalankan Servis tersebut, tanpa mendapatkan arahan selanjut daripada plaintif dan/atau wakil plaintif dan seterusnya, defendan telahpun mengenakan satu bayaran terhadap plaintif, melalui No. Servis Anggaran (Service Estimate) 6043 bertarikh 7 Jun 2016, sebanyak RM1,173-10 (selepas ini dirujuk sebagai "Bil tersebut") ke atas plaintif untuk Servis tersebut.

[86] The usage of the term "bill" in the plaintiff's pleadings indicates that the plaintiff knew that the service estimate was a valid claim by the defendant against the plaintiff.

[87] Furthermore, as I had determined earlier that the service estimate does indeed constitute a valid bill, the third condition is hereby satisfied as there was indeed a sum due and outstanding from the plaintiff to the defendant.

[88] I hence rule that the defendant had a specific lien pursuant to s. 123 of the Contracts Act 1950 and did not unlawfully detain the vehicle throughout the period that the amount due for its services remained outstanding.

Whether The Plaintiff Is Entitled To Claim RM2,500 A Day For Loss Of Use Of The Said Vehicle Arising From Wrongful Detention Between 7 June 2016 And 28 April 2017

[89] I have scrutinised the claim by the plaintiff for RM812,500, computed as loss of use valued at RM2,500 per day for 326 days, and find no valid evidence tendered before me to substantiate the claim. For example, there was no documentary evidence tendered by the plaintiff to provide the basis for its claim of RM2,500 a day, such as an invoice from or a receipt of payment made to a car rental company for an equivalent vehicle.

[90] Instead of providing a reliable basis to substantiate the extent to which the detention of the vehicle had resulted in demonstrable loss to the plaintiff, it merely summoned Chan Tai Ann (PW2) to explain how the estimate of RM2,500 a day was derived. I do not find this evidence satisfactory, as PW2 is not even a car rental operator but the director of a company which provides tours and limousine hire services, and is therefore not in the position to provide reliable expert opinion on the value of loss of use of the said vehicle.

[91] Moreover, PW2 explained that the figure of RM2,500 a day was derived based on his assessment of the rental price of a completely different car, namely a Mercedes Benz S400 which is a sedan when the vehicle in question is a sports utility vehicle. While they are both luxury car models, sufficient differences exist to preclude them from being directly comparable, and at no point did the plaintiff make an earnest attempt to ascertain a *bona fide* value for loss of use of the vehicle in question, ie a BMW X5.

[92] At the same time, it did not escape my attention that the detention period only extended to 326 days because of the plaintiff's decision to not collect the vehicle from the service centre despite multiple notifications from the defendant. I hereby reject this claim by the plaintiff as it is not only unsubstantiated but also aggravated by the plaintiff's own inaction.

Whether The Plaintiff Is Entitled To General Damages Arising From Loss Of Reputation And Income, As Well As Aggravated Damages And Exemplary Damages

[93] The plaintiff's claim for "general damages for the loss of reputation and loss of income" cannot be entertained in light of the decision of *Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor* [2010] 6 CLJ 681 where the High Court held that:

> It is trite law that as the plaintiff in this case is a private limited Company, it has its own legal identity and entity. Chan & Koh on *Malaysian Company Law, Principles & Practice*, 2nd edition states:
>
> > A company is a legal fiction, an abstraction with legal but no physical existence. A company has "neither body, parts or passions. Apart from its corporators, it can have neither thoughts, wishes, or intentions, for it has no other mind than the mind of the corporators".

[94] A resultant effect of the theory of independent legal entity is that the property of the company which is a going concern belongs to it and not to its members individually or collectively. Generally, an individual member of the company has no property, legal or equitable, in the assets of the company even if the members own all, or substantially all, of the company shares.

[95] Given that the vehicle is registered in the name of the plaintiff, PW1 as such has no *locus* to claim for any damages on behalf of himself. Conversely, the plaintiff also has no *locus* to claim for any damages arising from "discomfort, inconvenience, extra expenditure, distress, anxiety and severe embarrassment" suffered by PW1. As the plaintiff is a corporation, there is no question of itself suffering from "discomfort, inconvenience, distress, anxiety and severe embarrassment."

[96] In the case of *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1975] 1 LNS 44 Arunalandam J held (and I agree) that a company is a complete legal entity and a completely different person from others or other companies, and directors cannot be equated with the company or *vice versa*.

[97] I venture to add that had the plaintiff assigned its rights and liabilities arising in the contract of sale and purchase of the car to PW1, then perhaps PW1 could have successfully claimed for damages for "discomfort, inconvenience, extra expenditure, distress, anxiety and severe embarrassment."

[98] Even if such a thing was possible, I further note that no evidence has been adduced to show that PW1 was indeed authorised to be conflated with the plaintiff, with several paragraphs in the statement of claim referring to PW1 as the plaintiff when the action was actually launched by Gegaran Potensi Sdn Bhd.

[99] More fundamentally, it goes without saying that damages must be caused by wrongful conduct by the party from whom the damages are claimed. In this regard, I have earlier established that the defendant indeed had a right to detain the vehicle as it had yet to be paid by the plaintiff for the services it rendered. Moreover, the detention period only extended to 326 days due to the plaintiff's decision to not collect the vehicle from the service centre despite multiple notifications from the defendant.

[100] Therefore, as the detention of the vehicle by the defendant was not unlawful - and indeed, only prolonged due to inaction on the part of the plaintiff - it is clear that damages cannot flow from this action and I hereby reject these claims by the plaintiff.

[101] Based on the above reasons, the court dismissed the plaintiff's claims against the defendant with costs. Further, the counter-claim by the defendant against the plaintiff is allowed for the sum of RM1,173.10 with interest.

[102] The court also fixed the cost of trial in the amount of RM10,000 payable by the plaintiff to the defendant.