

Chan Chee Kien v Performance Motors Ltd  
[2015] SGHC 54

**Case Number** : Suit No 760 of 2011/L  
**Decision Date** : 26 February 2015  
**Tribunal/Court** : High Court  
**Coram** : Chan Seng Onn J  
**Counsel Name(s)** : Por Hock Sing Michael and Er Jing Xian Cindy (Michael Por Law Corporation) for the plaintiff; Kirpalani Rakesh Gopal, Kwek Yuen Justin and Joanne He Xiuwen (Drew & Napier LLC) for the defendant.  
**Parties** : Chan Chee Kien — Performance Motors Ltd

*Contract – misrepresentation – fraudulent*

*Contract – Misrepresentation Act*

*Commercial Transactions – sale of goods*

26 February 2015

Judgment reserved.

**Chan Seng Onn J:**

**Introduction**

1 On 17 May 2010, the plaintiff, Mr Chan Chee Kien, purchased a new BMW 550i car (“the Car”) at an aggregate price of \$378,100 from the defendant, Performance Motors Ltd, the authorised dealer and agent for sale of BMW cars in Singapore. The Car was duly registered and delivered to the plaintiff on 25 August 2010. It was the first model of its kind to be sold in Singapore although cars of such a model had been in production for more than six months and had been sold elsewhere. Numerous complaints of defects in the Car were subsequently made by the plaintiff. In the end, the plaintiff decided that he no longer wanted the Car and commenced this suit.

2 The plaintiff alleges that Ms Tan Hua Si (“Ms Tan”), the defendant’s sales consultant, had made several fraudulent misrepresentations about the quality and performance of the Car to induce him to purchase the Car and he had relied on them. Alternatively, if they were not made fraudulently, the plaintiff relies on s 2 of the Misrepresentation Act (Cap 390) to claim an award of damages in lieu of rescission of the contract of sale. The plaintiff further claims a breach of the contract of sale, including a breach of implied conditions on correspondence with description, quality and fitness of purpose under ss 13(1), 14(2) and 14(3) of the Sale of Goods Act (Cap 393) (“SOGA”) respectively.

3 In the statement of claim, the plaintiff claims the following remedies:

- (a) a replacement of the Car with a new car;
- (b) a declaration that the sale and purchase agreement (“the Agreement”) is rescinded by virtue of the defendant’s misrepresentation;
- (c) a return of the purchase price; and

(d) alternatively, damages to be assessed on account of the misrepresentation and/or breach of the contract of sale and purchase.

It is clearly wrong of the plaintiff to claim a new car in replacement and at the same time, demand a return of the purchase price paid.

### **Oral representations made**

4 It is not disputed that Ms Tan showed the plaintiff the BMW 535i model and provided the plaintiff with the 2009 BMW "5 Series" catalogue ("BMW Catalogue") and the standard equipment list of the BMW 550i model. The plaintiff was interested in the BMW 550i model even though at that time, the defendant had not brought in a BMW 550i car, did not have a BMW 550i car on display in the defendant's showroom for the plaintiff to view or to test drive, and had not accepted any orders for such cars for its customers. Ms Tan said that she tried to promote the BMW 535i model instead, but the plaintiff was not interested and continued to express a keen interest in the BMW 550i model.

5 Ms Tan admitted that she had informed the plaintiff that the BMW "5 Series" range of cars was generally superior in terms of quality, comfort and performance to the BMW 330i that the plaintiff was driving then. She told the plaintiff that the BMW 550i was an exclusive top-of-the-line model in the BMW "5 Series" range and was superior to the other models in the BMW "5 Series" range, and that there were very few numbers of the BMW 550i. She accepted that she might have said that the plaintiff would stand out from other drivers in Singapore as she believed that not many drivers would pay for a BMW 550i.

6 The plaintiff however alleges that Ms Tan induced him to purchase the Car by making the following additional specific oral representations to him:

(a) The BMW 550i had enhanced driving stability and comfort and there was ease of and/or accuracy in steering, without any undue noise, due to the installation of the Integral Active Steering.

(b) The BMW 550i had enhanced the performance of the suspension system with the installation of the Adaptive Drive, and consequently, the ride comfort for the car passengers was maximised, with the choice of, amongst other things, a "Comfort" mode which was made for a softer ride, without unusual intrusive noises in the cabin.

(c) The BMW 550i would be quieter within the cabin, without undue noises intruding into the cabin while the car was being driven.

(d) The BMW 550i had a satellite navigation system ("GPS") as a premium standard equipment, containing the latest updated maps pre-installed and would be extremely user-friendly.

(e) The BMW 550i was easier and/or more comfortable to drive in view of the Integral Active Steering, which was installed also as standard equipment similar to BMW's top-of-the-line luxury range, the BMW "7 Series".

(f) The BMW 550i gave a more comfortable ride in view of the Adaptive Drive, due to an enhanced suspension system similar to that installed for BMW's top-of-the-line luxury range, the BMW "7 Series", which feature the defendant had included as an optional item as recommended.

(g) The Integral Active Steering and the Adaptive Drive installed in the BMW 550i were both

fully tested technology and highly reliable, having been installed and used already in BMW's top-of-the-line luxury range, the BMW "7 Series", without any complaints about their performance respectively.

(h) The plaintiff could enjoy the prestige and enhanced social status that came from driving the BMW "5 Series" in particular the BMW 550i in Singapore daily or regularly, which would be specially indented from Germany where it would be manufactured and fully fitted-out.

(i) The BMW 550i was more reliable and of superior quality in performance in that it would be less prone to breakdowns, and would have fewer problems with its performance such as to require lengthy stays in the workshop for repair, since it would be specially indented from Germany, where the quality of workmanship in manufacture would invariably be expected to be higher than if any fitting-out was done locally, and which would have helped to preserve the original factory warranty on the parts fitted in Germany.

(j) The BMW 550i, although a relatively new model then, was free of any unknown defects as it had already been rigorously tested for electronic and/or mechanical defects prior to its launch for sale. Features such as the Integral Active Steering and the Adaptive Drive, also to be installed for use with the BMW 550i, were already installed in the BMW luxury range, the BMW "7 Series", without any complaint.

(k) The BMW 550i would transport the plaintiff and/or his other passengers from one place to another with the appropriate degree of comfort, ease of handling and reliability one could expect from the BMW "5 Series", which represented the "epitome of a sporty executive saloon", and even more so for the BMW 550i, being the top-of-the-line premium model in the BMW "5 Series", this being a premium car and not an average mass market model.

(l) The BMW 550i was a car which would provide a better driving experience than the BMW 535i and in particular, the steering system, the suspension system, as well as the cabin ambience in terms of quietness, would all be superior in the BMW 550i.

(m) The defendant, being the leading distributor of BMW cars in Singapore for years, even if no longer an exclusive distributor, charged a premium for the BMW cars it sold compared to local parallel importers because they were very familiar with the specifications, features and performance of all the BMW cars they sold.

(n) The defendant would be able to promptly and satisfactorily identify and repair any problem with the BMW 550i if necessary since it was the leading service centre for BMW cars in Singapore, where even BMW cars sold by local parallel importers would be sent to the defendant for complicated repairs where necessary, for a price.

(o) The defendant's ability to satisfactorily carry out any repairs required on the BMW 550i would not be compromised by the fact that the BMW 550i was specially indented from Germany and fully fitted-out thereat, in view of the defendant's close working relationship with the manufacturers of BMW cars in Germany as well as the fact that the original factory warranty for parts fitted in Germany would still apply during that warranty period.

(p) In carrying out any repairs required on the BMW 550i as might be identified by them in Singapore, the defendant would not compromise on the fact that the BMW 550i was a specially indented car from Germany, being fully fitted-out thereat as required by the plaintiff, and thus would not remove and/or change any parts in the BMW 550i which had been installed or fitted in

Germany since this could compromise the original factory warranty on parts fitted in Germany, unless this was required to ensure prompt, satisfactory and effective repairs to be effected on the BMW 550i.

7 Ms Tan firmly denied making these additional specific oral representations (a) to (p) at [6] above. I am inclined to believe her evidence and disbelieve the plaintiff's. I am surprised that the plaintiff can recall these specific representations with such incredible detail when he has no written contemporaneous notes taken of what Ms Tan had said orally. Looking at the overall nature and content of these alleged representations, it seems to me that the plaintiff is tailoring them in order to substantiate a misrepresentation claim based on the events that subsequently transpired (see [19] to [86]). An example would be the specific representation that the Car "*would be less prone to breakdowns, and would have fewer problems with its performance such as to require lengthy stays in the workshop for repair*", which corresponds with the subsequent fact that the Car was in the workshop for lengthy stays. Another example would be the particularisation that "*the steering system, the suspension system, as well as the cabin ambience in terms of quietness would be all superior in the BMW 550i*" which fits the subsequent complaints of the plaintiff, *inter alia*, of noise from the steering and the suspension system as well as other pulsating, whining, squeaking, humming, hissing, knocking, ticking, propeller, air conditioner and metallic sounds which could be heard in the cabin. As there was a subsequent complaint that the GPS did not have the latest updated maps, curiously one of the specific oral representations attributed to Ms Tan was that she told him that the "*BMW 550i had a satellite navigation system ("GPS") as a premium standard equipment, containing the latest updated maps pre-installed*". As the car had been in the workshop of the plaintiff for a fairly long period of time to investigate the defects and to perform the repairs, there is another oral representation attributed to Ms Tan that "*the defendant would be able to promptly and satisfactorily identify and repair any problem with the BMW 550i*". As some felt insulating material had to be used in the car to eliminate some knocking, pulsating and propeller sounds, there is yet another oral representation attributed to Ms Tan that "*in carrying out any repairs ..., the defendant would ... thus not remove and/or change any parts in the BMW 550i which had been installed or fitted in Germany since this could compromise the original factory warranty on parts fitted in Germany*". As the defendant had test driven a BMW 535i, another specific oral representation inducing the plaintiff to purchase the Car was attributed to Ms Tan that she had told him that "*the BMW 550i was a car which would provide a better driving experience than the BMW 535i and in particular, the steering system, the suspension system, as well as the cabin ambience in terms of quietness, would all be superior in the BMW 550i*". From the records, the test drive of the BMW 535i took place on 24 May 2010, 7 days after the Agreement was signed by the plaintiff. Even if such a specific comparison was in fact made by Ms Tan, I think it is unlikely to have been made before the conclusion of the sale when no test drive of the BMW 535i had taken place yet. It also seems odd for Ms Tan to give an oral guarantee that "*the BMW 550i, although a relatively new model then, was free of any unknown defects as it had already been rigorously tested*". It is not likely for Ms Tan to make these specific representations at that time about the BMW 550i as alleged when not a single BMW 550i model had been sold in Singapore. For Ms Tan to tell the plaintiff that the defendant "*charged a **premium** for the BMW cars they sold compared to local parallel importers because they were very familiar with the specifications, features and performance of all the BMW cars they sold*" does not appear to me to be a very polished and effective way of making a sales pitch. It does not appear likely for Ms Tan, an experienced sales person, to have made a sales pitch in this fashion.

8 I doubt very much that Ms Tan would have made the oral representations (a) to (p) at [6] above and I believe her evidence that she did not. I accept her evidence that in her years of experience as a sales executive and now a sales consultant, she would never make an absolute statement or give an absolute guarantee with respect to a certain product or feature such as the total absence of complaints about the performance of the Integral Active Steering and the Adaptive

Drive installed in the BMW "7 Series" models; and an assurance that the BMW 550i, although a relatively new model, was "free from any unknown defects".

9 I believe that Ms Tan's representations to the plaintiff, who was the first customer to purchase a BMW 550i model from the defendant, would more likely be general in nature. When she represented that the BMW "5 Series" would be "superior" in terms of "quality, comfort and performance" to the car that the plaintiff was then driving, it was likely to be with reference to the BMW "5 Series" as a whole. If she had extolled the virtues of the BMW 550i to induce the plaintiff to purchase a car, it was more likely to be in relation to promoting the BMW 550i as a superior model of car to choose from. It could not have been that she was saying that the particular car that was to be delivered to him in due course would in fact be a superior car to the BMW 330i car that he was then driving.

10 From the totality of the evidence adduced at the trial, I am of the view that the plaintiff is a fairly sophisticated car customer. The evidence shows that he was well-read and knowledgeable about BMW cars. He had done his research on the type or model of BMW car that he wanted to purchase and the different specifications of the various models and the kind of features that he would like the car to have. It is not likely that the plaintiff would have relied so substantially on general and largely non-specific representations of Ms Tan concerning the quality and performance of the BMW "5 Series" in selecting the particular model of BMW car that he eventually purchased. Ms Tan does not appear to me to be someone who, at that time, would be that familiar with the specifications and performance of the new BMW 550i model, which had yet to be brought in by the defendant. When she was asked about technical features, she referred him to the BMW Catalogue and the standard equipment list of the BMW 550i model for information on specifications, technical features and functions so that the plaintiff could read up for himself.

11 It is pertinent to note that the plaintiff had agreed to the following term in the Agreement dated 17 May 2010 that representations are to be excluded:

#### 1. REPRESENTATIONS EXCLUDED

1.1 The order herein shall be deemed to be an offer made by the Customer to the Vendor for the purchase of the Vehicle and accepted by the Vendor upon these conditions and save as provided herein, no person has any authority to accept further liability on the Vendor's behalf or to make, on the Vendor's behalf, any representation or promise, oral or written, relating to this Agreement whatsoever and any such representation or promise, oral or written, not expressly stated in these conditions or implied by law shall be deemed to be known by the Customer as made without the Vendor's authority and are void and unenforceable against the Vendor except if such representation or promise is agreed to by the Vendor in writing.

#### **No misrepresentations in the BMW Catalogue**

12 To buttress his claim for misrepresentation, the plaintiff relies on the following general statements in the BMW Catalogue:

- (a) The Integral Active Steering would enhance "driving stability and comfort".
- (b) The Adaptive Drive "can be fine-tuned as well, for maximum ride comfort".
- (c) "Everything in the new BMW 5 Series Saloon is designed for maximum efficiency, a virtue that comes as standard in every BMW", where such virtue "would enhance driving pleasure".

13 I find that the above statements are merely general advertising puffs and are so non-specific in nature that the plaintiff has not shown how they can amount in law to actionable misrepresentations in the context of this case.

#### **No oral misrepresentations made by Ms Tan**

14 I accept the defendant's submission that the claim for misrepresentation by Ms Tan lacked *bona fides* and this is evident from the numerous changes made to the alleged representations in his pleaded case.

15 I find on a balance of probabilities that Ms Tan did not make any of the alleged pre-contractual oral representations set out at (a) to (p) at [6] above. As I have earlier explained, they appear artificial and contrived. Many are tailored by the plaintiff to suit a misrepresentation claim relying on events occurring long after the delivery of the Car to the plaintiff. Some of the alleged oral representations are even identical to statements printed in the BMW Catalogue and I agree with the defendant's submission that it is inconceivable that Ms Tan would have memorised the statements printed in the BMW Catalogue and regurgitated them orally to the plaintiff. It is even more surprising that the alleged oral representation at [6](k) above – of transporting the plaintiff and/or his passengers "*from one place to another*" "*with the appropriate degree of comfort, ease of handling and reliability*" one could expect from the BMW "5 Series" – would bear a remarkable resemblance to a part of the case note and the text of the judgment in *Rogers v Parish (Scarborough) Ltd* (1987) All ER 232. I find that the plaintiff has not been *bona fide* in making the misrepresentation claim based on the alleged oral representations at (a) to (p) at [6] above.

16 With respect to the representations which have been admitted by Ms Tan set out at [5] above, they are largely non-specific in nature and are not sufficiently clear and precise enough to constitute actionable misrepresentations of an existing or past fact. The plaintiff has not persuaded me in what way those representations were false at the time they were made, or had been dishonestly or fraudulently made. I have no doubt that Ms Tan herself believed that the BMW 550i was then the top-of-the-line model in the BMW "5 Series" and was marketed by the defendant as such in the BMW Catalogue. Even if it subsequently transpires that the particular car manufactured and subsequently delivered to the plaintiff is unfit for its purpose and is not of satisfactory quality (which gives rise to separate remedies), it does not necessarily follow that *all* or a *substantial number* of the cars of the BMW 550i model are of the same poor quality such that it is no longer factually correct, and in fact false, to represent that the BMW 550i as a model is a top-of-the line model with superior quality, comfort and performance. The mechanical problems present in the Car may only be limited to the Plaintiff's specific car. One lemon in a basket of apples does not turn the basket into a whole basket of lemons. It is clear to me that Ms Tan was merely making a broad comparison between the BMW "5 Series" as a whole with the BMW 330i when she said that the BMW "5 Series" range of cars was "generally superior in terms of quality, comfort and performance to the BMW 330i that the plaintiff was driving then". I do not think that Ms Tan made or would have made any oral representations that in substance promised that the actual car to be delivered to the plaintiff would be (a) perfect and defect-free; (b) almost noiseless and silent in the cabin under all driving conditions; and (c) would continue to remain so during the life of the Car, which representations that she herself could honestly have believed in. I also do not expect the plaintiff to be so naïve as to believe and rely on such extraordinary sales hyperbole even if Ms Tan was brazen enough to have made such representations.

17 I note that the plaintiff stated in his evidence during cross-examination that when he first took delivery of the Car and drove it for about two months, it provided a much more comfortable ride and was quieter than the BMW 330i he had and the Car was superior to the BMW 330i until the alleged defects surfaced in the Car. As it is not possible for Ms Tan to have known that fairly numerous

defects would subsequently appear in the particular BMW 550i of the BMW "5 Series" (ie the Car) that was eventually delivered to the plaintiff, the pre-contractual representations referred to in [5], even as statements of fact, cannot be said to be false or fraudulently made at the time they were made because the Car did perform up to expectations for a continuous period of at least two months following its delivery to the plaintiff.

18 For all the reasons that I have stated, I dismiss the plaintiff's claim for misrepresentation.

### **Complaints of defects in the Car**

19 Numerous complaints of defects in the Car were made by the plaintiff, some were valid and some were invalid. Many were related to sounds produced by the Car which bothered him.

20 I find the affidavit of evidence-in-chief of Mr Teo Chee Sen ("Mr Teo"), the then Senior Customer Service Advisor of the defendant, to be most helpful in determining (a) the nature of the plaintiff's complaints each time the Car was sent to the defendant's workshop; (b) the investigations undertaken by the defendant; (c) the various steps taken to troubleshoot the cause of each defect; (d) the remedial measures taken to address the complaints valid or otherwise; (e) the nature of the repairs; (f) the time taken to address the plaintiff's complaints; (g) the number of days the Car was in the workshop on each occasion; and (h) the dates on which the plaintiff was told to retrieve the Car. The facts stated in his affidavit are based primarily on the contemporaneous documentary records of the defendant. Some events are within Mr Teo's personal knowledge as he had attended to some of the plaintiff's complaints. I find his evidence to be reliable on the whole and I accept his evidence. He left the employment of the defendant on 29 October 2013 and he is now with Cycle and Carriage Industries Pte Ltd.

21 Mr Teo opined that the defendant has the technical knowhow and expertise to deal with most issues that arise with BMW cars. The defendant's policy in dealing with complaints made by its customers is to ensure that its customers gain the best possible experience out of driving BMW cars. Pursuant to this policy, the defendant tries to address any complaints made, even if the symptoms of such complaints are in fact part and parcel of the way that BMW cars are designed to function.

22 In the following paragraphs, I have set out the plaintiff's complaints and the kind of investigative and remedial work performed by the defendant to address each of the complaints. Most of the information is extracted from Mr Teo's affidavit of evidence-in-chief.

### ***Car in workshop from 26 to 29 October 2010***

23 On this occasion, the plaintiff complained of (a) a hissing sound coming from the engine ("Hissing Sound Complaint"); (b) a sound that emanated from the front left suspension when the Car was driven over a hump ("Initial Suspension Sound Complaint"); (c) a "knocking" sound that emanated from the Car's engine when the Car was started "cold" ("Knocking Sound Complaint"); and (d) a warning message on the electronic display panel that the Car was in motion even when the transmission of the Car was placed in the "Park" mode ("Electronic Display Complaint"). Pursuant to the defendant's investigations, the defendant discovered that the rear air-conditioning sounded louder than usual when it was turned on ("Air Conditioner Sound").

24 To troubleshoot the Initial Suspension Sound Complaint, the defendant removed, lubricated and then re-installed the tension struts of the Car, the left front spring strut mount, and the left rear spring strut shock absorber. Apparently, these measures did not address this complaint as the Car was brought back on 4 December 2010 to resolve the issue again. With hindsight, the work done on

the suspension was unnecessary as the sound was eventually discovered to be a normal operating characteristic of the front suspension of the Car.

25 With respect to the Electronic Display Complaint, tests showed that there was no fault with the display. The Knocking Sound Complaint, which was a genuine complaint, was to be addressed apparently at the next visit.

26 The Hissing Sound Complaint was traced to a faulty air intake system and the necessary parts were indented for the repairs to be completed at the next visit.

27 I allocate only one out of three days that the Car was in the workshop (see the second row in the table at [107], ("the Table")) for troubleshooting the actual defects because significant work done during this visit was more in relation to the Initial Suspension Sound Complaint, which as it transpires later, arose from sounds that are actually part of the normal operating characteristic of the Car's front suspension. Essentially, the defendant wasted a lot of time trying to resolve a non-existing defect.

### ***Car in workshop from 4 to 11 December 2010***

28 From the records, the Car was brought in again to address the previous Hissing Sound Complaint, Initial Suspension Sound Complaint and Air Conditioner Sound issue. The plaintiff made an additional complaint of sound emitting from the steering wheel of the Car ("1<sup>st</sup> Steering Sound Complaint"). The defendant could not detect the sound in relation to the 1<sup>st</sup> Steering Sound Complaint and nothing was done.

29 The Hissing Sound Complaint was successfully addressed by the replacement of parts of the faulty air intake system. Dr William Douglas Guentzler ("Dr Guentzler"), an Automotive Engineer and Forensic Examiner called as an expert witness by the plaintiff, did not identify the hissing sound as an unresolved issue.

30 To further troubleshoot the Initial Suspension Sound Complaint (and instead of relying on mere lubrication as was done previously), the defendant this time replaced the left front spring strut and the left rear spring strut shock absorber with new ones. Again this was a wasted effort.

31 To address the previous Air Conditioner Sound issue, the defendant replaced the rear compartment blower fan with a new one. It is not as if the air conditioner blower fan in the rear part of the cabin was not working. The problem was merely that the rear compartment air-conditioning fan was running slightly more noisily than usual. I regard this as a minor non-recurring fault.

32 This minor fault was rectified during the time that the defendant was still troubleshooting the Initial Suspension Sound Complaint and the 1<sup>st</sup> Steering Sound Complaint. On this occasion, the defendant was also troubleshooting the cause of the Knocking Sound Complaint by replacing the air pipes on the left and right sides of the Car. With hindsight, the air pipes were not the true cause of the Knocking Sound Complaint.

33 Making a very rough estimate in the absence of clear evidence, I would allocate two out of the seven days of workshop time on this visit for the unsuccessful attempt to trace the cause of the Knocking Sound Complaint (subsequently established to be an actual defect) by changing the air pipes; two days for the unnecessary work done in replacing the left front spring strut and the left rear spring strut shock absorber to troubleshoot the Initial Suspension Sound Complaint (subsequently established to be a normal operating characteristic); and 1½ days for troubleshooting and 1½ days



for the rectification work in relation to the minor faults arising from the Air Conditioner Sound and the Hissing Sound Complaint. Leaving out the two days for the unnecessary work done on the suspension system, a total of 3½ days would be spent troubleshooting the actual defects and another 1½ days would be for the replacement of (a) the rear compartment blower fan of the air conditioner to address the Air Conditioner Sound issue; and (b) the faulty air intake system to address the Hissing Sound Complaint. These allocations are reflected in the third row of the Table.

***Car in workshop from 7 January to 19 July 2011***

34 On this third visit, the plaintiff complained of the following:

- (a) a squeaking sound that emanated from the steering wheel of the Car when it was turned to the left quickly ("1<sup>st</sup> Squeaking Sound Complaint");
- (b) a whining sound that emitted from the Car when it was driven at 30km/h or more ("Whining Sound Complaint");
- (c) the Initial Suspension Sound Complaint, ascertained by Mr Charlie V. Sabado, the Technical Specialist and Quality Controller of the defendant ("Mr Sabado"), to be reproducible only when the Car was driven over a hump at 10km/hr ("Suspension Sound Complaint");
- (d) a pulsating sound being emitted from the turbocharger of the Car's engine compartment when the Car was left idle ("1<sup>st</sup> Pulsating Sound Complaint");
- (e) the Knocking Sound Complaint, described as a continuous and loud "knocking" or "helicopter-like" sound emanating from the undercarriage of the Car when the gear of the Car was engaged to the "Drive" or "Reverse" mode;
- (f) the cold air blown from the left pillar of the rear air-conditioner was weaker compared to the cold air blown from the right pillar of the rear air-conditioner ("Air-Con Complaint");
- (g) the short messaging system ("SMS") was not functioning properly as SMSes that were sent through the SMS function were not transmitted accurately to the recipient ("SMS Complaint");
- (h) the map on the GPS was not updated (an additional complaint he made later on 13 January 2011) ("GPS Complaint").

35 The GPS Complaint was not a valid complaint because the latest maps were installed when the Car was delivered to the plaintiff on 25 August 2010.

36 The defendant lubricated some of the mechanical components in the steering spindle to address the 1<sup>st</sup> Squeaking Sound Complaint.

37 The defendant installed two new high pressure pumps in the Car to troubleshoot the 1<sup>st</sup> Pulsating Sound Complaint. When it did not eliminate the pulsating sound, the two pumps were removed. The plaintiff eventually did not pursue this complaint any further. Unnecessary work was again done by the defendant pursuant to the Plaintiff's complaints.

38 The cause of the Air-Con Complaint was traced to the settings of the air conditioner not being

properly adjusted. Adjustments of those settings rectified the Air-Con Complaint. This to my mind was a minor issue and was not a defect.

39 The defendant was not able to detect or reproduce any “whining” sound when the car was driven at the speed of 30km/h.

40 The defendant could not detect any inaccuracies with respect to the SMS Complaint and there was no fault detected.

41 To troubleshoot the Knocking Sound Complaint, the defendant replaced the engine mounts of the Car, removed and installed the fuel injectors, replaced the left and right high-pressure fuel rails, replaced both the engine ventilation lines, removed and installed the spark plugs, replaced a fuel injector, replaced the Car’s vacuum pump, removed the exhaust catalytic converter, removed and installed the intake filter housings, checked the vacuum system for air leaks, replaced the vacuum hose which had linked the vacuum pump to a “T junction” with a new vacuum hose, removed and installed the heat shield in order to trace and isolate the sound. Much time and effort were spent trying to find the source of the sound. These massive efforts however led nowhere. On 21 February 2011 (some 45 days after the Car was sent to the workshop on this occasion, and assuming that the defendant spent five days attending to the other non-defects first as set out at [35] to [40] above, the extensive troubleshooting of the Knocking Sound Complaint would then have taken 40 days), the Knocking Sound Complaint was finally isolated to a sound generated when a loose oil cooler hose knocked against the lower portion of the engine cooler. After finding the cause, the solution was simple. The defendant secured the cooler hose using a cable tie on the same day and that prevented the cooler hose from coming into contact with the engine cooler. As an additional measure, the defendant installed a layer of felt covering over the engine cooler to insulate any noise arising from any contact with the cooler hose. The Knocking Sound Complaint was thus successfully addressed.

42 For the Suspension Sound Complaint, the defendant removed and installed the lower ball joints, the tension struts, the tie rods and the front stabiliser to try to isolate the sound. Additionally, the front shock absorbers were replaced with new ones. Starting from 25 February 2011, the defendant carried out further tests on the suspension of the Car. The cooling system was also checked for leaks. On 1 March 2011, further tests on the shock absorbers and the cooling system were carried out. The defendant discovered a leak from the intercooler reservoir of the Car. On the next day, the defendant installed a new cover lid on the intercooler reservoir. To try to eliminate the suspension sound, the defendant reprogrammed the Car on 4 March 2011. On the same day, the defendant installed a hydraulic tooth ring as an insulator to isolate the suspension sound which it suspected was emitted from the hydraulic pipe connected to the fuel tank. On 10 March 2011, as part of its efforts to eliminate the suspension sound, the defendant also removed and re-installed the front spring struts on both sides of the Car, replaced the rear spring struts shock absorbers and the front spring strut mounts to isolate the suspension sound and carried out reprogramming and encoding works on the control units of the Car. On 21 March 2011, the defendant replaced both front shock absorbers as part of its continuing efforts to eliminate the suspension sound.

43 At the meeting with the plaintiff on 8 April 2011, Mr Anthony Teo Chin Yong, the defendant’s Senior Manager (Service) and Mr Sim Kee Boon (“Mr Sim”), the defendant’s Service Manager, informed the plaintiff that:

- (a) the suspension sound could not be heard when the Car was driven ordinarily on a flat road and could only be heard when the Car was driven over a hump;
- (b) the defendant was checking with BMW Asia Pte Ltd (“BMW Asia”) on the additional

measures to take to minimise the "squeaking" sound;

(c) the defendant had carried out a thorough check on the Car including its suspension system and had ascertained that there were no defects or abnormalities that contributed to the suspension sound; and

(d) the suspension sound had no safety implications.

44 The plaintiff was asked to collect the Car in the meantime but he refused to do so.

45 On 14 April 2011, the plaintiff called the defendant and requested, among other things, that the Defendant update the maps installed in the Car's GPS to the 2011 version free of charge. The defendant agreed to do so as a gesture of goodwill.

46 At a meeting during the third week of April 2011, Mr Teo and Mr Sim told the plaintiff that the defendant had successfully addressed his complaints, save for the Suspension Sound Complaint. They said that while the defendant was still trying to find a way to eliminate or reduce the suspension sound, the fact was that the Car was operating in the way it was intended to operate and the defendant did not regard the suspension sound as a defect or fault of the Car.

47 Mr Teo and Mr Sim again tried to persuade the plaintiff to collect the Car. The plaintiff refused and asked for a timeline within which the defendant could provide him with a solution to eliminate the suspension sound. As the defendant was not sure if it was technically possible to eliminate the suspension sound, they declined to provide a timeline.

48 The defendant wrote a letter to the plaintiff dated 15 April 2011 stating:

[We] would like to assure you that the suspension system is running in good working order and the "noise" from the current left hand front suspension has no safety implication to your BMW 550.

From our conversation, we understand that you will not be taking your car back until we fully resolve the "noise" issue. We have raised this matter to the principal and discussed in great length with them. We regret to inform you that our principal may not be able to get back to us so soon with any suggestion for the betterment of your BMW 550. Hence, we strongly advise that the car be taken back while we closely monitor the developments from our principal side.

In view of our earlier extended warranty offered to you, you are requesting us to extend the period to 5 years instead. We have since reviewed your request and we will extend the coverage for the suspension system to 5 years. This coverage will start from the day our principal advises (sic) us that there is new solution available. We shall respond to this in more details later.

As a further gesture of goodwill, we will upgrade the software of your car's navigation map to the latest version.

49 On 27 April 2011, the defendant upgraded the maps in the Car's GPS free of charge as a gesture of goodwill. Following that, the plaintiff was informed to collect the Car but he said that he would not collect it until (a) the suspension sound had been eliminated; or (b) the defendant provided him with a deadline within which it would eliminate the suspension sound.

50 By way of a letter dated 5 May 2011, the defendant informed the plaintiff of its regret that the

plaintiff refused to collect the Car even though he had earlier agreed to do so after the defendant updated the Car's GPS to the latest version as a gesture of goodwill. The letter reiterated that the Car was ready for collection and that there was no safety or performance-related issue in relation to the suspension sound. The plaintiff was informed that defendant reserved its right to impose a storage charge of \$50 per day if the Car was not collected by 13 May 2011. It was only on 19 July 2011 that the plaintiff arranged for someone to collect the Car.

51 Out of the 193 days the Car was in the workshop, I estimate that troubleshooting for the Knocking Sound Complaint, which was a valid complaint, would have taken about 40 days; and the actual work done to address the Knocking Sound Complaint and the leak in the intercooler reservoir would have taken about two days. The rest of the 151 days in the workshop would be attributed to the time taken to troubleshoot and address the complaints that were not defects (eg Suspension Sound Complaint, GPS Complaint, 1<sup>st</sup> Squeaking Sound Complaint, 1<sup>st</sup> Pulsating Sound Complaint, Air-Con Complaint, Whining Sound Complaint and SMS Complaint) and the refusal of the plaintiff to collect the Car. The allocations are set out at row 4 of the Table.

#### ***Car in workshop from 21 to 30 July 2011***

52 On 21 July 2011, the plaintiff sent the Car to the workshop and asked the defendant to investigate why the light indicator for low coolant level had lit up ("1<sup>st</sup> Coolant Complaint") and why the stability control function for the Car was also lit up ("Stability Control Complaint").

53 On 28 July 2011, Mr Teo informed the plaintiff that the defendant would be replacing the radiator tank cap, the intercooler tank cap and the auxiliary water pump in order to troubleshoot the 1<sup>st</sup> Coolant Complaint. As for the Stability Control Complaint, it did not appear to be a defect that needed rectification work.

54 Sometime on 29 or 30 July 2011, Mr Teo telephoned the plaintiff to inform him that the defendant had successfully resolved the 1<sup>st</sup> Coolant Complaint and the Car was ready for collection. On 30 July 2011, the defendant collected the Car. He did not subsequently complain about the stability control function.

55 The whole period of nine days in the workshop has to be attributed to the troubleshooting and repair work to address the 1<sup>st</sup> Coolant Complaint. As an estimate, I allocate equal time for the troubleshooting and repair works for the defect in the coolant system. See row 5 of the Table.

#### ***Car in workshop from 1 to 12 August 2011***

56 On this visit to the workshop, the plaintiff made four complaints:

(a) The Car would veer to the left even though the steering wheel was initially positioned straight when the Car was driven at a low speed. When the Car was driven over an uneven surface, the steering wheel of the Car would turn anti-clockwise ("Alignment Complaint").

(b) A "whoop" sound could be heard when the Car's steering wheel was turned to the left or when the Car was stationary ("Steering Whooping Sound Complaint"). This appears to be similar to the 1<sup>st</sup> Steering Sound Complaint referred to in [28].

(c) A sound would be emitted from the angle bar support for the bonnet when the Car's bonnet was opened ("Bonnet Sound Complaint").

(d) The light on the head up display of the Car indicating that the rear door was not closed would be turned off after some time even though the rear door was not actually closed ("HUD Complaint").

57 The defendant ascertained that the steering wheel of the Car was slightly misaligned and would cause the Car to pull slightly to the left when the steering wheel was positioned straight. The defendant carried out the necessary adjustments and successfully rectified the Alignment Complaint by 3 August 2011, which was two days after the Car was sent to the workshop.

58 The HUD Complaint was a normal operating characteristic as other BMW cars displayed similar characteristics.

59 The defendant could not replicate or detect the sound that the plaintiff complained of under the Bonnet Sound Complaint.

60 On 4 August 2011, the defendant found that a Whooping Sound also emitted from another car of the BMW "5 Series" which was similarly equipped with the Integral Active Steering system and concluded that it was a sound which it might not be able to eliminate as the Car was designed to function in such a manner. The defendant consulted BMW Asia on the Steering Whooping Sound Complaint. On 8 August 2011, Mr Victor Chin from BMW Asia informed the defendant that the Whooping Sound was a normal operating sound of the Car. Based on the evidence, I accept the defendant's submission that it is a normal operating characteristic and not a defect in the Car.

61 On 10 August 2011, the plaintiff called to complain that the update installed on the Car's GPS on 27 April 2011 was not user friendly ("New GPS Complaint"). However, nothing could be done because the latest version from BMW Asia had been already been installed. On 12 August 2011, the plaintiff collected the Car. Mr Teo informed him that the New GPS Complaint and the Steering Whooping Sound Complaint were not faults or defects which the defendant could remedy.

62 Out of the 11 days in the workshop, the actual time taken to resolve the Alignment Complaint was two days. The remaining nine days were spent trying to address complaints which were subsequently found to be non-defects. See row 6 of the Table.

### ***Test Drive on 16 August 2011***

63 As the plaintiff detected "propeller" noise emanating from the Car's engine which could be heard when the Car's steering wheel was turned while in reverse gear and the engine was hot, he brought the Car to the defendant's workshop on 16 August 2011.

64 Mr Albert Agravante, the Assistant Technical Advisor of the defendant, accompanied the plaintiff for a test drive and recorded the plaintiff's complaint of a propeller-like sound which could be heard when the Car was reversed under certain conditions ("Propeller Sound Complaint"), and a further complaint of a "ticking" sound which could be heard when the steering wheel of the Car was turned and when the Car was stationary ("1<sup>st</sup> Ticking Sound Complaint"). Thereafter, plaintiff drove the Car away.

### ***Car in workshop from 22 August to 13 September 2011***

65 On 22 August 2011, the Car was towed to the workshop. The plaintiff complained that the Car overheated and asked for the cooling system to be checked ("2<sup>nd</sup> Coolant Complaint").

66 Tests carried out by the defendant on 23 August 2011 showed up a fault in the Digital Motor Electronics ("DME") unit of the Car. BMW Asia recommended that the DME unit be replaced. The plaintiff was told that the Car would have to be left in the workshop for some time because a new DME unit had to be ordered from BMW Asia which could only be delivered in 10 to 11 days.

67 After extensive investigations, the cause of the overheating for the 2<sup>nd</sup> Coolant Complaint was traced on 1 September 2011 (some 11 days after the Car was sent to the workshop) to the swapping of two coolant hoses which were found in two separate cooling systems in the Car's engine. That swapping of the coolant hoses led to a build-up of pressure in the engine cooling system. As that built-up pressure could not be released, the Car overheated. This wrong connection was rectified by the defendant.

68 On 2 September 2011, the defendant replaced the steering column switch cluster and managed to resolve the 1<sup>st</sup> Ticking Sound Complaint successfully. Mr Teo called the plaintiff and informed him that his complaints had been resolved and the defendant was still investigating the Propeller Sound Complaint.

69 On 9 September 2011, the defendant isolated and insulated the intake filter housings of the Car, and the air pipes on the left and right sides of the Car with a view to troubleshoot the Propeller Sound Complaint. Mr Teo then telephoned the plaintiff to inform him that the defendant managed to eliminate the propeller sound when the Car was being reversed. However, the propeller sound could still be heard when the Car was driven forward and the defendant would continue to troubleshoot the Propeller Sound Complaint.

70 The plaintiff collected the Car on 13 September 2011. Mr Teo gave him a summary of the works that were carried out. In respect of the Propeller Sound Complaint, Mr Teo said that the defendant had traced the propeller sound to the hitting of some air pipes against an engine cover which was used as a heat shield. The defendant had isolated and insulated the affected areas. The defendant had not detected the propeller sound after monitoring. He told the plaintiff to contact him again if the propeller sound could still be detected.

71 Out of the 22 days in the workshop, I estimate 11 days for troubleshooting the 2<sup>nd</sup> Coolant Complaint, three days to troubleshoot the other complaints and another four days to perform the remedial work. Four more days were spent monitoring the Propeller Sound Complaint. See row 7 of the Table.

### ***Test Drive on 19 September 2011***

72 The plaintiff drove his Car to the workshop and complained of the following:

- (a) a "metal knocking" noise coming from the Car's engine compartment when the Car travelled downslope and when the Car negotiated a turn which became even louder when the steering wheel was turned left and right when stationary ("2<sup>nd</sup> Ticking Sound Complaint");
- (b) a "humming" sound which could be heard when the Car was stationary ("Humming Complaint");
- (c) a "pulsating" sound when the Car was stationary ("2<sup>nd</sup> Pulsating Complaint").

73 Mr Sabado accompanied the plaintiff on a test drive to verify the complaints. After that, the

plaintiff drove the Car away.

***Test Drive on 21 September 2011***

74 The plaintiff drove his Car again to the workshop and made two further complaints:

- (a) a rocky and vibrating sensation when the Car was driven at a slow speed or at constant speed ("Rocky Complaint"); and
- (b) a metallic sound from the undercarriage of the Car when the gear of the Car was shifted from "Neutral" to "Drive" and vice versa ("Metallic Gear Sound Complaint").

75 At the end of a test drive, Mr Teo, Mr Sabado and Mr Bob Hung ("Mr Hung"), the defendant's Technical Executive, concluded that the sensation in relation to the Rocky Complaint was actually feedback from the road transmitted to the Car. The plaintiff disagreed and said that he would monitor it further.

76 Mr Hung also told the plaintiff that the metallic sound was a natural operating characteristic of an actuator in the Car and could not be eliminated. When the sound was demonstrated on another car, the plaintiff accepted it was a normal operating characteristic.

***Car in workshop from 26 September 2011 to 13 January 2012***

77 The plaintiff sent his Car to the workshop for the defendant to resolve the 2<sup>nd</sup> Ticking Sound Complaint, the Humming Complaint and the 2<sup>nd</sup> Pulsating Complaint.

78 Although the sounds complained of were very minor and did not affect the safety, performance and functionality of the Car, the defendant in its commitment to provide excellent service to its customers decided to try to isolate and eliminate the sounds complained of.

79 On 29 September 2011, the defendant removed the high-pressure fuel rails of the Car for testing before re-installing it, and also disconnected the gearbox torque converter of the Car before re-connecting it in order to isolate the sound complained of under the 2<sup>nd</sup> Pulsating Complaint.

80 The defendant also replaced the bearings of both front wheels of the Car and in doing so, eliminated the 2<sup>nd</sup> Ticking Sound Complaint.

81 On 4 October 2011, the defendant removed and installed the high pressure pumps on both sides of the Car to gain access to the Car's fuel injector holders. The defendant isolated and insulated the fuel injector holders and in doing so, eliminated the "pulsating" sound in relation to the 2<sup>nd</sup> Pulsating Complaint.

82 On the same day, the defendant removed and installed the fan shroud with the electric fan and other associated components to isolate the humming sound. After investigations, the very minor "humming" sound was discovered to be emitted from the auxiliary fan of the Car. The "humming" sound was naturally more audible when the fan speed increased. No further action was taken as the Car was functioning as it was designed.

83 By way of a letter dated 11 October 2011, the defendant informed the plaintiff that the Car was ready for collection. On 13 October 2011, Mr Teo called the plaintiff to remind him to collect the

Car. In a second letter dated 17 October 2011, the defendant requested the plaintiff to collect his Car by 20 October 2011.

84 The plaintiff refused to collect his Car although he had been told that the “humming” sound could not be eliminated.

85 Following the exchange of letters between the plaintiff’s lawyers and the defendant’s lawyers, the plaintiff eventually collected the Car on 13 January 2012, some three months after he had been notified to do so. On the day he collected the Car, he complained that the comfort access lock (“the Lock”) on the driver’s side was faulty. Mr Teo tested the Lock and found that it was less sensitive when compared with the other door handles. The door handle needed to be pressed harder to lock all the Car’s doors. Even though the door handle was not faulty or defective, the defendant agreed to replace the door handle with a new one.

86 Out of the 109 days in the workshop, I estimate that five days were needed for troubleshooting and another three days were needed for the remedial work to address the 2<sup>nd</sup> Ticking Sound Complaint and the 2<sup>nd</sup> Pulsating Sound Complaint. These figures are set out in the penultimate row of the Table. The main reason why the Car remained in the workshop for so long was because of the plaintiff’s refusal to collect the Car after the repairs.

### **Complaints which are not borne out as defects**

87 Having regard to the detailed evidence of Mr Teo, which is to a large extent supported by the contemporaneous documentary evidence and corroborated by other witnesses called by the defendant, I find that the following complaints are not to be regarded as genuine defects because they are (a) not detectable or reproducible; (b) addressed with some greasing or setting adjustments; (c) normal operating characteristics of the Car; (d) attended to as part of the defendant’s policy to provide excellent service to the customer rather than as real defects *per se*; and/or (e) not pursued by the plaintiff as indicated on exhibit “P6”:

- (a) Electronic Display Complaint
- (b) 1<sup>st</sup> Steering Sound Complaint
- (c) Suspension Sound Complaint
- (d) GPS Complaint
- (e) 1<sup>st</sup> Pulsating Sound Complaint
- (f) 1<sup>st</sup> Squeaking Sound Complaint
- (g) Whining Sound Complaint
- (h) Air-Con Complaint
- (i) SMS Complaint
- (j) Stability Control Complaint
- (k) Steering Whooping Sound Complaint



- (l) HUD Complaint
- (m) Bonnet Complaint
- (n) New GPS Complaint
- (o) Rocky Complaint
- (p) Metallic Gear Sound Complaint
- (q) Humming Complaint
- (r) Comfort Door Access Complaint

88 Of the 18 complaints listed above, the plaintiff maintains that the Suspension Noise Complaint remains outstanding and unresolved. He disputes that the Suspension Sound Complaint is a normal operating characteristic of the Car.

89 I was taken on a test drive on 24 September 2013. The main purpose was to allow me to have a general feel of the overall performance, ride comfort and noise levels of the Car, and for the plaintiff to demonstrate the suspension noise and his other noise complaints. The car was driven several times over various humps. I had to pay very careful attention and strain my ears to detect the very faint sound. It was a sound that I think would not be ordinarily noticeable on most occasions. If it was not specifically pointed out to me, I would not have noticed it at all.

90 The defendant's employees including Mr Torsten Simon ("Mr Simon"), the Technical Manager from BMW Asia and the defendant's expert witnesses testified that the suspension sound was a faint sound reproducible only under specific circumstances. I agree with the defendant's submission that the faint sound produced when the Car goes over a hump could be replicated only under very specific conditions. The Car has to be driven over a hump of a certain shape at a particular speed with the suspension mode of the Car set to the "Comfort" mode as opposed to the "Sport +" mode.

91 As the plaintiff is the only person to have made a complaint about the sound from the front suspension of the BMW "5 Series" cars, the defendant's principal in Germany did not want to develop or design a new improved front suspension for the BMW "5 Series" cars. With only one complaint received, the cost of the design development was not justifiable. I note that the defendant's principal re-designed the rear suspension spring struts to improve its noise characteristics after receiving 34 complaints worldwide concerning the suspension sound being emitted from the rear suspension of the BMW "F Series" cars. When these improved rear suspension struts were fitted on the Car, they eliminated the sound from the rear suspension of the Car.

92 As with all mechanical designs, improvements can often be made to the design to have better performance. But for our purposes, the more relevant question is whether the original design is a defective design. No evidence is shown to me that the present design of the front suspension strut is defective or that its use as front suspension would render the Car unfit for its purpose or unsatisfactory in quality and hence, the front suspension must be replaced with a *re-designed* suspension. That there can still be possible further improvements to a design for a particular part of a car to improve its performance or further reduce its overall noise characteristics does not make the car unfit for its purpose or unsatisfactory in quality. There is a clear distinction between a defective design and a non-defective design that has room for improvement. What the plaintiff is asking is for

the front suspension to be re-designed to further improve its performance or noise characteristics. It is not because the front suspension does not serve its purpose or does not work properly or renders the Car unreliable or unsafe for use.

93 I accept the evidence of Mr Simon that it is BMW Asia's position that the Suspension Sound is a normal operating characteristic of the Car.

94 The defendant called an expert witness, Mr Don Dunoon ("Mr Dunoon"), a chartered engineer involved in the product development process of the motor industry – a process used by established motor vehicle manufacturers in planning, designing and engineering a vehicle for commercial production and sale to the world markets. He has final sign-off responsibility for a range of passenger vehicles, where he has to ensure that in his expert opinion, the vehicle meets all objective standards as well as the subjective requirements of the critical customer in terms of total vehicle performance. I accept the evidence of Mr Dunoon that (a) the Suspension Sound is not a fault in the Car; (b) the Car is operating according to its technical specifications; and (c) the Suspension Sound should be acceptable to even a critical customer, and certainly under Singapore road conditions. The Suspension Sound remained even after the front shock absorbers were replaced with brand new ones of the same design when the Car was brought to the workshop on 7 January 2011. This indicates to me that it is not likely to be a defect but a characteristic of the front shock absorbers as designed.

95 Accordingly, I find that the Suspension Sound Complaint is a normal operating characteristic of the Car and forms no basis to render the Car unfit for its purpose or unsatisfactory in quality. It is unreasonable for the plaintiff to expect no noise whatsoever when driving the Car over a hump. The front suspension as installed in the Car is not defective in its design and is satisfactory for use as a front suspension for the Car.

### **Complaints of defects which were rectified**

96 I find that the following complaints may be classified as defects (used in a very broad sense and not limited to those which affect performance and safety) that the defendant had addressed or repaired as part of its warranty to the plaintiff:

- (a) Hissing Sound Complaint
- (b) Air Conditioner Sound
- (c) Knocking Sound Complaint
- (d) Leak in the intercooler reservoir
- (e) 1<sup>st</sup> Coolant Complaint
- (f) Alignment Complaint
- (g) 1<sup>st</sup> Ticking Sound Complaint
- (h) Propeller Sound Complaint
- (i) 2<sup>nd</sup> Coolant Complaint
- (j) DME fault

(k) 2<sup>nd</sup> Ticking Sound Complaint

(l) 2<sup>nd</sup> Pulsating Sound Complaint

97 Where parts had to be replaced to rectify the complaints listed above, the defendant used *new* replacement parts as can be seen from the evidence of Mr Teo. The modular method of repair is adopted by the workshop, where the whole assembly or the entire component is changed even though the defect may reside in a small part of the whole assembly or component. With the modular mode of rectification using only brand *new* replacement parts, the Car as a whole should still be considered as new if the rectification is successful.

98 Of the 12 complaints listed above, the plaintiff asserts that three remain unresolved: the Propeller Sound Complaint, the Knocking Noise Complaint and the 2<sup>nd</sup> Pulsating Sound Complaint. From the defendant's submissions, the defendant appears to have accepted that the remaining nine complaints have been successfully resolved. I will therefore focus on these three allegedly unresolved complaints.

99 For a start, I could not detect for myself any of the specific sounds from the three unresolved complaints during the test drive. Even if others with far more sensitive hearing can detect them, all that can reasonably be said is that they are barely audible. It must be borne in mind that the plaintiff had not told the defendant prior to his purchase of the Car that he only wanted a car that is close to being absolutely noiseless and neither has the defendant marketed the Car as such.

100 The defendant's two expert witnesses, Mr Dunoon and Mr Bryan Ang, a Senior Technical Investigator with LKK Auto Consultants Pte Ltd, both confirm that, save for the Suspension Sound, they did not experience the symptoms of any other complaints made by the plaintiff. If the sounds were as bothersome as alleged, Mr Dunoon said he would have picked it up fairly easily, since he was looking out for any sounds that would not be acceptable to the critical customer. I have no reason to reject their evidence. In my view, the Propeller Sound Complaint, the Knocking Noise Complaint and the 2<sup>nd</sup> Pulsating Sound Complaint have been adequately and satisfactorily rectified by the defendant.

101 Dr Guentzler opined in his expert report that the defendant's technical solution of installing a layer of felt to cover the engine cooler was inappropriate, ineffective and dangerous for the following reasons:

- (a) the black felt holds the heat in, rather than dissipate the heat energy, which is what the oil cooler is designed to do;
- (b) the tie wraps deteriorate with heat over time and tend to fall off, which causes the oil cooler to continue to be a source of overheating and noises.

102 Having analysed the evidence, I accept the defendant's contention that the layer of felt covering is effective, safe and durable for the following reasons:

- (a) the black felt tape that the defendant used is described in the BMW's parts catalogue as a sound absorber. It is an authorised part with a unique part number from BMW, the manufacturers of the Car. The defendant's rectification was therefore done with authorised parts from BMW. In response to questions from the plaintiff's counsel, Mr Teo testified that he had come across some other cars with similar insulation installed to address the "propeller sound" on other F10 cars in

the BMW "535 Series" cars. [\[note: 11\]](#)

(b) The black felt tape was not placed across the entire length of the oil cooler pipe but only at the location which may come into contact with an adjacent part of the Car. Heat can still be dissipated from the oil cooler and oil can still flow smoothly through the pipes.

(c) Mr Simon's evidence is that in BMW Asia's view, the solution of installing a layer of felt covering over the engine cooler is a permanent solution. The felt material can withstand temperatures around two to three times the operating temperature of the oil cooler and he expects the felt tape and cable tie to last for the Car's normal lifespan. I have no reason to disbelieve his technical assessment.

103 The plaintiff says that he had been sold a "lemon" and at the end of the day, all he had was a patched-up car with a lot of insulation material used in the engine compartment that was "unique" to his car. The plaintiff is dissatisfied that insulation material has been applied to rectify these three noise complaints of his.

104 The insulation material is applied to prevent any direct metallic contact between certain parts within the engine compartment when the Car is subject to severe movements or if the temperature and pressure of the Car's engine changes significantly. The noise is not attributable to any defective mechanical operating parts as such and therefore it can have no bearing on safety or reliability. The insulation material is an authorised part from BMW and has also been used in other cars for the same purpose of noise insulation. The application of felt insulation material for noise insulation is not unique to the Car.

105 I believe that the plaintiff's rejection of the Car has more to do with him being unhappy with the presence of insulation material being used by the defendant to isolate the noise as a mode of rectification, and not that the Car as a whole is objectively of unsatisfactory quality and unfit for its purpose.

### **Extensive period that the Car was in the workshop**

106 The plaintiff submits that the Car required far more servicing than one would reasonably expect from a new car, and even more so when one considers this Car to be the premium top-of-the-line model from BMW. In the submissions, the plaintiff plays up the fact that the Car was in the workshop ten out of the first 12 months after delivery to assert rather impressively that the Car is therefore unfit for its purpose and of unsatisfactory quality.

107 To address this point with the limited evidence available to me, I have to assess on a very rough basis the number of days spent on troubleshooting the genuine defects and the number of days taken to perform the remedial or repair work for genuine defects. I have to discount the workshop time taken to troubleshoot and entertain non-defects and the period for which the defendant refused to take delivery of the Car after being notified that it was ready for collection. I summarise my assessment in the Table below.

<b>The period the Car was in the workshop</b>	<b>Number of days in the workshop</b>	<b>Number of days troubleshooting for actual defects</b>	<b>Number of days for remedial work for actual defects</b>
26 to 29 Oct 2010	3	1	0

4 to 11 Dec 2010	7	3.5	1.5
7 Jan to 19 Jul 2011	193	40	2
21 to 30 Jul 2011	9	4.5	4.5
1 to 12 Aug 2011	11	0	2
22 Aug to 13 Sep 2011	22	18	4
26 Sep 2011 to 13 Jan 2012	109	5	3
TOTAL	354	72	17

108 The plaintiff was provided with a courtesy car free of charge each time that the Car was in the workshop except on one occasion when the Car was in the workshop from 4 to 11 December 2010 for seven days. Thus, there was no significant loss of amenities for the plaintiff in this case even though a considerable number of days were spent troubleshooting complaints that eventually were not valid. When the plaintiff refused to collect the Car for several weeks after the repairs were completed and continued with the use of the courtesy car, he had in fact deprived the defendant the use of the courtesy car for the defendant's other purposes. I do not think that the plaintiff was reasonable in this regard.

109 I now analyse the various reasons why the Car was in the workshop for such a long period of time. The Table broadly establishes that out of the total of 354 days, a substantial part of that period totalling perhaps some 265 days is caused by the plaintiff's refusal to collect the Car when informed that it was ready for collection and by the defendant having to attend to and troubleshoot the many complaints (see the list at [87]) made by the plaintiff, which are not strictly defects.

110 The Table shows that the estimated total number of days taken for the remedial or repair work for all the actual defects is only about 17 days, which is not an unacceptably long period. I recognise that the defendant should not have taken so long to troubleshoot the Knocking Sound Complaint, which took 40 out of the total of 72 days spent on troubleshooting all the valid complaints. It may be difficult to trace the source of a particular noise or sound. Nevertheless, the defendant ought to have been more effective in its troubleshooting efforts. However, that lack of effectiveness in troubleshooting does not make the Car unsatisfactory in its quality or unfit for its purpose. The defendant took another 11 days of the total of 72 days to troubleshoot the 2<sup>nd</sup> Coolant Complaint which was eventually traced to an unexpected cause. This might explain why the troubleshooting took such a long time. The defendant eventually found a wrong connection of the hoses in two separate cooling systems probably resulting from an earlier repair which led to the 2<sup>nd</sup> Coolant Complaint. Where a qualified team of technicians is involved in the repairs, this sort of error does seem unacceptable. However, once again, the question is not so much about the competency of the technicians in the defendant's workshop but whether after the rectification of the mistake in the hose connections, the Car is still satisfactory in quality and fit for its purpose.

### **Whether the Car corresponds with description under s 13(1) SOGA**

111 It is not disputed that the sale of the Car is governed by the SOGA. The conditions set out in ss 13(1), 14(2) and 14(3) of the SOGA are thus applicable. I shall first deal with s 13(1). Section 13(1) of the SOGA provides as follows:

#### **13 Sale by description**

—(1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.

112 The plaintiff claims that the Car does not correspond with the description given by the defendant in the BMW Catalogue and the alleged oral representations of Ms Tan set out earlier at [5] and [6].

113 The plaintiff does not clearly identify any specific description (not mere general advertising puffs) in the BMW Catalogue that he takes issue with. If the plaintiff alleges any specific technical feature, accessory or component mentioned in the BMW Catalogue that is absent in the Car or any technical specification stated in the BMW Catalogue that is not complied with, I am prepared to examine the allegation further. But he does not. Hence, I find that the plaintiff has not established that the Car as delivered does not correspond with the description stated in the BMW Catalogue.

114 If the plaintiff intends to rely on the general advertising puffs at [12] in the BMW Catalogue as the “description” that the Car does not correspond with, then I find that there is no breach of s 13(1) of the SOGA. These advertising puffs stating, for instance, that the Integral Active Steering would enhance driving comfort, the Adaptive Drive can be fine-tuned for maximum ride comfort and that everything in the BMW “5 Series” is designed to enhance driving pleasure, are so non-specific and general in nature that it is next to impossible to assess for a breach of an implied condition of correspondence with description. I do not think that such advertising puffs are meant to be construed as a “description” of the Car for the purpose of s 13(1) of the SOGA.

115 Since I have found that Ms Tan had not made the specific oral representations set out at [6] but had made only the oral representations at [5], the plaintiff no longer has a factual basis to mount a claim under s 13(1) of the SOGA for a breach of an implied condition that the Car as delivered does not correspond with the “description” contained in those alleged specific representations at [6].

116 As for the representations made by Ms Tan at [5], she was not factually inaccurate with her description that the BMW “5 Series” range of cars is “generally superior in terms of quality, comfort and performance to the BMW 330i that the plaintiff was driving then.” In fact, during the first two months that the plaintiff was driving the Car, he had no complaints. The Car performed well and met his own very high expectations. Certainly it can hardly be said that the Car as delivered had not corresponded with Ms Tan’s description of the BMW “5 Series” range of cars.

117 As the Car had performed up to expectations for the first two months of use, at the very least, the Car cannot be said to be of unsatisfactory quality and unfit for its purpose during this fairly substantial period of two months. I would have thought that the plaintiff would have accepted the Car by then as the plaintiff had already enjoyed driving the Car for two months after delivery. Having accepted the Car, any defects arising thereafter would have to be addressed under the warranty provided by the defendant, which is for a period of 24 months and a further 12 months if the odometer registers less than 100,000km. If the defendant is able to satisfactorily repair these defects that arose, there would be no breach whatsoever by the defendant of its obligations under the warranty. If the defendant is not able to satisfactorily repair these subsequent defects under the warranty, then the defendant can claim for damages. However, having already accepted the Car, he cannot reject the Car and claim the full price that he paid for the Car, especially when the complaints are of relatively minor noise issues which do not affect the safety, performance and reliability of the Car. In other words, the plaintiff would have lost his right of rescission. Since the defendant has not pleaded or made any argument along the lines indicated in this paragraph, I will say no more about it.

118 If the alleged defects complained of are non-existent, it appears that the plaintiff would accept

that the Car is indeed a better car than the BMW 330i that he was driving. I do not construe the oral representations made by Ms Tan at [5] to amount to a specific description (or guarantee) that the specific car to be delivered to the plaintiff is in fact going to be a far more reliable car in that it will have far less mechanical defects than the BMW 330i that he was then driving. Being in the sales department and not in the maintenance department of the defendant, Ms Tan would not know the actual maintenance history of the plaintiff's BMW 330i to begin with, for her to be able to describe the Car in those terms. She would not have known that the plaintiff had previously made 14 sound and noise complaints with respect to his BMW 330i. Without any knowledge of the maintenance history of the plaintiff's previous car and with no customer feedback or any idea of what the reliability of the new BMW 550i is going to be as this was the first car of this model that was being bought into Singapore, I doubt that she would have ventured to represent to the plaintiff her guess as to the reliability of the Car when compared with his BMW 330i. Even if the plaintiff had misunderstood what she meant, I do not believe that the plaintiff could have reasonably believed that she was in any position to make a comparison of the reliability of the two cars.

119 I interpret what Ms Tan had said to mean that if one were to make a broad comparison using the specifications (as would normally be set out in the brochures) of both series of BMW cars, then one will find that the "5 Series" is of "superior quality, comfort and performance". There is nothing in the brochures to indicate that cars of the "5 Series" are far more reliable than cars of the "3 Series", and hence cars of the "5 Series" are of "superior quality" in terms of their "reliability" over the "3 Series" cars. Given the context in which she had used the words "superior quality, comfort and performance", they cannot be construed to mean "superior reliability" *ie* "with a much lower incidence of defects". Ms Tan is basically making a comparison based on the specifications and descriptions in the BMW brochures and it must have been understood in this sense by the plaintiff.

120 Accordingly, I find that she had not represented to the plaintiff any erroneous description of the Car that could be elevated to one that is specific enough to attract a breach of s 13(1) of the SOGA.

### **Whether the Car is of satisfactory quality under s 14(2) SOGA**

121 The defendant does not dispute that the Car had certain genuine defects. These are set out at [96]. The defendant contends and I accept that these have been satisfactorily repaired without cost to the plaintiff as part of its warranty obligations. The plaintiff however claims that the defendant, having sold to him a car that is both unsatisfactory in quality and unfit for its purpose, has breached the conditions of sale implied under ss 14(2) and 14(3) of the SOGA, which I shall now address.

122 Section 14(2) of the SOGA provides that:

14.—(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:

(a) fitness for all the purposes for which goods of the kind in question are commonly

supplied;

- (b) appearance and finish;
- (c) freedom from minor defects;
- (d) safety; and
- (e) durability.

123 The plaintiff's counsel helpfully referred me to the decision of the English High Court in *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220 ("*Bernstein*"), which held that in considering whether any particular defect or feature rendered a new car "unmerchantable" (this being the previous standard to be applied under the law), the following factors would have to be considered (at 227):

... the ease or otherwise with which the defect may be remedied, or, to put the matter another way, the intractability of the defect. Some faults in a car prove particularly difficult to trace and rectify, but keep manifesting themselves in some way or another.

... Such a defect or defects may not be particularly serious in individual manifestations, but nevertheless can, by reason of their intractability, render a car unmerchantable in appropriate cases; and the fact that the purchaser does not reject the contract at the first manifestation of trouble, but perseveres in his attempts to have the matter put right, does not debar his right of eventual rescission, always assuming he is not deemed to have accepted the car.

Similarly, the time which is taken and the expense of rectification, evidencing as it does the seriousness of the defect, are relevant considerations. ... I do not believe that the question of who pays for the repair can be relevant. ...

Which brings me on to the next relevant factor, namely whether the defect is of such a kind that it is in fact capable of being satisfactorily repaired so as to produce a result as good as new. This in all cases will be a question of fact, but in general terms I would give as my opinion that if the defect is so serious, or of such fundamental a kind that no amount of repair, however well performed, will ever bring the car properly to its pristine state, then it will be almost impossible to see how a car so handicapped could pass the test of merchantability. This consideration applies not only to the part or parts which may be the site of the actual defect, but also to what has been described as the "knock-on" effect. ... Like a patient who is taken to the operating theatre, a car which is taken to the repairers must undergo a risk inherent in the operation itself, either that the defect will not properly be repaired or that other defects or items of damage will escape scrutiny; and clearly the more widespread the area which is either damaged or in need of scrutiny, the greater that risk will be.

There is also the cumulative effect of a series of relatively minor defects to consider, "a congeries of defects" as was stated in one case. Here again it is a question of degree, but clearly there could come a stage when an army of minor, unconnected defects would be evidence of such bad workmanship in the manufacture, or on the assembly line generally, as to amount in toto to a breach of the condition of merchantability.

So far I have dealt only with mechanical matters, but it may well be that in appropriate cases cosmetic factors will also apply depending on the description and price applied to any individual



car. No buyer of a brand new Rolls-Royce Corniche would tolerate the slightest blemish on its exterior paintwork; the purchaser of a motor car very much at the humbler end of the range might be less fastidious.

124 Relying on the above persuasive authority, the plaintiff submits that the Suspension Noise, the Propeller Noise, the 2<sup>nd</sup> Pulsating Noise and the Engine Knocking Sound are all intractable defects. Since it is my finding that the Suspension Noise is a normal operating characteristic and the rest of the three complaints have been satisfactorily resolved with no evidence of recurrence after the repairs, there are in fact no intractable defects in the Car.

125 I have also found that the other defects set out at [96] have been successfully repaired. There is also no evidence that these defects set out at [96] have been repeatedly manifesting themselves after having been repaired. From the nature of the repairs set out in a summarised form at [129] below, it is clear to me that different types of repairs are performed on different parts of the Car. The defects arising are quite unconnected. There is no evidence of re-occurrence of the same defect after repair. Hence, they are not intractable defects. With the modular form of repairs practised nowadays where the whole part is being replaced with a brand new part even though it may only be a small component within the entire assembly that is faulty, the chances of having recurrence of the same defect is much reduced. Replacement of whole parts with brand new parts also makes defects far easier to rectify. From the description of the repairs provided by Mr Teo, that appears to me to be general method by which the repairs were being undertaken by the defendant.

126 The plaintiff submits that the application of felt insulation materials to address the Propeller Noise, the 2<sup>nd</sup> Pulsating Noise and the Engine Knocking Sound is a temporary solution at best. It cannot put the Car back in an as-new condition since they merely seek to muffle the sounds complained of and do not eliminate such sounds. For the reasons set out in [102] and [104], I accept the defendant's submission that it is an acceptable remedy and a permanent solution.

127 The plaintiff submits that taking nine months to rectify the defects reflects the seriousness of the defects and the unsatisfactory condition of the Car. I do not agree. The long duration that the Car remained in the workshop as can be seen from the Table is due primarily to other reasons which have been stated earlier and are not directly related to the actual time needed for repairing the actual defects, which I estimate to only be about 17 days.

128 When there is direct evidence available of what those defects really are and how they are repaired, it is evidentially unreliable and inappropriate to draw an inference from the length of time that a car is in the workshop to determine the seriousness of the defects or the unsatisfactory condition of the car. Without any details of what is actually happening in the workshop and what is the nature of the repair work carried out on the Car, one can hardly assume that there is automatically a good correlation between the duration in a workshop and the seriousness of the defects. What if the workshop is too busy attending to other cars? Does it necessarily mean that the car to be repaired, which had not been quickly attended to, must be having serious defects?

129 The plaintiff simply makes a bold assertion that some of the defects were so serious or fundamental in nature that the defendant is unable to satisfactorily rectify them, without explaining why and how they were so serious or fundamental in nature. To describe them as such is in my view a gross exaggeration. A closer examination of the nature of the repairs carried out will show that the defects set out at [96] are relatively minor in nature. For ease of reference, I summarise these defects below with the brief description of the repairs done to show that the rectified defects can hardly be regarded as being *"so serious or fundamental in kind that no amount of repair, however well performed, will ever bring the car properly to its pristine state"*:

- (a) Hissing Sound Complaint – Addressed by the replacement of new parts for the air intake system.
- (b) Air Conditioner Sound – New air conditioner blower fan installed for the rear cabin.
- (c) Knocking Sound Complaint – Securing of the cooler hose with a cable tie to prevent it from coming into contact with the engine cooler, and a layer of felt was applied as an additional measure for insulation against noise arising from any contact with the cooler hose.
- (d) Leak in the intercooler reservoir – New cover lid installed on the intercooler reservoir.
- (e) 1<sup>st</sup> Coolant Complaint – replacement of the radiator tank cap, the intercooler tank cap and the auxiliary water pump.
- (f) Alignment Complaint – Re-setting the alignment. No faulty parts need to be replaced to address this complaint.
- (g) 1<sup>st</sup> Ticking Sound Complaint – Replacement of a steering column switch cluster with a new set.
- (h) Propeller Sound Complaint – Insulation applied to prevent air pipes hitting against an engine cover used as a heat shield.
- (i) 2<sup>nd</sup> Coolant Complaint – Traced to wrong connection of hoses. Reconnection done.
- (j) DME fault – Digital Motor Electronics unit replaced with a new unit.
- (k) 2<sup>nd</sup> Ticking Sound Complaint – Both front wheel bearings replaced with new ones.
- (l) 2<sup>nd</sup> Pulsating Sound Complaint – Felt Insulation applied to fuel injector holders.

130 The plaintiff further asserts without any sound basis that the Car clearly could not be returned to its original pristine state. He argues that in view of the extensive replacement of parts and the extensive repair works undertaken, there is the increased risk that the Car may not ultimately be restored to its proper condition as the defendant may not have spotted additional damage or may have caused further damage. This is rather speculative in my view.

131 The plaintiff then asserts that the cumulative effect of the defects for such a new premium car must be evidence of such bad workmanship in the manufacturing or on the assembly line generally as to amount *in toto* to a breach of the condition of satisfactory quality. The use of insulation material to address the Engine Knocking Sound Complaint, the Propeller Sound Complaint and the 2<sup>nd</sup> Pulsating Noise Complaint must imply that these were also manufacturing defects since no other similar cars required such treatment. The standard to be applied to determine whether the Car is of satisfactory quality must be based on that for a top-of-the-line luxury vehicle. The plaintiff submits that no reasonable buyer will accept the Car to be of satisfactory quality. I will have to examine this argument more closely.

132 The manifestation of 12 relatively minor defects (see above at [129]) within 14 months of the delivery of the Car, though satisfactorily rectified by the defendant, has caused me considerable

concern as to whether the Car, which is supposed to be an exclusive top-of-the-line model in the BMW "5 Series" range and costs \$378,100, can still objectively be regarded to be of a satisfactory quality. I share the observations of the court in *Bernstein* that the cumulative effect of a series of relatively minor defects has to be considered, and that being a question of degree, there can come a stage where an army of minor, unconnected defects could well be evidence of such bad workmanship in the manufacturing as to amount to a breach of the condition of satisfactory quality. In other words, too many minor defects even if rectified may nevertheless still render the goods to be unsatisfactory in quality. In fact, s 14(2B) of the SOGA explicitly provides that "freedom from minor defects" and "durability" are, in appropriate cases, aspects of the quality of the goods.

133 If there had been only one or a few minor defects in the Car, the question of whether the Car is of satisfactory quality can be more readily and easily answered. In *Darren Egan v Motor Services (Bath) Ltd* [2008] 1 WLR 1589, the court held at [47] that it is unlikely that a buyer will be entitled to reject goods simply because he can point to a minor defect. He must also persuade the court that a reasonable person would think that the minor defect is of sufficient consequence to make the goods unsatisfactory. Being a matter of fact and degree, should a large number of minor unconnected defects develop cumulatively over a short space of time not long after delivery, I do not discount the real possibility of a stage being reached when the reasonable person would quite reasonably regard the goods, sold as new, to be of unsatisfactory quality. This is because the goods break down so often and are wholly unreliable or not durable, even though all the minor defects may have been subsequently rectified as part of the seller's warranty for the goods.

134 It is appropriate at this juncture to set out the applicable legal principles that have been adopted by our courts. In *Koh Wee Meng v Trans Eurokars Pte Ltd* [2014] 3 SLR 663 ("*Trans Eurokars*"), Judith Prakash J observed at [91] that:

A local case which considered the meaning of "satisfactory quality" is *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd* [2006] SGHC 242 ("*Compact Metal*"). There, Sundaresh Menon JC (as he then was) had to deal with an allegation that the paint supplied by the defendant to the plaintiff for application on aluminium panels forming the cladding of a prestigious new building was not of satisfactory quality. In considering this allegation, the judge made the following observations on the standard of satisfactory quality at [102]:

- (a) the inquiry whether the goods are of a satisfactory quality is an objective one to be undertaken from the viewpoint of a reasonable person;
- (b) the reasonable person in question is one who is placed in the position of the buyer and armed with his knowledge of the transaction and its background;
- (c) the burden of proof is on the buyer who is alleging that the goods were not of satisfactory quality;
- (d) the inquiry is a broad-based one directed at whether the reasonable person placed in the situation of the buyer would regard the quality of the goods in question as satisfactory; and
- (e) at every stage of that inquiry, the Act clearly contemplates that the court should consider *any and all factors* that may be relevant to the hypothetical reasonable person.

(emphasis in original)

135 At [113], Prakash J held that a defect that can be remedied so as to put a vehicle back into an

as-new position cannot render that vehicle to be of unsatisfactory quality unless there are exceptional circumstances. Although she cited no authorities in support of this proposition, it does make eminent logical sense to me.

136 The legal effect of the burden of proof falling on the party alleging that the goods are not of satisfactory quality is that the plaintiff fails in his claim if the court is unable to reach a conclusion based on the evidence as to whether or not a reasonable man would have regarded the quality of the goods as unsatisfactory. Thus, if the court finds itself in much difficulty and is unsure how the question of satisfactory quality in the circumstances of a particular case is to be determined, the plaintiff would have failed to discharge his burden of proof.

137 I have some sympathy for the plaintiff as he bought an expensive car and he naturally had very high expectations of the level of quietness, comfort and pleasure he should have in driving it. It did not meet his subjectively high standards. But that is not the test to determine if he is entitled to reject the Car and claim the return of the purchase price.

138 Applying a broad based inquiry following the approach set out in *Trans Eurokars* and *Compact Metal*, I find that the reasonable person placed in the position of the plaintiff, having paid \$378,100 to purchase an exclusive top-of-the-line model in the BMW "5 Series" range with the description and characteristics as set out in the BMW brochure and taking all relevant factors into account, would not have considered the Car to be of unsatisfactory quality because of (a) the presence of the hardly noticeable suspension sound in the front suspension which is a normal operating characteristic of the Car when going over humps of a particular shape at a certain speed; (b) the 12 minor defects set out at [96] that have manifested themselves within 14 months; (c) the length of time needed to troubleshoot and undertake the repairs for the actual defects as set out in the Table (at [107]); (d) the minor and non-intractable nature of the defects; (e) the manner in which the repairs were carried out (summarised at [129]); (f) the kind of materials used for the repairs; (g) the use of brand new parts to replace the defective parts; (e) the non-recurrence of the defects after they have all been satisfactorily rectified; and (e) the overall performance, reliability and safety of the Car, its ride comfort and quietness after the successful completion of all the rectification work for all the 12 defects.

139 This is not an easy conclusion to arrive at on the facts as it is not such a clear-cut case. I find the balance to tilt just slightly in favour of the defendant. Even if I am wrong on my finding on a balance of probabilities that the condition of satisfactory quality implied under s 14(2) of the SOGA is not breached, I would say that the outcome is evenly balanced. If I am not able to reach a determination either way on whether a reasonable man would have regarded the quality of the Car as unsatisfactory, the plaintiff necessarily would have failed to discharge his burden to establish a breach under s 14 (2). Accordingly, his claim under s 14(2) fails.

### **Whether the Car is reasonably fit for its purpose under s 14(3) SOGA**

140 Additionally, the plaintiff submits that the Car does not comply with the implied condition under s 14(3) of the SOGA. Section 14(3) provides that:

14(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known —

(a) to the seller; or

(b) where the purchase price or part of it is payable by instalments and the goods were

previously sold by a credit-broker to the seller, to that credit-broker,

any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.

141 Since I have found on a balance of probabilities that there is no breach of s 14(2), the plaintiff can no longer rely on the defects set out at [129] to establish that the Car is not fit for the purpose for which it was purchased and reject the Car because of a breach of s 14(3).

142 The plaintiff has not alleged that he had told the defendant that the Car was meant additionally to fulfil some extraordinary purpose or special requirement eg the Car has to be almost noiseless because of his hypersensitivity to noise and his irritability when he hears the slightest noise in the cabin whilst he is driving the Car.

143 The Car, in my view, more than reasonably fits its general purpose to be used as a high end BMW "5 Series" car to transport the plaintiff and his passengers in safety and comfort. Accordingly, I find that there is no breach of the implied condition in s 14(3) of the SOGA.

144 The plaintiff's claim under s 14(3) is also dismissed.

### **Counterclaim**

145 The defendant counterclaims for a total storage charge of \$4,700 based on \$50 per day of storage. The plaintiff refused to collect the Car after being requested to do so by the defendant. The Car remained uncollected in the defendant's workshop for a total of 94 days between 11 October 2011 and 13 January 2013. The repair orders signed by the plaintiff states, *inter alia*, that the plaintiff as its customer shall collect the vehicle within 48 hours from the date of notification of readiness for collection. If the customer fails to collect within the 48 hours stipulated, the customer shall pay for all storage charges at a rate to be determined by the defendant. The rate of \$50 imposed per day of storage as liquidated damages is not unreasonable and has been notified to the plaintiff. As he refused to collect the Car in breach of the terms of the repair order, I allow the defendant's counterclaim in full.

### **Conclusion**

146 I find that no misrepresentations were made by the defendant. I find that the defendant had discharged all its obligations under the Agreement. The 12 genuine defects have been satisfactorily rectified. The rest of the plaintiff's complaints were not faults or defects. The front Suspension Sound is a very faint sound emitted only when the Car is driven over a hump of a certain shape at a particular speed and only in the "Comfort" mode. It is a normal operating characteristic of the Car. The performance, safety and reliability of the Car are unaffected by the rectification work done. Brand new parts and authorised materials were used to remedy the defects. The Car performs satisfactorily and this is further borne out during the test drive.

147 Taking into account all the relevant undisputed factual circumstances and all the relevant facts as I have determined as a fact finder in areas where the facts are disputed, I find that a reasonable person as the buyer of the Car would not regard the Car to be of unsatisfactory quality. As there is no special purpose or requirement indicated by the plaintiff to the defendant before he purchased the

Car, there is no evidence that the Car is unfit for its purpose as a car in the high end range of the BMW "5 Series". I further find that the defendant has not provided any specific description of the Car prior to the completion of the sale such that the Car as delivered is not in conformance with that description. Accordingly, there is no breach of the implied conditions under ss 13(1), 14(2) and 14(3) of the SOGA.

148 The plaintiff's entire claim is dismissed and the defendant's counterclaim is allowed. Unless parties write in to be heard on costs within 14 days, I order that the costs be taxed if not agreed.

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[\[note: 1\]](#) Transcript of 16 October 2014 at pp 58 and 62.

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