Wee Poh Hueh Florence v Performance Motors Ltd
[2004] SGHC 47

Case Number : Suit 541/2002, RA 234/2003, 278/2003

Decision Date : 02 March 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Kenneth Tan SC (counsel) and Leslie Phua (Phua Wai Partnership) for plaintiff; Indranee Rajah SC and Daryl Mok (Drew and Napier LLC) for defendants

Parties : Wee Poh Hueh Florence — Performance Motors Ltd

Civil Procedure – Costs – Scales – Whether costs awarded should be taxed on Subordinate Courts scale – Section 39(4) Subordinate Courts Act (Cap 321, 1999 Rev Ed)

Contract – Remedies – Damages – Breach of warranty of quality – Correct amount of damages payable

Damages – Assessment – Date of assessment of damages – Whether date of delivery or date of discovery of damage – Whether allowance to be given for use of goods – Section 53(3) Sale of Goods Act (Cap 393, 1999 Rev Ed)

Damages – Assessment – Replacement goods of lower prestige and quality than goods contracted for – Whether compensation should be given for subsequent loss of use

Damages – Mitigation – Contract – Whether failure to mitigate affected cut-off date for award of consequential damages

2 March
2004
Judgment reserved.

Judith Prakash J:

Background

1 This appeal is about the correct amount of damages payable to the purchaser of a luxury car which subsequently turned out to be defective.

2 The plaintiff, Ms Wee, purchased a top-of-the-line BMW car (then known as the BMW 728iA) from the defendant, Performance Motors Limited ("PML"), in November 1997. She drove the car without complaint for some one and a half years. In May 1999, the car's engine experienced an abnormally high rate of loss of coolant. This was the first manifestation of the overheating complaint that was to bedevil the car thereafter. On this first occasion, Ms Wee lost the use of the car for two days while the problem was dealt with. The remedial measures taken proved to be short-term and the problem recurred thereafter at ever-decreasing intervals. Ms Wee complained that the coolant level indicator came on frequently and that she continually had to top up the coolant. Various work was done which did not rectify the problem. In 2001, the car was in the workshop for much of the year. It remained in the workshop until February 2002 when PML, having determined that the car could not be satisfactorily repaired, returned it to Ms Wee.

3 In May 2002, Ms Wee commenced these proceedings against PML for breach of warranty of quality. She asked for a declaration that she was entitled to reject the motor car and to be given a full refund of the purchase price. Alternatively, she wanted damages. After hearing the evidence, Woo

Bih Li J found that PML was in breach of the contractual warranty of satisfactory quality in respect of the car. Woo J held, however, that Ms Wee was not entitled to reject it or obtain a full refund of the purchase price as she had affirmed the contract and had had the use of the car for a substantial period. He ordered that interlocutory judgment for damages to be assessed be entered in favour of Ms Wee. Woo J also directed that the costs of the action be dealt with by the Registrar in the course of the assessment.

4 The assessment of damages took place before the assistant registrar in July 2003. The damages claimed fell under two broad heads and that these were the correct heads of claim was not really disputed. What was hotly disputed was how each head was to be computed. The first head related to the correct measure of general damages and the second head related to the recovery of consequential loss. On behalf of Ms Wee it was contended that she was entitled to:

(a) the difference between the value of the car at the time of the discovery of the breach of warranty (June 1999) and the value that the car would have had at that time had it been of satisfactory quality and that, on the evidence before the assistant registrar, this sum was $137,511.94;

(b) loss of use of the car for 778 days calculated as amounting to $77,363,51; and

(c) loss of interest paid during the period when she was deprived of the use of the car calculated as amounting to $18,746.

Item (a) related to the first head of damage and items (b) and (c) related to the second head.

5 In relation to the first head, PML contended that the date at which the diminution in value had to be calculated was not June 1999 but was either February 2002 when it was clear that repairs were not possible or, at the latest, April 2002. On the evidence, if either of these dates had been adopted, the loss to Ms Wee would have been between $8,000 and $9,500. As for the claim for consequential damages, this was disputed on various bases that I do not need to detail here.

6 The assistant registrar held as follows:

(a) that the diminution in value should be assessed as at the time when repair attempts were abandoned and the defects were proclaimed as not being rectifiable and that although this determination took place in February 2002, the appropriate date was April 2002 as Ms Wee should be given a further two months to assess her position and take advice before scrapping the car;

(b) the difference in value between a defective car and a working car as at April 2002 was $8,000;

(c) Ms Wee should have mitigated her damages by selling or scrapping her car no later than mid-April 2002;

(d) Ms Wee was entitled to be compensated for 302 days' loss at the rate of $2,000 a month so that the monetary value of the loss was $19,857.53. The assistant registrar arrived at this sum on the basis that Ms Wee was entitled to the use of a BMW 7 series car like her own and therefore the replacement vehicles that PML had provided her with did not compensate completely for her loss as they were only BMW 3 series or BMW 5 series cars. The difference in the rental costs of such vehicles and that of a BMW 7 series car was approximately $2,000 a month;

(e) Ms Wee was also entitled to recover $6,085.50 as the rental she expended on a substitute car between February 2002 and mid-April 2002 and road tax and insurance amounting to $549.10 for the same period; and

(f) the claim for bank interest was disallowed as the payment of this sum did not arise out of PML's breach of contract.

The total amount awarded as damages under the foregoing paragraphs was $34,492.13.

7 On the issue of costs, having regard to the quantum of damages, the assistant registrar ordered that costs be fixed on the Subordinate Courts scale. He also took into account the fact that PML had made an offer to settle. He calculated that the damages awarded were effectively only $1,492.13 more than the value of the offer to settle and exercised his discretion to give lower costs to Ms Wee, the plaintiff, after the date of the offer to settle. The offer to settle was made on 10 September 2002 which the assistant registrar regarded as the mid-point in the getting up. Under the Subordinate Courts' scale, a three-day trial would have merited costs of around $15,000. The assistant registrar awarded costs of $7,500 up to the date of the offer to settle and another $4,000 in costs from the date of the offer to settle to the date of the assessment. PML was ordered to pay Ms Wee total costs of $11,500 with reasonable disbursements incurred up to and including the date of the offer to settle.

8 Both parties were dissatisfied with the outcome of the assessment. Ms Wee appealed against all the orders made including the costs order. PML also appealed against the quantification of the damages but its appeal was directed particularly to the assessment of compensation for the loss of use of the car from June 1999 to February 2002 at $19,857.53. As a result, all the issues canvassed during the assessment were revisited during the appeal.

Issues arising on the appeal

Measure of general damages: legal principles

9 In an action for damages arising from breach of contract, the innocent party is entitled to recover such damages as may fairly and reasonably be considered as arising naturally, in the ordinary course of events, from such breach of contract. This was the measure laid down by the first rule in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145. In relation to the sale of goods, this first rule was incorporated as the normal measure of damages for breach of a contractual warranty by s 53 of the Sale of Goods Act (Cap 393, 1999 Rev Ed). Section 53 reads:

(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may —

(a) …

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality, such loss is prima facie the difference

between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

10 This was a case of breach of warranty of quality. Therefore, the first consideration was whether the measure of damages prescribed by s 53(3) had to be used to determine what was recoverable by Ms Wee. Applying that measure would mean determining the difference in the value of the car in its defective state at the time of delivery to Ms Wee and the value it would have had if it had been sound. It is clear from the section itself that what I will call "the s 53(3) measure" is only a *prima facie* measure and may not apply in every case. In *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, the issue was whether the purchaser who had bought vinyl film for the production of decals for resale to end users was entitled to recover as damages for the defective film delivered by the seller the s 53(3) measure, or whether the damages were limited to the purchaser's liability to the subsequent purchasers of the decals arising because of the defects. In that case, using the s 53(3) measure would have resulted in greater compensation being awarded to the purchaser. At first instance, the s 53(3) measure was applied but this decision was reversed on appeal. The UK Court of Appeal held, by a majority, that the s 53 measure would be displaced where it had been in the contemplation of the parties at the time the warranty was given that the goods sold would be used in making a product for resale. Otton LJ expressed the view that s 53(3) lays down only a *prima facie* rule from which the court may depart in appropriate circumstances and that the burden of proof will lie on the person who seeks such a departure (at 97). Auld LJ on the other hand considered that the starting point for a claim for a breach of warranty is not the determination of whether one or the other party has "displaced" the *prima facie* test in that sub-section but the *Hadley v Baxendale* principle reproduced in s 53(2). The evidence may be such that the *prima facie* test never comes into play at all. Auld LJ went on to say (at 102):

> The *Hadley v Baxendale* principle is recovery of true loss and no more (or less), namely to put the complaining party, so far as money can do it, in the position he would have been if the contract been performed. Where there is evidence showing the nature of the loss that the parties must be taken to have contemplated in the event of breach, it is not to be set aside by applying the prima facie test in section 53(3) simply because calculation of such contemplated loss would be difficult. Equally, it should not be set aside in that way so as to produce a result where the claimant will clearly recover more than his true loss.

11 In the present case, neither party argued that the s 53(3) measure had been or could be completely displaced and that the damages should be calculated on some other basis. Both parties agreed that Ms Wee was entitled to recover the difference between the value of the car in its defective state and the value of a sound car. What they could not agree on was the date at which such difference in value should be assessed. On the appeal, Mr Kenneth Tan SC, counsel for Ms Wee, moved away from the position advocated before the assistant registrar that the date of such assessment was June 1999 when the defect first manifested itself. He contended that the s 53(3) measure had to be applied in full and that consequently the date of assessment was the date of delivery of the car. Ms Indranee Rajah SC, counsel for PML, disputed this and maintained PML's position that the correct date of assessment was that chosen by the assistant registrar.

12 Ms Rajah's submissions were basically derived from the principles of law on assessment of damages for breach of contract set out in Treitel's *The Law of Contract* (9th Ed, 1995) ("*Treitel*"). *Treitel* explains at 864–865 that the starting principle is that damages are assessed by reference to the time of breach and that the theory behind this rule is "that any loss suffered by reason of market movements after the time of breach is not caused by the breach, but rather by the injured party's failure to mitigate". The discussion goes on (at 865–867)

(a) Time of breach. … The principle of assessment by reference to the time of breach is based on two assumptions: that the injured party knows of the breach as soon as it is committed, and that he can at that time take steps to mitigate the loss which is likely to flow from it. Where the facts negative these assumptions, the courts will depart from the principle, and assess the damages by reference to "such other date as may be appropriate in the circumstances." In particular they will have regard to the time when the breach was, or could have been discovered; and to the question whether it was possible or reasonable for the injured party to make a substitute contract immediately on such discovery. …

(b) Time of discovery of breach. The injured party may not have known of the breach when it was committed and may have been unable, acting with reasonable diligence, to discover it at that time. The damages will then prima facie be assessed by reference (at the earliest) to the time when the party, so acting, could have made the discovery. …

(c) …

(d) Reasonableness of acting on knowledge of breach. Even where it is possible for the plaintiff to make a substitute contract on discovering the breach, it may not be reasonable to expect him to do so because at that time there is still a reasonable probability that the defendant will make good his default. In such cases damages are prima facie assessed by reference to the time when that probability ceased to exist.

Whilst there can be no quarrel with the above as a statement of general legal principle, whether in fact passages (b) and (d) above apply so as to make it reasonable to fix as the date of assessment the date when PML decided it could not repair the car is another matter.

Which date should be applied?

13 It was common ground that in this case, there were three possible dates at which damages could be assessed *viz*:

(a) date of breach *ie* November 1997;

(b) date of discovery of breach *ie* June 1999; and

(c) the date when it became clear that there was no possibility of repair and the contract was effectively lost *ie* February or April 2002.

It was agreed that the date of the breach was the time when the car was delivered in November 1997 because the defect was a latent one and therefore, although it did not cause any trouble at the beginning, it was present in the car from the start. The breach of contract by PML was a breach of the warranty of satisfactory quality. That warranty was a warranty as to the state of the car at the time it was sold and delivered. It was delivered in November 1997 and should have been of satisfactory quality on that date. Despite outward appearances, it was not satisfactory on delivery since it contained a defect which resulted in it having to be prematurely scrapped. Therefore, on delivery, PML was in breach of the warranty.

14 Ms Rajah's submission was that it would not be appropriate to take either November 1997 or June 1999 as the date on which damages should be assessed. As regards November 1997, assessing damages at that date would be to give Ms Wee a benefit because she had the use of a car which showed no defect from November 1997 to June 1999 and she had substantial use of the car for

another one and a half years thereafter *ie* between July 1999 and the end of 2000. As regards June 1999, at that time it was reasonable for Ms Wee to expect PML to make good the default by repairing the defect and therefore it would not have been reasonable to have expected her to immediately scrap the car in June 1999 on discovery of the defect. From June 1999 to 2000, the problem was minimal and Ms Wee had substantial use of the car. It was only in 2001 that the problem became really serious. Further, Ms Wee was provided with a replacement car by PML on the days when the car was in the workshop during the period from June 1999 to February 2002. It would be wrong to have damages assessed as at June 1999 and at the same time allow Ms Wee to have the benefit of the use of a replacement vehicle between June 1999 and February 2002. It was only in February 2002 that it could be said that the possibility of repair ceased to exist and the contract was well and truly lost. This was also the point of time at which Ms Wee ought to have mitigated her loss. Accordingly, the correct time at which damages should be assessed would be February or April 2002.

15 I find the above arguments in relation to June 1999 and February 2002 to be topsy-turvy. The *prima facie* date for assessment of the damages is the date of delivery. If that date is to be displaced because of the failure to discover the defect until later, then the *prima facie* date of assessment is the date of discovery of the defect. In either case, the party that wishes to change the date from the *prima facie* date which the law specifies must bear the burden of showing why the *prima facie* date is not applicable. In the *Bence Graphics International Ltd* case, Otton LJ recognised that when a party wishes to depart from a *prima facie* rule of law, that party bears the burden of proof of establishing that this is justified. On this point at least he was at one with the trial judge who had held in favour of the s 53(3) measure of damages on the basis that the defendants had failed to satisfy him that the normal measure should be displaced.

16 Here, PML, the party that delivered a defective vehicle to Ms Wee, is, in effect, arguing that it is the party entitled to determine when her damages should be assessed. This is because the time for assessment is being delayed from delivery right up to the date when PML decided that it could not remedy the defect. To accept this argument would be to give the contract breaker a control over damages to which it is not entitled. There was no magic in PML's decision in February 2002 that the repair could not be rectified. This is a decision that it could have made any time between June 1999 and February 2002. The car was in its hands for substantial periods of time and, as the manufacturer's local agent, it had (or should have had) the necessary expertise to determine the seriousness of the defect at the earliest possible moment. It cannot be seriously argued that PML was entitled to take its own time to investigate the defect and at its own convenience decide when nothing further could be done and that the date of determination of damages depended on when PML came to such a decision. With respect, I cannot uphold the finding below that the date of assessment had to be calculated in relation to PML's decision to give up trying to rectify the car.

17 As for the argument that June 1999 should not be taken as the date of breach because it was reasonable of Ms Wee to give PML the opportunity to rectify the problem, in my opinion, such a contention is not justified by legal principle. Assuming, for the time being, that June 1999 as the date of discovery of the breach is the correct date to assess damages, then on the basis of the principles that *Treitel* set out, that would also be the date on which Ms Wee should have mitigated her loss so that movements in market prices thereafter did not aggravate the loss. If the *prima facie* rule was that Ms Wee should have mitigated in June 1999, then whether she acted reasonably or not by giving PML the opportunity of effecting a cure would only be a relevant consideration if she herself was putting forward a date after June 1999 as the date for assessment of damages. In fact, in the court below, she did not take this course but argued for June 1999 as the relevant date. The reason why PML objected to June 1999 as the date of assessment was that it knew that Ms Wee would be awarded more damages if that date was chosen than if February 2002 was chosen as the correct date. In this situation, PML cannot argue that because it was reasonable of Ms Wee to allow it to

rectify the defect instead of scrapping the car immediately, the time for assessing the damages must be pushed forward to a date which is more favourable to itself rather than to Ms Wee.

18 I am now left with the question whether the correct date is the date of breach or the date of discovery. The principles explained in *Treitel* indicate that where the injured party does not know of the breach as soon as it is committed and cannot at that time take steps to mitigate the loss, the date of breach as the *prima facie* date of assessment is displaced and the court can assess the damages by reference to another date. That principle is for the protection of the injured party and not for the protection of the contract breaker. Therefore the fact that the injured party is ignorant of the breach when it occurs does not mean that damages should not be assessed as of that date.

19 Mr Tan submitted that when Ms Wee chose, as a consumer, to buy a top-of-the-series car, both she and PML contemplated at the time of the sale and delivery that she was buying the car for her own use and enjoyment over time. It was not in contemplation that she would sell a car after a short period or that she would have to be concerned with overheating and frequent workshop repairs. If at the time of delivery Ms Wee had known of the serious inherent defect in the car, she would not have bought it. She would have returned it and obtained a refund or a replacement car. The value of the car as at 5 November 1997 was already that of a seriously defective BMW 7 series. After the defect manifested itself, PML gave the impression that it could be rectified. Any use that Ms Wee put the car to after 5 November 1997 did not detract from the value of the car as at 5 November 1997 as being that of a seriously defective car and of a car that she had not bargained to buy. Accordingly, he submitted that the diminution in the value to Ms Wee was the difference between the value of a BMW 7 series car of proper quality and the value of a seriously defective BMW 7 series car as at the date of delivery. Such diminished value did not change because Ms Wee used the car. The concepts of value and use should not be confused. The argument, that the value of the defective car should be taken as at the time when the defect manifested itself, confused use with value and ignored the reality that any use was of a car that was not the sound car that was bargained for. Such use would not have taken place had Ms Wee known of the serious defect from the outset. Further, it wrongly attributed to the parties a contemplation that Ms Wee would be content with a limited use of the car and intended to value the car for a premature sale if her use was interrupted by the serious latent defect. This was clearly not the case. Ms Wee bought a top-of-the-range car to use and enjoy over the years. As a result of PML's breach she lost the opportunity to continue such use and instead was compelled to sell prematurely at a depreciated value.

20 I accept the above submissions and hold that, in this case, the proper date for assessment of the diminution in value of the car is the date of its delivery to Ms Wee. I also consider, however, that an allowance has to be given for the fact that for a substantial period of time the car appeared to be exactly what it was supposed to be and Ms Wee used it and enjoyed it during this period as if it was a sound BMW 7 series car. I think that to totally disregard such use and enjoyment for the purpose of quantifying her damages would be to over-compensate Ms Wee for the breach of contract.

Calculation of general damages

21 I now turn to the quantification of the s 53(3) measure of damages in the present case. The first figure to be determined is the value that the car would have had if it had fulfilled the warranty of satisfactory quality. Ms Wee paid $289,000 for the car inclusive of the Certificate of Entitlement, goods and services tax, registration fees and one year's road tax. I think that this price has to be taken as the value of a sound car as it was the price in October/November 1997 at which a new and apparently sound BMW 728iA was available from PML, the sole dealer in new BMW cars.

22 The second figure to be determined is the value that the car, in its defective state, had in November 1997. One Mr Au Eng Choon, a dealer in new and used cars, was called as a witness by PML. He gave it as his opinion that at that date a defective car would have been worth $225,000. His opinion was, however, based on the supposition that a buyer in the second-hand market would be willing to take the car at a lower price even with a coolant loss problem. In cross-examination, he agreed that he had not seen a copy of the expert's report on the car when he gave his opinion. After being told that the expert's report stated that the car could not be repaired and could not be driven like a normal car because its cooling system was unpredictable, Mr Au stated that in these circumstances, no one would buy and use the car. He confirmed that this car had no second-hand value in November 1997 or any time thereafter if the true condition of the car had been made known to potential purchasers.

23 On the basis that there was no second-hand market for the car, its only value in its defective state in November 1997 would have been its scrap value. The evidence was that in Singapore, at any given point in time, between the date of registration of a car and the tenth anniversary of that date, the scrap value of the car can be calculated on the basis of its Preferential Additional Registration Fee ("PARF") rebate plus its Certificate of Entitlement ("COE") rebate plus a value for the body of the vehicle. In this case, the evidence was that if the car had been scrapped within the first five years of registration, the PARF rebate would have been 130% of its open market value (as stated in the records of the Land Transport Authority) of $68,228 *ie* $88,696.40. It was also in evidence that if the car had been scrapped within two years of registration, the COE rebate would have been 80% of $74,150 *ie* $59,320. As for the third component, Mr Au's testimony was that the value of the body, if scrapped locally, would be $2,000. Accordingly, in November 1997, the value of the car in its defective state was $150,016.40. This means that the diminution in value of the car by reason of the defect was $138,983.60 being $289,000 minus $150,016.40.

24 I have said that to award Ms Wee the full diminution in value would be to over-compensate her since she enjoyed the car as if it was sound for a substantial period. The next question is how her enjoyment of the car should be quantified. After much consideration, I have concluded that the fairest way of calculating this would be to depreciate the car on a straight-line basis over a period of ten years. The period of ten years is chosen, of course, because that is the period of time for which the COE in respect of a car is valid. At the time of purchasing a new car, the purchaser knows that he can use it for ten years and that at the end of ten years the open market value of the car will be refunded by the Land Transport Authority provided that the car is scrapped. Thus, dividing the price of the car less its open market value over ten years would give you the yearly cost of use. As that represents the amount that Ms Wee would have paid each year for the full enjoyment of the car (on the basis that she kept it for the full ten years and there is no evidence that she did not intend at the beginning to keep it for that full period), I think it is a fair figure to use in determining her true loss arising from the defect in the car.

25 The price of the car was $289,000 and its open market value was $68,228 which means that its net cost to Ms Wee was $220,772. Thus, the yearly cost of use of the car over ten years would have been $22,077. From 5 November 1997 until end May 1999, Ms Wee enjoyed the car unencumbered by any worries over defects. According to PML's records, from late May 1999 until the end of December 1999, there were only two complaints regarding the overheating and the car spent only two days in the workshop to rectify this problem. In 2000, Ms Wee complained about the cooling system to PML in February, May and July. In October 2000, there was a more serious complaint that the car was overheating every two weeks and this complaint was repeated in December 2000. The car spent 11 days in the workshop because of this problem in 2000. By the beginning of February 2001, Ms Wee was complaining that the coolant level indicator came on every week and, on 19 February, she complained that the indicator came on every day. The complaint was renewed at

the beginning of March 2001. Thereafter, substantial work was done on the car and it spent 243 days in 2001 in PML's workshop. It remained there from the beginning of 2002 until 15 February 2002. Looking at this record, I would say that at the most Ms Wee had two and a half years of full enjoyment of the car. That being the case, I would quantify her enjoyment at $22,077 multiplied by 2.5 or $55,192.50.

26 Accordingly, I think the correct figure to award Ms Wee as general damages for the defect in the car is $138,983.60 minus $55,192.50 *ie* $83,791.10 which I would round off to $83,790.

Consequential damages

27 The assistant registrar awarded Ms Wee consequential damages on three different bases. For the period when the car was in the workshop of PML, a total of 302 days from June 1999 to 15 February 2002, he awarded her loss of use. For the period from 16 February 2002 up to 15 April 2002, he allowed her to recover the cost of rental of a substitute car. Thirdly, for the period from 31 January to mid-April 2002, he allowed her to recover road tax and insurance.

28 Ms Wee's appeal against the foregoing decision was on the basis that the cut-off date for the damages should not have been February 2002 or April 2002 but instead November 2002, when the trial started. Ms Wee had testified that she had kept the car in case parties needed to inspect it and in fact PML did go to her home in April 2002 for an inspection. PML had never intimated to her that she should scrap the car and in the circumstances she had acted reasonably in not disposing of the car in February 2002.

29 As Ms Rajah pointed out, however, Ms Wee's own evidence was that after she brought back the car from PML's workshop in February 2002, she checked with a couple of car dealers. She told them about the problem that the car had and asked them how much it could fetch in the market. She was informed that no one would want to buy a car with such a problem and, taking into consideration the high COE price that she had paid for it, it would be a better idea for her to scrap the car. She knew therefore that the car could not be sold in the open market and that it could only be scrapped. Additionally, by the end of March 2002 her expert had inspected the car. The assistant registrar gave Ms Wee up to mid-April 2002 to decide what to do with the car and I think that was correct. The period of two months was more than sufficient for her to get advice on the car. The car being unusable, I agree with Ms Rajah that Ms Wee ought to have scrapped it by mid-April 2002 instead of keeping it without using it, thereby continuing to incur road tax and insurance payments. Ms Wee's appeal on this point must fail.

30 PML appealed against the award of $19,857.53 for Ms Wee's loss of use of the car over 302 days. It was common ground that during these days, PML had provided Ms Wee with a BMW 5 series car to drive or, if that was not available, with a BMW 3 series car. Ms Wee's contention before the assistant registrar was that she was entitled to be compensated as the substitute cars had a lower capacity and status than the BMW 728iA which was in the workshop. The $2,000 which was used to quantify this loss was the alleged difference in the monthly rental cost of a BMW 7 series car and that of a BMW 5 series car.

31 On appeal, the argument was that Ms Wee was not entitled to any compensation for loss of use because she had not shown any loss under this head. On every day when the car was in the workshop, she had had the use of a replacement vehicle and she had actually used this vehicle. Ms Rajah relied on the cases of *Watson Norie, Ltd v Shaw and Nelson* [1967] 1 Lloyd's Rep 515 and *West Mount Properties Ltd v Sandhu* (1985) 30 ACWS (2d) 503 for the proposition that in such circumstances, a replacement vehicle does not have to be the exact equivalent of the vehicle under

repair. In the first case, the plaintiff company's car, a Jensen, was damaged by the defendants. This car was used by the plaintiff's managing director and the plaintiff claimed from the defendants the sum of £400 being the cost of hiring cars of comparable status and prestige (a Jaguar and a Rover) during the seven weeks that it took to repair the Jensen. The trial judge disallowed the plaintiff's claim and allowed only the sum of £185 as being what he considered to be the cost of obtaining a reasonable replacement vehicle. The Court of Appeal declined to interfere with this decision. Russell LJ stated his reasons at 518 of the report:

> In a case like this, where hire is necessary for a short period, I do not think it is correct to say that the plaintiff is entitled, as an axiom, to put upon the defendants the burden of the cost of hiring a car equal or substantially equal in quality, value and prestige to the damaged car. The test is whether the hiring cost is no more than reasonably necessary to fill the time gap, having regard to the purposes for which the plaintiff company needed to hire a car. I think that the County Court Judge was entitled to conclude that a Zephyr [a medium-sized car] would have, quite adequately for the plaintiff company's purposes, filled the gap.

32 In the second case, the defendant caused an accident which damaged the plaintiff's car. The plaintiff rented an identical car for $100 a day for 153 days while his car was being repaired. His claim for the rental cost of $15,300 was rejected by the British Columbia Supreme Court which found that he could have acquired an adequate replacement vehicle at $900 per month. Damages were assessed on that basis. The claim was found to be unreasonable because it was not shown that the particular vehicle hired was the only one which would have served the purpose during the repair period.

33 Both cases cited were, however, tortious claims where the plaintiff's car had been damaged in an accident and the plaintiff was obliged to act reasonably in procuring a substitute for a short period. The present case is somewhat different in that Ms Wee had been offered replacement vehicles of lesser quality and had acted reasonably in accepting them instead of going out and hiring a luxurious substitute. This acceptance does not mean, however, that she did not suffer any loss of use since her claim arose from the breach of a contract for the purchase of a car of a particular quality.

34 It is true that during the 302 days in question, Ms Wee did not incur any expense in relation to a replacement vehicle. The replacement vehicles provided by PML obviously served the purpose of transporting her as and when necessary but did not carry as much prestige as a BMW 7 series car would have and perhaps were not as comfortable or as good to drive as a sound 7 series car. There was no evidence, however, that for Ms Wee's particular purposes, only a BMW 7 series car would do. Also, and this was an objection that Ms Rajah raised too, there was no evidence of the actual rental cost of a BMW 7 series car at the material time. Further, I do not think that the loss in prestige and quality can be quantified by reference to the different rental prices for a BMW 5 series car and a BMW 7 series car. All in all, I consider that there was no justification to quantify Ms Wee's loss of use at $2,000 per month and I therefore set aside the award of $19,857.53. However, I accept that there is a difference between driving a BMW 7 series car and a smaller vehicle (if there was not, the former would not cost so much more than the smaller BMW cars) and that Ms Wee did suffer a loss in amenity whilst using the replacement vehicles. She had a loss of use, though it was intangible. Taking the broad brush approach, I award Ms Wee $5,000 for having to forego the use of her luxury vehicle during the repair periods.

35 The other items of consequential damage awarded by the assistant registrar were $6,085.50 for rental of an alternative car between February and mid-April, $221.18 being the insurance cost of the car for the same period and $549.10 being the road tax for that period. On appeal, Mr Tan's only objection to those awards was in relation to the period covered. He submitted the cut-off date should

be November 2002 and not mid-April 2002. I have dealt with that argument in [29] above. PML accepted the assistant registrar's holding on the cut-off date as being correct. The award in relation to these items of consequential damage therefore remains.

Costs

36 There are two issues that arise in relation to the costs award made below. In making the costs order that he did, the assistant registrar was influenced by the fact that PML had made an offer to settle and that the damages awarded were effectively only $1,492.13 more than the value of the offer to settle. The damages awarded by the assistant registrar totalled $34,492.13. On the basis of the findings above, the damages have now been assessed at a total of $95,645.78. This figure is substantially higher than the value of the offer to settle ($33,000 as calculated by the court below) and therefore the offer to settle can play no part in the award of costs. Accordingly, the award of costs below is set aside.

37 The second issue that arises is whether nevertheless the costs awarded to Ms Wee should be ordered to be taxed on the Subordinate Courts scale. Mr Tan referred me to s 39(4) of the Subordinate Courts Act (Cap 321, 1999 Rev Ed) which provides that in any action, the High Court, if satisfied that there was sufficient reason for bringing the action to the High Court, may make an order allowing the costs or part thereof on the High Court scale or on the Subordinate Courts scale as it may direct. He submitted that in the instant case, there was a very serious defect in the car and Ms Wee's claim for $289,000 being a refund of the purchase price was not deliberately inflated. The action was appropriately brought in the High Court and Ms Wee should be awarded costs on the High Court scale.

38 The District Court has jurisdiction over actions in contract involving claims of up to $250,000. This limit is far in excess of the sum of $95,645.78 which I have now found to be the damages to which Ms Wee is entitled. Ms Rajah submitted that the test for application of the High Court scale of costs is not whether the original claim had deliberately been inflated by Ms Wee but whether, as stated in s 39(4)(a) of the Subordinate Courts Act, there was "sufficient reason for bringing the action in the High Court". Her submission was that there was no such sufficient reason in this case as it did not involve complicated issues of law or fact and was a simple case of sale of goods.

39 I agree that the appropriate test is as set out in the Subordinate Courts Act. This case could have been dealt with in the Subordinate Courts. On the facts, Ms Wee's right of rescission was lost long before the action was commenced and therefore she could not recover the purchase price but only damages. A realistic assessment would have informed her that such damages would not have exceeded the District Court limit. The issues of law and fact which needed to be determined in the case were not exceedingly complicated and could have been dealt with in the Subordinate Courts. In my judgment, the action should have been started there and I therefore award Ms Wee her costs of the action and of the assessment to be taxed on the Subordinate Courts scale.

Conclusion

40 In view of the findings I have made above, I allow both appeals in part and set aside the orders made below except for the award of $6,085.50 for rental, $221.18 for insurance and $549.10 for road tax. I award Ms Wee $83,790 as general damages for the defective car and $5,000 as damages for loss of use of the car while it was in the workshop. The costs order below is set aside and replaced by the order in [39]. As for the costs of the appeal, overall Ms Wee has been the successful party though she has not succeeded on all issues. I award her 85% of the costs of the appeal.