IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: W-02(IM)-2348-2009

BETWEEN

PUNCAK NIAGA (M) SDN BHD ------ APPELLANT

AND

NZ WHEELS SDN BHD
(COMPANY NO**:** 329033-V) ------ RESPONDENT

(In the matter of Suit No: D2-22-1169-2009)
In the High Court of Malaya at Kuala Lumpur

Between

Puncak Niaga (M) Sdn Bhd ------ Plaintiff

And

(1) NZ Wheels Sdn Bhd
(No**:** Syarikat 329033-V)
(2) Daimler Chrysler Malaysia Sdn Bhd
(No**:** Syarikat 596096-H)
(3) Daimler Chrysler AG ------- Defendants

CORAM:

(1) ABDUL MALIK BIN ISHAK, JCA
(2) KANG HWEE GEE, JCA
(3) AZHAR HJ MA'AH, JCA

ABDUL MALIK BIN ISHAK, JCA
DELIVERING THE JUDGMENT OF THE COURT

Introduction

[1] The plaintiff appellant (Puncak Niaga (M) Sdn Bhd) applied for summary judgment under Order 14 of the Rules of the High Court 1980 (**"RHC"**) against the first defendant respondent (NZ Wheels Sdn Bhd (no: syarikat 329033-V)) before the Senior Assistant Registrar (**"SAR"**). The SAR allowed the plaintiff appellant's application for summary judgment. Aggrieved, the first defendant respondent appealed to the Judge in Chambers of the High Court at Kuala Lumpur and succeeded.

[2] The plaintiff appellant now appeals to this Court.

The parties

[3] The plaintiff appellant is a private limited company incorporated in Malaysia with its registered address at the 10th floor, Wisma Rozali, No: 4, Persiaran Sukan, Seksyen 13, 40100 Shah Alam, Selangor Darul Ehsan.

[4] The plaintiff appellant sued the first defendant respondent as the sole importer and as an authorised dealer of Mercedes-Benz motor vehicles in Malaysia**.**

[5] The second defendant (Daimler Chrysler Malaysia Sdn Bhd (no**:** syarikat 596096-H)) carried on the business as the distributor of the Mercedes-Benz motor vehicles in Malaysia**.**

[6] The third defendant (Daimler Chrysler AG) carried on the business as the manufacturer of Mercedes-Benz motor vehicles in the Republic of Germany and in various parts of the world**.** It is world renowned**.**

[7] This judgment concerned the plaintiff appellant and the first defendant respondent**.**

The salient facts

[8] Sometime in March 2007**,** the plaintiff appellant – familiar with the second and third defendants' public claims of high quality and standards attached to their Mercedes-Benz motor vehicles**,** purchased a brand new luxury Mercedes-Benz motor vehicle model S350L (**"the Mercedes-Benz motor car"**) from the first defendant respondent for an on the road price of RM769**,**040**.**23 excluding insurance**.** The Mercedes-Benz motor car was subsequently registered as WNH 59**.**

[9] The plaintiff appellant contended that there are statutory implied conditions and/or guarantees in relation to the purchase of the brand new Mercedes-Benz motor car pursuant to the Sale of Goods Act 1957 and the Consumer Protection Act 1999**.**

[10] Inter alia**,** the particulars of the statutory implied conditions and/or guarantees are set out in the Amended Statement of Claim and that would include the averment that the Mercedes-Benz motor car should be of a quality befitting a new luxury motor vehicle free from defects**.** Another averment would be that the Mercedes-Benz motor car should be reasonably fit for use as a new luxury motor vehicle for comfortable and uninterrupted travelling**.**

[11] The plaintiff appellant took delivery of the Mercedes-Benz motor car on 13**.**4**.**2006 and since that date**,** the plaintiff appellant encountered fundamental problems and defects in that the Mercedes-Benz motor car could not start thereby rendering the said motor car to be of unsatisfactory quality and/or unfit for its purpose**.**

[12] The particulars of the breach of implied conditions and/or guarantees are tabulated as follows**:**

No:	Descriptions of Problem/Defect	Date	Mileage
1	Vehicle could not start	02.05.2006	1,809
2	Vehicle could not start	20.08.2006	9,293
3	Vehicle could not start	28.08.2006	9,844
4	Vehicle could not start	26.10.2006	15,967
5	Vehicle could not start	15.01.2007	21,516
6	Vehicle could not start	26.02.2007	22,652
7	Vehicle could not start	21.05.2007	24,000

[13] On each occasion**,** the Mercedes-Benz motor car could not start and had to be towed to the first defendant respondent's workshop for repairs**.** And on each occasion**,** the Mercedes-Benz motor car had to be left at the first defendant respondent's workshop for repair works for a total period of approximately 128 days**.**

[14] After six (6) breakdowns for the same defect**,** the plaintiff appellant rejected the Mercedes-Benz motor car on 9**.**3**.**2007**.**

[15] Subsequently**,** the plaintiff appellant agreed to re-take the Mercedes-Benz motor car upon the assurances and guarantees of the first defendant respondent and the second defendant that the Mercedes-Benz motor car had been thoroughly inspected and was operating normally and**,** more importantly**,** that no further breakdown for the similar defect would occur again**.**

[16] Despite assurances that the defect had been rectified and after having re-taken the Mercedes-Benz motor car on 18.5.2007, the same defect recurred on 21.5.2007.

[17] This culminated in the plaintiff appellant rejecting the Mercedes-Benz motor car and, having lost all confidence in the said motor car, the plaintiff appellant re-affirmed its rejection of the said motor car on or about 25.5.2007.

Analysis

[18] Order 14 of the RHC allows the plaintiff appellant to secure judgment without the need of a full trial. It is an efficacious and expeditious procedure to allow the plaintiff appellant to dispose of its action where the first defendant respondent's defence is clearly unsustainable in law or on the facts. In this way, time and costs would be saved and the disposal statistic would be increased. However, if there are triable issues, summary judgment would not be appropriate.

[19] The High Court in **Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd [2005] 3 MLJ 552,** at pages 556 to 557, had this to say:

> **"(3)The plaintiff is confident that it will succeed in its cause of action and so the plaintiff files the Order 14 application. It is now trite law that a plaintiff may obtain a judgment against the defendant on the ground that the defendant has no cause of action.**

> **(4) The plaintiff must establish its cause of action, that is, copyright infringement and that the defendant has not raised any defence to the plaintiff's claim of copyright infringement or any triable issue for that matter. Once the plaintiff succeeds in making out a prima facie case, the onus then shifts to the defendant to show to this court as to why judgment should not be entered against it. One may ask, what then constitutes a triable issue or a *bona fide* defence? One may also ask, how does one assess whether there are triable issues?"**

[20] Again**,** the High Court in **Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd [2001] 2 AMR 1639,** at pages 1648 to 1649 had this to say**:**

> **"But a mere bare assertion by the defendant would not be sufficient. The duty of the court is quite onerous in the extreme. The court must be vigilant and must view in perspective at the whole scenario in order to ascertain whether the defendant has a real or what is commonly known as a bona fide defence."**

[21] So**,** in an Order 14 application the court should undertake a critical evaluation of the facts presented by the parties through their pleadings and affidavits and the court must always bear in mind that mere bare assertions or denials must be rejected outright**.** The Supreme Court speaking through Mohamed Azmi FCJ had occasion to say in **Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC,** at page 408**:**

> **"Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a**

> **judge is in no position to exercise his discretion judicially in an Order 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue."**

[22] We categorically say that mere bare denials or assertions do not constitute evidence and they cannot give rise to triable issues**.** This court in **Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363,** at page 367 aptly said**:**

> **"When an application is made for summary judgment under Order 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In the present case the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain."**

[23] Whether an issue is triable would depend on the facts and the law as disclosed in the affidavit evidence**.**

[24] Now**,** when the Mercedes-Benz motor car could not start on 21**.**5**.**2007**,** the said motor car had done 24**,**000 miles**.** The first defendant respondent had explained that on the first four occasions the battery of the Mercedes-Benz motor car was weak and this prevented the said motor car from starting**.** The first defendant respondent changed the battery on the first three occasions and the said motor car functioned normally**.** On the

fourth occasion, the first defendant respondent changed the alternator regulator of the Mercedes-Benz motor car. And on the fifth occasion, the SRS lit up and when it was re-programmed the Mercedes-Benz motor car functioned normally. On the sixth occasion, a fuse was blown and after a pre-fuse was changed the Mercedes-Benz motor car functioned normally. On the seventh occasion, the battery of the Mercedes-Benz motor car was weak.

[25] Further investigations were conducted by the first defendant respondent and it was found that the failure to start the Mercedes-Benz motor car occurred on each occasion in the early morning at the plaintiff appellant's employee's house at Taman Melawati. And the reason as to why the battery of the Mercedes-Benz motor car was weak was because the anti-theft alarm inclination sensor was triggered when the said motor car was parked on a very steep incline at the Taman Melawati's house of the plaintiff appellant's employee. The first defendant respondent replaced the inclination sensor and the said motor car functioned normally.

[26] Now, the plaintiff appellant's claim against the first defendant respondent, inter alia, is for the loss and damage suffered in relation and consequent to the supply of the Mercedes-Benz motor car. It cannot be denied that there are statutory implied conditions and/or guarantees that the Mercedes-Benz motor car are of acceptable quality and fit for all the

purposes for which goods of the type are commonly supplied. Section 32 of the Consumer Protection Act 1999 enacts as follows (the relevant parts):

> **"Implied guarantee as to acceptable quality**
>
> **32. (1) Where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality.**
>
> **(2) For the purposes of subsection (1), goods shall be deemed to be of acceptable quality–**
>
> **(a) if they are–**
> **(i) fit for all the purposes for which goods of the type in question are commonly supplied;**
> **(ii) acceptable in appearance and finish;**
> **(iii) free from minor defects;**
> **(iv) safe; and**
> **(v) durable."**

[27] It is crystal clear that when the Mercedes-Benz motor car could not start early in the morning when the said motor car was parked on a very steep incline at Taman Melawati there is a breach of the implied conditions and/or guarantees which rendered the said motor car not to be of satisfactory or acceptable quality and unfit for its purpose. On the last occasion on 21.5.2007, the Mercedes-Benz motor car was towed to the first defendant respondent's workshop and remained there till today. We agree with the contention of the plaintiff appellant that the first defendant respondent are in breach of the conditions and/or guarantees. Section 12(2) of the Sale of Goods Act 1957 states that a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. Indeed it is the stand of

the plaintiff appellant to reject the Mercedes-Benz motor car and they did so reject. The manner of rejecting goods are set out in section 45 of the Consumer Protection Act 1999 which enacts as follows (the relevant parts):

> **"Manner of rejecting goods**
>
> **45. (1) The consumer shall exercise the right conferred under this Act to reject goods by notifying the supplier of the decision to reject the goods and of the ground or grounds for the rejection.**
>
> **(2) Where the consumer exercises the right to reject goods, the consumer shall return the rejected goods to the supplier unless– ."**

[28] Here, the plaintiff appellant had rejected the Mercedes-Benz motor car when it was left in the first defendant respondent's workshop on 21.5.2007. Section 45(3) of the Consumer Protection Act 1999 states that where the ownership in the goods has passed before the consumer exercises the right of rejection, the ownership in the goods re-vests in the supplier upon notification of rejection. Leaving the Mercedes-Benz motor car in the first defendant respondent's workshop on 21.5.2007 without taking it back constitutes notification of the rejection.

[29] We took into account the admissions by both the first defendant respondent in its Defence and Counterclaim dated 5.10.2007 that the Mercedes-Benz motor car did have defects, albeit minor defects (here the plaintiff appellant denied that it was only minor defects) and given the numerous fundamental problems encountered by the plaintiff appellant, we are of the view that the Mercedes-Benz motor car is not of an acceptable

quality within the provisions of the Consumer Protection Act 1999**.** The relevant paragraphs in the first defendant respondent's Defence and Counterclaim averring to the minor defects can be found in paragraphs 11 and 12(i) and we will now reproduce these paragraphs in quick succession**:**

> **"11. Merujuk kepada perenggan 10 Pernyataan Tuntutan, pihak Plaintif membuat kesimpulan sendiri tanpa membuat pemeriksaan terhadap Kenderaan tersebut walaupun pada hakikatnya kerosakan tersebut adalah kecil dan tidak melibatkan penggantian enjin Kenderaan tersebut walaupun hakikatnya ianya telah dibaiki sepenuhnya.**
>
> **12. Selanjutnya dan/atau secara alternatif, tindak tanduk Defendan adalah tidak wajar dari sudut undang-undang dan ekuiti dan perlakuan yang sedemikian menyebabkan Plaintif terhalang untuk membatalkan secara sebelah pihak kontrak penjualan Kenderaan tersebut tanpa mengambil kira fakta bahawa:**
> **(i) Kerosakan Kenderaan tersebut adalah kecil hanya melibatkan penggantian 'ATA Inclination Sensor' dan 'Door Module' tanpa kerosakan enjin atau kerosakan lain yang besar yang boleh disifatkan menyebabkan Kenderaan tersebut tidak mempunyai kualiti boleh dagang dan/atau tidak mencapai tujuan ianya dibeli."**

[30] Accordingly**,** we are of the considered view that the plaintiff appellant was entitled to reject the Mercedes-Benz motor car**.** At this juncture**,** it is ideal to refer to three authorities**.**

[31] The first would be the case of **Rogers And Another v. Parish (Scarborough) Ltd. And Another [1987] 1 QB 933,** a decision of the Court of Appeal with a coram of Mustill and Woolf L**.** JJ and Sir Edward Eveleigh**.** In allowing the plaintiffs**'** appeal**,** the Court of Appeal held that goods which were defective on delivery were not to be taken to be of merchantable quality for the purpose of section 14 of the Sale of Goods Act

1979 (equivalent to our section 16 of the Sale of Goods Act 1957) by reason only of the fact that the defects had not destroyed the workable character of the goods, and it was not relevant to whether the goods had been of merchantable quality upon delivery that the defects had subsequently been repaired; that in respect of any passenger vehicle the purpose for which goods of that kind were commonly bought would include not only the purchaser's purpose in driving it but that of doing so with the degree of comfort, ease of handling, reliability and pride in its appearance appropriate for the market at which the vehicle was aimed; that defects which might be acceptable in a second hand vehicle and which would not therefore render it unmerchantable were not reasonably to be expected in a vehicle sold as new; and that the plaintiffs were entitled to repudiate the contracts since the vehicle was not as fit for its purpose as the plaintiffs were entitled to expect. At page 944, Mustill LJ writing a separate judgment had this to say:

> **"This being so, I think it legitimate to look at the whole issue afresh with direct reference to the words of section 14(6). Starting with the purpose for which 'goods of that kind' are commonly bought, one would include in respect of any passenger vehicle not merely the buyer's purpose of driving the car from one place to another but of doing so with the appropriate degree of comfort, ease of handling and reliability and, one might add, of pride in the vehicle's outward and interior appearance. What is the appropriate degree and what relative weight is to be attached to one characteristic of the car rather than another will depend on the market at which the car is aimed.**
>
> **To identify the relevant expectation one must look at the factors listed in the subsection. The first is the description applied to the**

> **goods. In the present case the vehicle was sold as new. Deficiencies which might be acceptable in a secondhand vehicle were not to be expected in one purchased as new. Next, the description 'Range Rover' would conjure up a particular set of expectations, not the same as those relating to an ordinary saloon car, as to the balance between performance, handling, comfort and resilience. The factor of price was also significant. At more than £14,000 this vehicle was, if not at the top end of the scale, well above the level of the ordinary family saloon. The buyer was entitled to value for his money.**
>
> **With these factors in mind, can it be said that the Range Rover as delivered was as fit for the purpose as the buyer could reasonably expect? The point does not admit of elaborate discussion. I can only say that to my mind the defects in engine, gearbox and bodywork, the existence of which is no longer in dispute, clearly demand a negative answer."**

[32] The second case would be that of **Stephens v Chevron Motor Court Ltd [1996] DCR 1, [1996] NZDCR LEXIS 29,** a decision of Judge J E MacDonald**.** In that case**,** the facts were these**.** The appellant there had purchased a 1983 Mitsubishi Pajero **("the vehicle")** from the respondent on 25 November 1994**.** Within a matter of days of purchase**,** the vehicle was found to be out of oil**,** with no brake or clutch fluid**.** The respondent rectified the defects**.** So**,** at that time**,** repair was chosen**.** Shortly afterwards**,** the vehicle started to **"blow smoke".** It was thought that the turbo charger needed to be cleaned**,** and the vehicle was referred to a car repairer for that purpose**.** The repairer replaced the valve stem oil seals**,** but the vehicle continued to **"blow smoke".** The vehicle was returned to the repairer**,** who removed the turbo charger**,** finding no oil traces that might suggest that the turbo chargor was at fault**.** Another repairer confirmed

that that was the case. By elimination, it was found that the rings were worn and had to be replaced. The cost of repairs, coming to approximately $1200, was paid by the respondent. In January 1995, after the last repairs, the appellant refused to uplift the vehicle and ceased paying hire purchase instalments. Cancellation of the contract was sought by solicitor's letter dated 27 January 1995. A complaint was lodged with the Christchurch Motor Vehicle Disputes Tribunal. The tribunal required the appellant to accept the vehicle back. The vehicle continued to suffer further mechanical problems. The appellant appealed to the District Court. The Court's focus was on the Consumer Guarantees Act 1993 (**"the Act"**), and the following issues were identified as requiring answers:

(1) Was the vehicle of **"acceptable quality",** as defined in section 7 of the Act**?**

(2) If the vehicle was not of **"acceptable quality",** had the consumer required the supplier to remedy the failure within a reasonable time in accordance with section 19 of the Act**?**

(3) Was there a failure of a **"substantial character"** within the meaning of section 21 of the Act**?**

(4) If the consumer had required the supplier to remedy the failure within a reasonable time, and the supplier did so, did the right to reject the goods under the failure of a **"substantial character"**

provision still allow for rejection under section 21 of the Act – did the rights in sections 18(2) and (3) exist concurrently (in that they might both be exercised) or sequentially (so that if a right to one existed**,** the right under the other was automatically extinguished)**?**

(5) If it was decided that there was a failure of a **"substantial character",** did the Court have the jurisdiction to order the rejection of the goods supplied within the terms of section 47 of the Act**,** as well as the right to order a refund**?**

(6) If the Court did have the jurisdiction to order the return of the vehicle**,** as well as a refund**,** did it also have the power to make an allowance in favour of the supplier for depreciation and compensation for the consumer**'**s use of the vehicle from the date of purchase down to the date of return**?**

[33] In allowing the appeal**,** cancelling the contract**,** ordering return of the vehicle to the respondent and refunding to the appellant the moneys she had paid**,** Judge J E MacDonald had this to say**:**

> **"…. I consider that the correct approach to the Act was to first consider whether the vehicle was of 'acceptable quality'. The tribunal considered it was not and as I perceived it there was no quarrel with that conclusion. The consequence of that conclusion was that the appellant was then entitled to seek cancellation of the contract if the failure could not be remedied or it was of a 'substantial character' as envisaged by section 21. In that regard I have found that the failure was of a 'substantial character'. I have also found that the remedy sought was cancellation and not repair.**

Therefore once cancellation was sought the respondent was obliged to accept it. It was not for the respondent to decide that it was unnecessary and proceed to carry out repairs which is effectively what occurred.

As far as the tribunal's decision is concerned, having found that the vehicle was not of 'acceptable quality' in my view it was obliged to go on and consider whether the failure was of a 'substantial character' and in turn consider the provisions relating to rejection under sections 18 and 21. In failing to do this I consider that the tribunal has erred in law and in effect there has been a failure to properly consider the provisions of the Act. In the process the appellant has been deprived of the right of rejection that should have been available to her."

[34] The third case would be the case of **Cooper v Ashley & Johnson Motors Ltd [1997] DCR 170; [1996] NZDCR LEXIS 19,** a decision of Judge G V Hubble**.** The facts taken from the headnotes are as follows**:**

"On 12 June 1995 the plaintiff visited the defendant's yard. He test-drove a 1989 Nissan Fairlady and then entered into a contract to purchase it for $41,000. This vehicle was a secondhand Japanese import and had come into New Zealand in January 1995. It was sold on 25 January 1995 with an odometer reading of 39,320 km. The vehicle was purchased by the defendant for $36,000 and sold to the first purchaser for $47,000. Five months later the defendant repurchased the vehicle for $35,000 with an odometer reading of 42,000 km. The odometer read 43,465 when the plaintiff purchased the vehicle. The defendant's salesperson told the plaintiff the vehicle was a good one and as far as she was aware the odometer reading was accurate, the vehicle having had only one owner in New Zealand.

From purchase, the vehicle was hard to start and was not running smoothly. Within three days the plaintiff complained to the defendant and was referred to a workshop, which diagnosed transmission problems which required repairs costing $2000. The cost was paid by the defendant. After repairs there was still difficulty in starting the vehicle and it ran poorly when cold but satisfactorily when warm. In September the brake indicator lights showed malfunction. The plaintiff paid $342 to have the malfunction repaired making no claim

on the defendant. In November the vehicle's drive shaft failed, and was repaired by the plaintiff for $510. In early December the vehicle was not running well and spark plugs were replaced. Late in December, using another mechanic, it was found the cam belt was very worn. It was replaced but the vehicle still ran roughly. The mechanic thought the vehicle had done 80,000 km rather than 40,000. The plaintiff paid $586 for the repairs. The defendant was told by the plaintiff about the various faults and was asked if it was prepared to repair them. The defendant was not.

The vehicle was taken back to the original repairer who cleaned electrical injectors, replaced a water pump and fuel filter and installed a turbo boost. The vehicle still ran poorly. The plaintiff paid $893.82 for the repairs. The vehicle was again referred to that mechanic in April but no fault could be found.

In early May the plaintiff tried a third mechanic who could not solve the problems. The plaintiff paid that mechanic $757.87. The plaintiff then telephoned the defendant to seek its assistance. It was not prepared to assist further. On 22 May 1996 the plaintiff wrote to the defendant purporting to cancel the contract and took proceedings against the defendant the same day.

The plaintiff argued he was entitled to cancel the contract under the Consumer Guarantees Act 1993. The defendant contended (inter alia) the plaintiff had retained the vehicle for too long to enable him to cancel the contract."

[35] It was held**,** again taking from the headnotes**,** as follows**:**

"(giving judgment for the plaintiff for part of his claim)

(1) The Consumer Guarantees Act 1993 ('the Act') clearly vests the consumer with new rights focused on reasonable consumer expectations rather than the previous rigid and technical approach. Where it was found there had been a breach of the Act a consumer was given the option under section 18(2) of requiring the supplier to remedy the defect within a reasonable time or alternatively to reject the goods and seek damages and compensation.

(2) A consumer's election to have repairs carried out by the dealer might not prejudice a subsequent right to reject the goods if the consumer had not been provided with sufficient information by the dealer to make an informed decision as to whether to reject or not. *Stephens v Chevron Motor Court Ltd* [1996] DCR 1, referred to.

(3) The vehicle was supplied in breach of the guarantee given by section 6 of the Act as at the time of supply it had substantial latent defects in that the transmission was faulty; the driveshaft couplings were in a seriously worn state and required replacement; and the vehicle was starting poorly and running roughly, notwithstanding the vehicle was said to be a good one and had relatively low mileage which was correct as far as the dealer was aware. A reasonable customer fully acquainted with the defects would not have regarded the vehicle as acceptable.

(4) In order to reach a conclusion that for the purpose of section 18(3) there had been a failure of a substantial character as defined by section 21 because of the defects it was not necessary to determine whether the vehicle departed in one or more significant respects from the description in that technically there might have been more than one owner; that the mileage might have been greater than indicated; or that the vehicle could hardly be described as a good one.

(5) Section 20(3) of the Act provided that the rules relating to loss of right to reject found in section 20 applied notwithstanding the provisions found in section 37 of the Sale of Goods Act 1908. Section 20(3) plainly imposed its own regime and accordingly little assistance could be gained from case law relating to section 37.

(6) Time to reject would begin to run as soon as it could be said that the goods had a 'substantial defect', the substance of which was known by the consumer. An understanding of the nature of the fault was relevant. Section 21(a) allowed a consumer to become 'fully acquainted with the nature and extent of failure'. The 'substantial defect' might either exist as a latent defect at the time of purchase or it might result because of an accumulation of more minor defects which in themselves could not be described as 'substantial'. In that situation a point would eventually be reached where the consumer could say convincingly that he or she had no confidence in the reliability of the vehicle. It was unlikely that a Court would tolerate a lapse of years before that point was reached but certainly several months might well elapse depending upon a number of minor problems and the periods in which the vehicle operated satisfactorily. In such a case the consumer would be fully informed because he would have a full knowledge of the history of the minor faults and would be expected to reject immediately at the point where he could be said to have lost confidence in the reliability of the vehicle.

(7) The 'accumulation of small defects' approach had currency in New Zealand. Section 21(b) clearly contemplated a multiplicity

of faults which individually went beyond mere trivia (ie significant) but which might not individually have prevented a buyer from purchasing as contemplated in section 21(a).

(8) Where the failure of a substantial character was in the form of a latent defect, but could be proved to have existed at the time of sale, time would not begin to run until that defect had not only been identified but had been identified to the extent that the purchaser could be said to be 'fully acquainted with the nature and extent of the failure' (section 21(a)). Only then could an informed decision be made whether to reject or have (it) repaired.

(9) The supplier had a continuing obligation to provide a consumer with sufficient information on which to make an informed decision to reject or repair. If a problem of a 'substantial character' existed at the time of sale, the dealer was prima facie responsible for the diagnosis of that problem and to fully inform the purchaser accordingly. If the dealer abdicated that responsibility to the purchaser then he could not be heard to complain if the purchaser took a long time to carry out the diagnosis himself.

(10) Section 22(2) of the Act which required a consumer to return rejected goods to the supplier was silent as to when the goods must be returned and it would not be unreasonable for the consumer to hang on to those goods until such time as the purchase price was in fact refunded. The continuing obligation to return the goods to the dealer could then be put into effect. A different situation could clearly arise if the consumer having rejected the goods continued to use them.

(11) The plaintiff having elected to do repairs himself without giving the dealer an opportunity of doing them at its cost within a reasonable time, pursuant to section 18(2) of the Act could not pursue the claim for the cost of those repairs."

[36] In his judgment**,** Judge G V Hubble had this to say**:**

"*Summary conclusion*

The defendant is in breach of the Consumer Guarantees Act and, in particular, the guarantee as to an acceptable quality. The vehicle was supplied with a substantial defect and the plaintiff retained the right to reject the car despite having used it over a period of months because the cause of the malfunction was not diagnosed. The election to reject has been exercised pursuant to section 23 and ownership in the goods has therefore passed to the defendant

pursuant to section 22(3). The vehicle has effectively been retrieved by the supplier pursuant to section 22(2)(b) and accordingly the plaintiff is entitled to judgment for the full amount of the purchase price being $41,000 together with interest at 11 per cent from the date of rejection being 22 May 1996."

[37] His Lordship concluded in this way**:**

"*Conclusion*

The plaintiff is entitled to judgment against the defendant for the sum of $$44,130.53 together with interest at 11 per cent on $41,000 from 15 May 1996 until the day of judgment. The plaintiff is also entitled to costs and disbursements according to scale."

[38] Here**,** the facts are clear and undisputed and there are no triable issues and the defence of the first defendant respondent is totally misconceived**.** We categorically say that not all cases must go for trial**.** Mohamed Azmi SCJ in **Bank Negara Malaysia v Mohd Ismail & Ors (supra)** at page 408 aptly said**:**

"Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under Order 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (*See Cow v Casey* [1949] 1 All ER 197 and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at page 516)."

[39] The Mercedes-Benz motor car encountered fundamental problems in that it could not start**.** The defects occurred on seven occasions**.** The supporting documentary evidence speak volumes in favour of the plaintiff appellant**:**

"(a) the first defendant respondent's invoice no**:** IV 061499/NZ 061026J dated 7**.**9**.**2006 as per exhibit **"PN-1"** of the plaintiff appellant's first affidavit (see page 211 of the appeal record at Jilid 3) carried the following notes**:**

"To attend breakdown service at Taman Melawati KL – vehicle cannot start .... ."

(b) the first defendant respondent's invoice no**:** IV 063373/NZ 063108J dated 7**.**9**.**2006 as per exhibit **"PN-2"** of the plaintiff appellant's first affidavit (see page 213 of the appeal record at Jilid 3) carried the following remarks**:**

"To check vehicle cannot start .... ."

(c) the first defendant respondent's invoice no**:** IV 063471/NZ 063227J dated 7**.**9**.**2006 as per exhibit **"PN-3"** of the plaintiff appellant's first affidavit (see page 215 of the appeal record at Jilid 3) carried the following remarks**:**

"To attend breakdown service at Taman Melawati KL – vehicle unable to start .... ."

(d) the first defendant respondent's invoice no**:** IV 064504/NZ 064398J dated 18**.**1**.**2007 as per exhibit **"PN-4"** of the plaintiff appellant's first affidavit (see page 217 of the appeal record at Jilid 3) carried the following notes**:**

"To attend breakdown at Taman Melawati, Kuala Lumpur –
To check vehicle cannot start .... ."

(e) the first defendant respondent's invoice no**:** IV 065906/NZ 065910J dated 18**.**1**.**2007 as per exhibit **"PN-5"** of the plaintiff appellant's first affidavit (see page 221 of the appeal record at Jilid 3) carried the following notes**:**

"To check SRS light on sometimes – check vehicle cannot start.... ."

(f) the first defendant respondent**'**s warranty invoice no**:** 701 dated 5**.**4**.**2007 as per exhibit **"PN-6"** of the plaintiff appellant's first affidavit (see page 223 of the appeal record at Jilid 3) carried the following remarks**:**

"Check vehicle at time cannot start."

(g) the plaintiff appellant's letter to the first defendant respondent's executive chairman dated 28**.**8**.**2006 as per exhibit **"PN-7"** of the plaintiff appellant's first affidavit (see page 225 of the appeal record

at Jilid 3) alluding to the time taken to repair the Mercedes-Benz motor car**.**

(h) the plaintiff appellant**'**s letter to the first defendant respondent**'**s executive chairman dated 30**.**10**.**2006 as per exhibit **"PN-9"** of the plaintiff appellant**'**s first affidavit (see page 230 of the appeal record at Jilid 3) alluding to the fourth breakdown of the Mercedes-Benz motor car and the contents of the letter read as follows**:**

"MERCEDES BENZ S350 (Registration No. WNH 59)
4th Breakdown

I write to seek YBhg Tan Sri's attention and assistance to resolve our inconvenience and frustration with regard to series of breakdowns to one of our company's car, Mercedes Benz S350 (WNH 59), which we purchased on 10th April 2006.

For YBhg Tan Sri's information, the above car had been undergoing several breakdowns during a short span of time on the following dates:-

1. **1st Breakdown dated 2nd May 2006.**
2. **2nd Breakdown dated 20th August 2006.**
3. **3rd Breakdown dated 28th August 2006.**
4. **4th Breakdown dated 26th October 2006.**

Earlier on, in pursuance to the 3rd breakdown, we had written to YBhg Tan Sri dated 28th August 2006 to rectify the problems. After the last repair on 29th August 2006, we were assured by your workshop personnel that the car would not breakdown again as the computer system and the battery system has been completely checked and repaired. Unfortunately, it had again encountered the 4th breakdown and it seems that the above car, which is apparently considered new is beyond repair or the workshop's personnel is incompetent to rectify the problems despite the assurance given.

As YBhg Tan Sri is well aware, a new prestigious and luxury car such as Mercedes Benz S350 undergoing a series of repairs would be very embarrassing to the user and more importantly would be critical to the good name of YBhg Tan Sri's company.

I sincerely hope that YBhg Tan Sri could take up the above matter seriously in order to avoid future recurrence."

(i) the plaintiff appellant**'**s letter to NAZA Motor Trading Sdn Bhd dated 9**.**3**.**2007 as per exhibit **"PN-12** of the plaintiff appellant**'**s first affidavit (see page 243 of the appeal record at Jilid 3) alluding to the returning of the Mercedes-Benz motor car and asking for a replacement and the contents of the letter read as follows**:**

"MERCEDES BENZ S350L (Registration No: WNH 59)

We refer to our earlier letters of complaints to your associate company, NZ Wheels Sdn Bhd on the above vehicle.

Due to the frequent breakdown which are totally unacceptable for such a new car and after numerous repairs that failed to rectify the problems affecting its reliability and its usability, we hereby return the said car to you.

We have no other alternative but to ask for a replacement of the above-mentioned car with a new trouble-free car of the same model since it is still under warranty.

Please acknowledge receipt of the car by returning the copy of this letter to us for our record."

(j) the plaintiff appellant's letter to the first defendant respondent dated 16.4.2007 as per exhibit **"PN-17"** of the plaintiff appellant's first affidavit (see pages 254 to 255 of the appeal record at Jilid 3) alluding to the hardship**,** inconvenience and embarrassment experienced by the plaintiff appellant's senior management staff as a result of the frequent breakdown of the Mercedes-Benz motor car**."**

[40] The first defendant respondent gave assurances that the problems pertaining to the Mercedes-Benz motor car had been rectified and that the said motor car was operating normally**.** The first defendant respondent's Chairman and Chief Executive Officer wrote a letter to the plaintiff appellant dated 22.9.2006 as per exhibit **"PN-8"** of the plaintiff appellant's first affidavit (see page 228 of the appeal record at Jilid 3) and that letter was worded in this way**:**

"MERCEDES BENZ S350-WNH 59

Reference is made to your letter dated 28th August 2006.

Thank you for writing to us pertaining to the above vehicle. We regret that you had experienced an unfortunate exception as our inspection ensured that the problem that you encountered had rarely occur. We are pleased to inform that the problem has been duly

rectified and the car has been collected by your employee on the 30th of August 2006.

I really appreciate your comments and suggestions on improving our services and I will definitely look into them seriously.

Again, thank you for your support to our company."

[41] Another letter from the first defendant respondent to the plaintiff appellant dated 27.3.2007 as per exhibit **"PN-15"** of the plaintiff appellant's first affidavit at page 250 of the appeal record at Jilid 3 should be referred to. That letter was worded in this way:

"RE : Mercedes Benz S350L
Registration No: WNH 59

We wish to inform you that the above-mentioned vehicle is ready for collection. We had carried out a thorough inspection on the vehicle together with DCM Technical Team and we assure you that the vehicle is now operating normally.

We apologize for the inconvenience caused and appreciate for your understanding on the above matter."

[42] Another assurance also came from the first defendant respondent to the plaintiff appellant by way of a letter dated 2.4.2007 as per exhibit **"PN-16"** of the plaintiff appellant's first affidavit at page 252 of the appeal record at Jilid 3 and that letter was worded in this way:

"RE : Mercedes Benz S350L
Registration No: WNH 59

We wish to inform you that we just carried out another thorough inspection on the vehicle together with DCM Technical Team and we assure you that the vehicle is now operating normally. Kindly advise us on the collection date of the said vehicle."

[43] Yet another letter from the first defendant respondent to the plaintiff appellant dated 15**.**5**.**2007 as per exhibit **"PN-20"** of the plaintiff appellant's first affidavit at page 263 of the appeal record at Jilid 3 in regard to the complete inspection of the Mercedes-Benz motor car should be referred to**.** That letter was worded in this way**:**

> **"RE : Mercedes Benz S350L**
> **Registration No: WNH 59**
>
> **We wish to inform you that, with the assistance of DaimlerChrysler Malaysia Technical Team, we have conducted a complete inspection and rectified the reported issues with the necessary parts replaced in accordance to the repair instruction of the motor vehicle manufacturer.**
>
> **Upon completion, the vehicle had been thoroughly road-tested and found to be operating normally. The said vehicle is ready for collection since 27 March 2007.**
>
> **Once again, we sincerely apologize for the inconvenience caused and appreciate for your understanding and patience on the above matter."**

[44] The plaintiff appellant's solicitors letter to the first defendant respondent and the second defendant dated 25**.**5**.**2007 as per exhibit **"PN-21"** of the plaintiff appellant's first affidavit at page 265 of the appeal record at Jilid 3 gave due notice of commencing legal proceedings in a court of law**.**

[45] All the documents alluded to in this judgment showed that the Mercedes-Benz motor car had defects and no further facts need be introduced by way of a trial in order to throw any light on the documents**.**

Consequently, there was no good reason to go formally to trial. The plaintiff's claim in **Carlsberg Brewery Malaysia Bhd v Soon Heng Aw & Sons Sdn Bhd & Ors [1989] 1 MLJ 104** was based on a guarantee document and the rights and liabilities of the parties depended upon the true construction of the guarantee document. Since it was within the contemplation of the parties that the liability of the defendants as guarantors was to be incurred both before and after signing the guarantee document, the court granted summary judgment in favour of the plaintiff. Likewise here, based on the documents, there was no necessity to proceed to trial.

[46] We were satisfied that there were no circumstances that ought to be investigated as envisaged in **Miles v. Bull [1968] 3 All ER 632,** at page 637 and summary judgment should be entered against the first defendant respondent.

[47] Since the first defendant respondent had admitted that the Mercedes-Benz motor car had defects and the assurances that the said motor car had been rectified, the plaintiff appellant rightly rejected the said motor car within a reasonable period of time.

[48] While admitting that the Mercedes-Benz motor car had defects, the first defendant respondent averred that the said motor car had been repaired and therefore was of an acceptable quality. But, to begin with, if

the Mercedes-Benz motor car could not start in the morning**,** it cannot be said to be of an acceptable quality and the plaintiff appellant was justified in rejecting the said motor car**.**

[49] In **Woodley v. Alex's Appliances Ltd. [1982] 16 Sask R 24,** the Court of Appeal of Saskatchewan held that a string of defects amounted in aggregate to a failure of a substantial character and allowed the purchaser in that case to reject the goods after a lapse of one year from the original purchase**.**

[50] A purchaser in **Baudais v Saskatoon Motor Products (1973) Ltd. [1987] SJ No 287 (QB)** experienced numerous mechanical problems with a Cadillac motor vehicle and had them repaired by the dealer and shared the costs with the dealer**.** The Court was of the view that the repairs considered individually and separately were not of a substantial nature but**,** when considered together**,** particularly the electrical problems**,** the Court was satisfied and held that **"a consumer would have no confidence in the reliability of the Cadillac".** Consequently**,** the Court came to the conclusion that the purchaser had the right to reject even though almost a year had elapsed**.** According to the Court**,** time began to run when the consumer **"no longer had any confidence with the Cadillac or that it could be repaired for worry-free driving".**

[51] And, notwithstanding that the plaintiff appellant's relief against the first defendant respondent was made pursuant to the provisions of the Consumer Protection Act 1999, we were satisfied that the plaintiff appellant had established through affidavit evidence that the Mercedes-Benz motor car was not in fact and in law of acceptable quality.

[52] All along the first defendant respondent dealt with the plaintiff appellant as a consumer in relation to the defects of the Mercedes-Benz motor car. That being the case, the first defendant respondent cannot turn around and say that the plaintiff appellant is not a consumer nor can the first defendant respondent argue that the plaintiff appellant is not entitled to the reliefs claimed (other than for distress and hardship) following the first defendant respondent's breach of the statutory implied conditions and/or guarantees pursuant to the Consumer Protection Act 1999 in relation to the supply of the Mercedes-Benz motor car. We categorically say that the plaintiff appellant has locus standi in this action and that cannot be doubted.

[53] The first defendant respondent averred that the Mercedes-Benz motor car was repaired on 2.7.2007 and/or on previous occasions. These averments are self-serving and irrelevant bearing in mind that the problem recurred and that the plaintiff appellant had rejected the Mercedes-Benz motor car on or about 9.3.2007 and on 25.5.2007.

[54] Consequently, all the tests and inspections of the Mercedes-Benz motor car alleged to have been carried out by the first defendant respondent after the event of the rejection of the said motor car must be considered as irrelevant.

[55] We were satisfied, based on the affidavit evidence, that there were no triable issues and the first defendant respondent had no defence on the merits. Thus, there was no necessity to call any witnesses to provide oral testimony in open Court.

[56] We agree that the plaintiff appellant being a corporation, cannot claim for distress and hardship. There was no affidavit evidence that the Mercedes-Benz motor car was assigned by the plaintiff appellant to an individual. See the illuminating judgment of Mah Weng Kwai JC (now J) in **Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Bhd & Anor [2010] 6 CLJ 681.**

[57] For the reasons alluded to in this judgment, we allowed the appeal of the plaintiff appellant with costs of RM10,000.00. We set aside the decision of the High Court. Deposit to be refunded to the plaintiff appellant.

[58] My learned brother Azhar Hj Ma'ah, JCA has expressed his concurrence with this judgment. The other panel member, Kang Hwee Gee, JCA has since retired.

14.9.2011

Dato' Abdul Malik bin Ishak
Judge, Court of Appeal,
Malaysia

Counsel

(1)	For the Plaintiff/Appellant	:	Mr. Malik Reza bin Zahanor
	Solicitors	:	Messrs Sreenevasan Young Advocates & Solicitors Kuala Lumpur
(2)	For the First Defendant/ Respondent	:	Mr. Jerald Gomez with Mr. Mohd Noh bin Nasira
	Solicitors	:	Messrs Nasira Aziz & Co Advocates & Solicitors Kuala Lumpur

Cases referred to in this judgment:

(1) Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd [2005] 3 MLJ 552.

(2) Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd [2001] 2 AMR 1639, 1648, 1649.

(3) Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, 408, SC.

(4) Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, 367.

(5) Rogers And Another v. Parish (Scarborough) Ltd. And Another [1987] 1 QB 933.

(6) Stephens v Chevron Motor Court Ltd [1996] DCR 1; [1996] NZDCR LEXIS 29.

(7) Cooper v Ashley & Johnson Motors Ltd [1997] DCR 170; [1996] NZDCR LEXIS 19.

(8) Carlsberg Brewery Malaysia Bhd v. Soon Heng Aw & Sons Sdn Bhd [1989] 1 MLJ 104.

(9) Miles v Bull [1968] 3 All ER 632.

(10) Woodley v Alex's Appliances Ltd [1982] 16 Sask R 24.

(11) Baudais v Saskatoon Motor Products [1987] SJ 287 (QB).

(12) Asia Pacific Information Services Sdn Bhd v Cycle & Carriage Bintang Bhd & Anor [2010] 6 CLJ 681.