

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. **CV2018-04407**

BETWEEN

**APTE GOPAUL**

Claimant

AND

**SOUTHERN SALES AND SERVICES CO. LTD**

Defendant

**Before the Honourable Mr. Justice V. Kokaram**

**Date of Delivery: Tuesday 10 December, 2019**

**Appearances:**

**Mr. Vashist Maharaj instructed by Ms. Karuna Maraj, Attorneys at Law for the Claimant**

**Mr. Ravindra Nanga instructed by Ms. Kenniesha N. Wilson, Attorneys at Law for the Defendant**

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**JUDGMENT**

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**Introduction**

1. The Audi A4 Ambiente Plus (A4 AP) is a luxury vehicle. The pride of German engineering. Like all motor vehicles it comes with its own demands for service and the teething problems of wear and tear. Despite the sophistication in engineering, no vehicle is perfect not even the A4 AP. Mr. Apte Gopaul, the Claimant, purchased his new A4 AP for \$419,022.50. He cannot complain about the performance of his vehicle for the first two years after its purchase. It was from August 2013 he encountered problems with it. Now some seven (7) years after its purchase, although he still retains the use of the vehicle, he claims that the vehicle is now unmerchantable and unfit for purpose and seeks damages for breach of contract against the dealer Southern Sales and Services Co. Ltd (SSSL).

2. One of Mr. Gopaul's main complaints about this prized motor vehicle was that occasionally its Electronic Power Control (EPC) light will illuminate indicating that something was wrong with the vehicle. The vehicle will either slow down or cut off. It quite clearly on those occasions posed a danger. It then occasionally can be restarted and driven to the final destination. But this is not a claim in negligence for negligent repair. Merchantability of a vehicle is one of degree. A minor defect may well render a vehicle not road worthy. It all depends on all the circumstances including the use of the vehicle by the consumer. Mr. Gopaul's case as to the question of merchantability and unfitness for purpose should be examined by reference to the condition of the vehicle at the time of delivery. In this case, there is no question that the alleged defects arose long after the date of delivery after some 13,562km of satisfactory use by the consumer. Although, there is an element of latency in any particular defect, the difficulty with this case for Mr. Gopaul is demonstrating that any alleged latent defect has gone beyond the question of wear and tear and is genuinely one which makes his vehicle unfit for purpose.
3. The parties have previously been in negotiations with a view to resolving the claim and I gathered from my meetings with them in our CMCs that there was still a good relationship between them. For this reason, I propose to offer to the parties' one final opportunity to resolve this claim after considering my judgment (which I have sent to them in advance) on the legal consequences of the evidence that has been adduced before me on this issue of the merchantability of Mr. Gopaul's A4 AP. Furthermore, I understand and empathise with Mr. Gopaul in relation to the inconvenience and the concern he would have encountered on those occasions when his vehicle required servicing. Equally, I empathise with the dealer who has demonstrated at all times their ability to repair and restore the vehicle's functionality.
4. While I understand Mr. Gopaul's frustration, I would like in this judgment to explain in plain terms to him why he was unable on the evidence adduced to demonstrate that the vehicle is unfit for purpose or not of merchantable quality. To do this I will examine briefly his claim, the main issue and the evidence that was adduced. However, such a legal result still does not leave the door closed to these parties to create their own solutions for a consumer with an aged A4 AP and a dealer with several brands of vehicles and a Service Manager who appears

to be from his evidence a competent service provider.

### **The Pleaded Case**

5. Very briefly, an examination of Mr. Gopaul's claim reveals a number of important features of this case. First, the particulars of damage to the vehicle were stated to be: Loss of engine power; EPC malfunction; Vibrating steering wheel; Rattling sound at rear of the vehicle; Scratched bumper; Unaligned suspension. From the evidence at the trial it appears that the main problem was the EPC light coming on signalling a problem with the vehicle, not that the EPC "malfunctioned".
6. Second, there is no claim for special damages. Nor are there any facts to support a claim for general damages. There is no value ascribed for the vehicle in its present condition nor any claim for loss of use if the vehicle was out of service for any considerable period of time. It is a plain and simple case for rescission and a total refund to Mr. Gopaul of all his purchase money for the vehicle. A vehicle which he purchased some seven (7) years ago and which he still retains and presumably enjoys its use.
7. Third, Mr. Gopaul has identified in his pleadings occasions when he complained to the Defendant of problems he experienced with the vehicle. However, on the face of the pleadings, his case appears vague and in some parts inconsistent. For example, in paragraph 9 in his Statement of Case he states that "for about three months the Claimant has been experiencing multiple problems" without specifying the dates, the occasions when the alleged problems occur or the nature of the problems. In paragraph 8 of the Statement of Case he states "shortly after taking possession of the vehicle it began malfunctioning in that the EPC light malfunctioned and the motor vehicle had less power." However, the invoices which he annexed to his pleadings, setting out the service record for the vehicle reveals that the earliest complaint made was in 2013, two years after delivery. Even at that time there was no complaint about the vehicle losing power.
8. The Defendant in its Defence has stated plainly that the vehicle was routinely serviced when it was brought to them. Further, that all the complaints were examined and it was determined that some of the complaints were due to a lack of understanding by Mr. Gopaul of the nature

and performance of the vehicle and with others the problem was rectified.

9. The Defendant contends that given the vehicle is now over seven (7) years old and the issues were either due to normal wear and tear and some were addressed under warranty, Mr. Gopaul has affirmed the contract and has lost the ability to rescind the contract given the length of time that has elapsed.

### **The Main Issue**

10. Mr. Gopaul has raised, therefore, the main issue for determination of whether the vehicle is unfit for purpose and not of merchantable quality. In determining this, the Court must examine the related question: whether through the passage of time he has indeed lost the right to reject the vehicle as the complaints are, on a balance of probabilities, of normal wear and tear rather than of latent defect with this vehicle. In analysing the evidence I have examined the nature of the complaints, the ability to diagnose the problems relatively quickly, the nature of the defect in relation to the vehicle's performance and the ability to remedy the deficiency. I have also examined the success so far by the dealer in keeping the alleged problem under control.

### **Analysis of the Evidence**

11. At the trial Mr. Gopaul led evidence from both himself and his son Avinash Gopaul who both used the vehicle for the family. The Defendant's main witness was Mr. David Melville, the Service Manager.<sup>1</sup> There was no expert evidence tendered by the Claimant. This is particularly important as the vehicle is still in his care. There was no attempt to produce by him the opinion of a qualified mechanic to demonstrate that the main problem with the vehicle after the passage of time remains a latent defect and not wear and tear. Further, there was no evidence of any other technician who serviced the vehicle when he alleged he had problems with the vehicle<sup>2</sup>. At the end of the trial the main facts and the service record for the vehicle were not in dispute between these parties.

12. Mr. Gopaul entered into an agreement with the Defendant to purchase the said vehicle at a

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<sup>1</sup> Mr. Scott Shepherd's Evidence was not required

<sup>2</sup> Such as Mileage Mack

sum of \$419,022.50. Prior to delivery of the vehicle he was allowed to test drive the vehicle in the presence of the sales representative, Mr. Ian Chadee and was allowed to inspect the exterior of the vehicle. The inspection, test drive and delivery of the vehicle was done in the presence of his son, Avinash Gopaul. No issues were found with the vehicle and they took delivery of the vehicle. The vehicle was serviced at the Defendant's company periodically either for routine service or in response to complaints made by Mr Gopaul. I conveniently set out the history of the service record based on the oral testimony and the service records below:

- (i) On 10<sup>th</sup> May 2012 the vehicle was brought in for routine service. The oil and filter were changed. The brakes and the fluid levels were checked. The mileage of the vehicle was 5193. No problems were reported in relation to its performance.
- (ii) The second service was on 18<sup>th</sup> February 2013. There are no service records for this service.<sup>3</sup>
- (iii) On 2<sup>nd</sup> August 2013 the vehicle was serviced. He reported a rough idle when the vehicle was in traffic; a noise emanating from the back left side of the vehicle; the screen above the steering panel had turned white for approximately fifteen minutes. The mileage of the vehicle was 13562. The Defendant rectified these problems and explained:
  - a) The rough idle was due to the design of the engine, that is the vehicle's transmission (a CTV- constant variable transmission) which disengages from the engine when the vehicle comes to a stop in traffic and there is a slight delay when the driver accelerates suddenly.
  - b) The noise to the back left came from the rear shock mount rubber which required lubricating. This is a natural occurrence through use of the vehicle. The lubrication was performed under warranty.
  - c) It was not possible for the screen above the steering panel to turn white. There

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<sup>3</sup> See paragraph 8 of the Witness Statement of Mr. David Melville filed 31<sup>st</sup> October, 2019

is a button on the steering wheel to turn part of the screen blank which may have explained what the Claimant experienced. The complaint was not duplicated upon checking and there was no further report of this issue. It is noteworthy that this complaint did not recur and could not therefore be attributable to any latent defect or indicator of a lack of merchantable quality or unfit for purpose.

d) The left side tyre needed to be aligned which was done at the service. At this time the vehicle was almost 2 years old and was doing 13,562km and it is possible given road and driving conditions that the vehicle of this age and with this type of usage will require an alignment.

(iv) In March 2014 the vehicle was serviced. There are no records for this service.<sup>4</sup> On this occasion Mr. Gopaul complained about the EPC light. The spark plugs and ignition coils were changed and a fuel additive was added all under warranty.

(v) Mr Gopaul alleged that on 22<sup>nd</sup> August 2014 he experienced problems with the EPC light and the vehicle was left at the Defendant's service station for three days before it was returned to him. He noticed the front bumper was scratched and the key chain from the vehicle was missing. The Defendant refuted this. Mr. Melville explained that during servicing it is not necessary to interfere with the vehicle's key chain therefore it is unlikely that the Claimant's key chain would have gone missing while the company was servicing the vehicle. He stated that they could not confirm if the vehicle came with a scratch on the underside of the front bumper. The scratch was only visible from the under side of the front bumper which is not normally checked. He contends that given the age of the vehicle it is possible that the bumper was scratched from the driving of the vehicle and not while it was in the care of the Defendant.

(vi) On 15<sup>th</sup> October 2014 Mr. Gopaul made a complaint of: irritating sound from rear vehicle on bumpy/ rough roads and going over speed bumps; gripping of tyres at slow

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<sup>4</sup> See paragraphs 12-15 of the Witness Statement of Mr. Apte Gopaul filed 31<sup>st</sup> October, 2019. See paragraphs 14 and 15 of the Witness Statement of Mr. David Melville filed 31<sup>st</sup> October, 2019

speed (car vibrates) while manoeuvring. The engine oil and oil filter were changed. All filters were checked as well as fluids and brakes. The mileage of the vehicle was then 23,184.

Mr. Gopaul alleged when the vehicle was returned that the suspension of the vehicle towards the left rear was higher than when the vehicle was returned to him. By emails dated 16<sup>th</sup> October 2014 and 7<sup>th</sup> November, 2014 he drew these issues to the attention of Mr. Melville. This observation by Mr. Gopaul was refuted by the Defendant.

- (vii) On 26<sup>th</sup> November 2015 the vehicle came in for service at 33,186 miles. There was a complaint about rough idle in the vehicle. The oil, filter, fluid levels and brakes were checked.

Since the last service in 2014 Mr. Gopaul complained about the EPC light. When the light comes on, he has to switch the vehicle off for approximately 5 minutes and then re-start. He also notified the Defendant of the issue via a number of emails.<sup>5</sup> In January 2015, he was granted an extended warranty of one year by a representative of the Defendant, Mr. Melville because of the persistent problem with the EPC light.

- (viii) On 5<sup>th</sup> January 2016 at 33215 miles the front disc pads were changed at a routine service. There were no other complaints made or recorded about the performance of the vehicle.

- (ix) On 27<sup>th</sup> January 2017 at 42,117 miles the vehicle was brought in for servicing. Mr. Gopaul complained this time that the RPM drops low when the vehicle comes to a complete stop in traffic (rough idle) and there was an irritating noise from rear of vehicle. It was repeated that the EPC light came on 12<sup>th</sup> August 2016. The Defendant addressed the issues.<sup>6</sup>

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<sup>5</sup> Emails sent 18/08/14, 22/08/14, 16/10/14, 14/01/15, 15/01/15, 18/02/15, 26/02/15, 17/4/15, 1/5/15, 13/05/15, 14/05/15 exhibited "A.G.3" in the witness statement of Apte Gopaul filed 31<sup>st</sup> October, 2019.

<sup>6</sup> It was found that the shocks required lubrication which was done. He contends the need for lubrication is not a defect and arises over time once the lubrication is washed off either whilst being washed over time or due to normal wear and tear from being driven.

- (x) On 5<sup>th</sup> December 2017 the vehicle came in for regular service and rear disc pads were changed. The mileage of the vehicle was 48,017. No complaint was made regarding poor performance of the vehicle.
- (xi) On 31<sup>st</sup> January 2018 at 49,601 miles, the vehicle was brought in for regular service and the complaint made was that the RPM drops on and off in traffic and since the rear disc pads were changed he noticed that whenever the A is engaged in traffic and the vehicle is parked upon the hand brake does not reset. The complaints were addressed.<sup>7</sup>
- (xii) On 12<sup>th</sup> August 2019 there were complaints that the EPC light came on nine (9) times on route from Tabaquite to Gasparillo and the vehicle vibrated and lost power.
- (xiii) On 14<sup>th</sup> August 2019, there were complaints that the EPC light came on and there was major vibration. The fuel injector was replaced.
- (xiv) On 19<sup>th</sup> August 2019, the complaints were that the EPC light was constantly coming on and there was severe loss of power and heavy vibration in the vehicle. The spark plug was changed.
- (xv) Mr. Melville stated that Mr. Gopaul had a scheduled appointment on 12<sup>th</sup> September,

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Mr. Gopaul also complained about the suspension of the vehicle and that he would hear a noise when he was driving into his garage. Mr. Melville explained to him that noise going into the garage occurred because the floor was smooth (tiled) which caused the tyre rubbing on the smooth surface. He demonstrated that on the company's garage floor with the vehicle since the floor also had a smooth surface. He also measured the height of the vehicle and showed Mr. Gopaul that it was the same.

He contends that the Mileage Report only indicates a normal alignment of the vehicle and not a suspension defect. He further contends that the Defendant never attempted to re-align the vehicle since they determined there was no issue with the suspension and therefore no need to attempt to fix or realign the vehicle.

<sup>7</sup> Mr. Melville contends that RPM means Revolutions per minute which relates to the particular type of engine. Engines can rotate at different speeds depending on the manner in which they are tuned. The revolution of the engine does not stay constant and it depends on the load of the vehicle, including the air conditioning, which may come on and off during normal functioning and cause the RPM to fluctuate. He stated that this is not a defect with the vehicle and is part of the normal operation.

He further explained that the handbrakes in the vehicle has two functions, it functions as handbrakes in the traditional sense of a parking brake and it can also be used as an automatic brake when the vehicle is at a standstill in traffic thereby allowing the driver to remove their feet from the foot brake. Once the accelerator pedal is depressed the automatic brake automatically disengages. This latter feature can be disengaged by pressing a button if the owner so chooses. There was no problem found with the hand brakes in Mr. Gopaul's vehicle.



2019 but he did not attend.

13. From the service record produced by the Claimant it appears that the vehicle was regularly serviced annually. Further, the only time when recurring complaints required the vehicle to be serviced frequently was in 2019 after the claim was filed and to be specific in August 2019. On that occasion the vehicle came in for service on three occasions in a relatively short space of time and specifically dealing with a loss of power issue.
14. Mr. Gopaul usefully exhibited his emails to the Defendant and this confirms that there was no complaint in writing or no complaint of substance about the vehicle's performance until 20<sup>th</sup> October 2014. Mr. Gopaul in his email dated 20<sup>th</sup> October, 2014 identified that the irritating sound from the rear of the vehicle no longer existed but identified another issue he detected with the suspension not being in the condition it was initially.
15. In further emails from February to May 2015 there are two complaints made by Mr. Gopaul of the EPC light coming on and the other that the EPC light coming on and the vehicle losing power. It was not made entirely clear in some of the emails whether his anxiety arose whenever he saw the EPC light coming on or whether it was that the vehicle shutting off every time the EPC light came on.
16. It would be convenient at this stage to examine some legal principles in relation to the question of lack of merchantability and unfitness for purpose.
17. Rahim J pointed out in **Marlon Rose v Routes Auto Limited** CV2017-04105:

“83. It is therefore clear to this court that merchantability is to be tested by reference to the condition of the vehicle at the time of delivery and that it is only in the most exceptional case that a new vehicle which on delivery was incapable of being driven in safety could ever be classed as being of merchantable quality. It was also clear to this court that the question of discoverability by itself does not affect the issue; in other words, the question of whether the defect is latent or patent is immaterial.

84. It is undisputed that the vehicle purchased by the claimant in this case was a new vehicle. It is further undisputed that the claimant purchased the vehicle to operate same

as a maxi taxi. In the case of **Gerard Antrobus v Neal and Massy Automotive Limited** (a case relied upon by the claimant) Dean-Armorer J had the following to say;

“52. In *Roger v. Parish* [1987] QB 933...Lord Justice Mustill described the purpose of the purchaser of a new motor vehicle: “that the purpose would not be merely driving a vehicle from one place to another but doing so with an appropriate degree of comfort, ease of handling and reliability...”

53. Where the specific purpose is for use as a taxi, it was my view that the purchaser would be entitled to expect more. No evidence was led, and indeed none was necessary, as to the phenomenon of the route taxi in this jurisdiction. A taxi driver in Trinidad or Tobago, would offer his vehicle for hire on chosen routes and would ply his route many times throughout the day and often at night, receiving cash payment at their chosen destinations. It was therefore my view, that where the specific purpose of purchasing a vehicle was for use as a taxi, it would be appropriate to add to the description of Lord Mustill, the qualities of reliability and durability over frequently travelled long distances.”

18. Similarly in **Danley Maharaj v Sterling Services Ltd** CV2015-00219 Seepersad J held that the purchaser of a Mercedes Benz who had to seek repairs on eight occasions was entitled to reject the vehicle. In that case the Claimant purchased the vehicle in August 2013 and shortly after its purchase between November 2013 to July 2014 he had to return the vehicle at least on eight occasions to effect repairs. Seepersad J observed:

“24. In **Cehave N.V. v. Bremer Handelgesellschaft m.b.h. The Hansa Nord** (1975) 3 WLR 447 at 468, the Court established that the issue of whether or not an article is of merchantable quality is fact dependent. However as demonstrated in **Rogers v. Parish** (supra) at page 945 and **Bernstein v. Pamson Motors (Golders Green) Ltd.** (1987) 2 ALL ER 220 at page 9 paragraph 3, the fact that a defect may be repairable or is under warrant does not automatically mean that the article is of merchantable quality. Where the defect is of a sufficient and/or significant degree then the item can be viewed as being not of merchantable quality but the mere fact that defects are manifest at the time of delivery

does not automatically render the vehicle as being not of merchantable quality and the factors that must be considered and the standards that are to be expected are closely related to the market at which the vehicle is aimed.

25. The law does recognize that where there is a warranty, the warranty gives effect to an implied term that the dealer ought to be given a reasonable opportunity to discharge the obligations under the said warranty.

26. The Court in the exercise of its discretion must also consider the facts of the case and apply an objective test that must have regard to the target market of the article in question. In the instant case, the vehicle was a luxury vehicle whose price point was significant and it is viewed an elite brand that has an international association with luxury and prestige. As was established in case like **Rogers v. Parish** (supra), the purchaser of a new vehicle can reasonably expect that such a new vehicle can be driven safely with an appropriate degree of comfort, ease of handling and with reliability and its use can reasonably be accompanied with the pride that is associated with the vehicle's external and internal appearance. With a luxury brand such as Mercedes, the expectations would be more heightened. The Court had to consider all these factors and the reasonable expectations of the Claimant as against the degree and significance of the complaint so as to determine whether the vehicle was reasonably fit for its purpose and was of merchantable quality. In determining merchantable quality the Court must be guided by the dicta as laid down in **Rogers v. Parish** (supra) and ultimately it is a matter of judgment for the Judge having considered the particular facts of the case.

27. The determination as to whether or not an item is of merchantable quality is a matter of degree and the appropriate weight to be apportioned to any one characteristic depends on the market at which the vehicle has targeted. The material factors to which the Court had to address its mind included inter alia:

- i. The nature of the complaint and nature of the perceived effects on vehicle;
- ii. The ability and time it takes to diagnose the complaint;
- iii. The gravity of the defect and consequence of the defect (whether minor or not)

on the performance, reliability, use, safety of or exposure of damage to the vehicle or comfort of the owner on the vehicle;

iv. The ability to successfully remedy the defect;

v. The expense to remedy the defect;

vi. Success in diagnosis and repair of problem prior to rejection;

vii. Communication of diagnosis or repair of the problem to the buyer and his conduct prior to rejection;

viii. Price of the motor vehicle”

19. Some useful principles emerge from these authorities:

- Section 16(1) of the Sale of Goods Act Chapter 82:30 provides that where a seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality.
- However, there is no such condition: (a) as regards defects specifically drawn to the buyer’s attention before the contract is made; or (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.
- It is not only the question of purchasing a vehicle to get from one point to the other but of doing so in an appropriate degree of comfort bearing in mind the vehicle’s reliability.
- The issue of merchantability is fact specific.
- The fact that a defect is repairable does not automatically mean that the vehicle is of merchantable quality.
- The question of merchantability is usually to be determined at the date of delivery.
- The buyer may still have a reasonable period of time after delivery within which a

complaint can be made of a defect affecting the road worthiness of the vehicle.<sup>8</sup>

- The Court will apply an objective test having regard to the target market of the vehicle in question.
- The lapse of time and the effluxion of time can be a bar to rescission where a reasonable period of time has elapsed and it would be inequitable in all the circumstances to grant rescission.

20. With these principles in mind, I now analyse Mr. Gopaul's main complaints.

21. **The EPC light:** The EPC is the Electronic Power Control. The EPC light illuminating is a warning and safety feature of the vehicle. Mr. Gopaul testified that it kept coming on. However, it is clear from his evidence in chief and in cross examination that the EPC light did not always illuminate since he purchased the vehicle; that it only came on around the periods for which he complained and in any event the vehicle did not always lose power when the EPC light did illuminate.

22. Despite having the use of the vehicle, Mr. Gopaul failed to produce any expert evidence or any evidence of a technician as to the cause of the loss of power. In his cross examination he frankly confessed his lack of expertise and his evidence is to be treated as a consumer whose knowledge is limited to his experience with the vehicle and not of the root causes of any problems.

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<sup>8</sup> In **Danley Maharaj v Sterling Services Ltd** CV2015-00219 Seepersad J referred to Lord Hope of Craighead in **J and H Ritchie Ltd. v. Lloyd Ltd.** (2007) 2 WLR where he observed at paragraph 16:

"The nature of the defect was not immediately obvious and it was not known what, if anything, could be done to correct it. But the underlying principles are the same. The effect of section 35(2)(a) is that, as the buyer is not deemed to have accepted the goods, he retains the right to reject them. That right will, of course, be lost if, at any time, he decides to accept the goods or is deemed to have accepted them. But it is a right of election which the buyer cannot be expected to exercise until he has the information that the needs to make an informed choice. The seller, for his part, cannot refuse to give him the information that he needs to exercise it."

In **Finch Motors Ltd v Quin** (No 2) (1980) 2 NZLR 519, Hardie Boys J observed referenced **Henry Kendall v Grimsdale and Sons Ltd** [1969] 2 A.C. 31 where it was observed:

"By getting the seller to undertake to use his skill and judgment the buyer gets under section 14 (1) an assurance that the goods will be reasonably fit for his purpose and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment on the part of the seller would not have detected them."

“Q: Similarly, if there is a problem with the fuel that you are putting in your vehicle, that is not a defect of the vehicle, it is a problem with the fuel, correct?”

A: Correct

Q: Can you assist anywhere in your witness statement do you say what cause these issues with your vehicle?

A: Manufacturing defect.

Q: Your position is that these issues that you had is manufacturing defects?

A: Yes.

.....

Q: So if I were to tell you that given the nature of the spark plugs and ignition coils being consumables, it is possible that it can wear out and caused the EPC light to come on. Can you dispute that?

A: I cannot dispute that because I don't know. I am not a technician.”<sup>9</sup>

23. Mr. Melville's explanation was unshaken in his cross examination and I find his answers plausible. Mr. Melville explained that the issue with the EPC light was not an issue isolated to the Claimant's vehicle and affected other Audi vehicles. The issue was referred to Audi International who advised that the issue appeared to be related to the quality of fuel being sold in Trinidad and not a problem with the vehicle. It appeared that impurities in the fuel being used caused the vehicles to mis-fire due to the clogging of the injectors and/or fouling of the spark plugs causing the EPC light to come on.

24. Mr. Gopaul was advised of this information and of the fact that the action of turning off the vehicle and restarting quickly dries the plugs and allows the vehicle to function normally. Mr. Melville contends that the EPC light was the only issue outside of regular wear and tear age and regular maintenance that was found with the Claimant's vehicle. Importantly, before the commencement of this action Mr. Gopaul was aware of the Defendant's explanation of the

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<sup>9</sup> See Claimant's submission 6<sup>th</sup> December 2019

quality of the fuel. It was also pleaded in paragraph 6 of the Defence. There was no Reply filed and importantly no case advanced that the Company was negligent in failing to implement any mechanisms to deal with “impure” fuel. Further, there is no pleaded case that the Defendant owed a duty to advise its customers of impure fuel affecting their vehicles.

25. Most recently the EPC light illuminated and was dealt with in 2018 and 2019. On 11<sup>th</sup> August 2019, the EPC light came on while Mr. Gopaul was proceeding in close vicinity to the Piparo Road. He reported the problem to the Defendant on 12<sup>th</sup> August 2019. A Repair Order was prepared based on the complaint. When Mr. Gopaul arrived with the vehicle the EPC light was not on and the Service Department checked the vehicle, road tested it and returned it to him. The Repair Order indicated that no work was done on the vehicle as no repairs were necessary.
26. Two days later on 13<sup>th</sup> August 2019, the EPC light came on again. He had to leave his vehicle by a relative and later that night his son Avinash collected the vehicle and dropped it off at the Defendant’s company around 8:30pm. A Repair Order was prepared. It was found that there was an intermittent fault with a fuel injector and Mr. Melville instructed that the fuel injector should be replaced since a fault could be generated due to contamination by the fuel and could reoccur if all the particles were not cleared from the injector which is a sealed unit.
27. On 18<sup>th</sup> August 2019, while proceeding along the Beetham Highway with his family, his son Avinash was driving when the EPC light came on. The vehicle lost power and began to vibrate violently causing it to automatically slow down. Avinash had to veer off the Beetham Highway onto the emergency shoulder and switch the vehicle off. On 19<sup>th</sup> August 2019 the Claimant made a complaint about the EPC light. The vehicle was scanned and it was diagnosed with a defective spark plug. Mr. Melville contends that this was due to the failed injector that was replaced on 14<sup>th</sup> August 2019. Given the nature of the engine, if the injector, which delivers fuel to the combustion chamber where the fuel is ignited by the spark plug is defective, the defective injector can cause the spark plug to foul and require replacing. He contends that such a defect can occur a few days after an injector is replaced.
28. From the cross examination of both parties it was clear that Mr. Gopaul had no idea why the

EPC light was illuminating. Mr. Melville explained the need to change the injectors and the spark plugs and its correlation to the type of fuel being used. Two aspects of Mr. Melville's testimony bear special mention; his explanation obtaining the manufacturer's assistance to diagnose the problem which eliminated any defect in the vehicle. Second, his explanation of the performance of the vehicle after long periods of use as in this case and the associated problems with the type of fuel contaminating the spark plugs and injectors which in turn will affect the performance of the vehicle. It is a misconception in the Claimant's closing arguments to say that there was a problem with the EPC light. The EPC light merely signals a problem being experienced with the vehicle as explained by Mr. Melville. I am satisfied that the problem was of regular wear and tear and there is no evidence of a latent defect.

29. **Dent in bumper and lost keys:** These were not significant defects and irrelevant to the question of latent defect and merchantability.
30. **Vibrating steering wheel:** This problem was rectified and there was only one complaint where this occurred.
31. **Unaligned suspension:** There was no evidence from Mr. Gopaul save for his own testimony of this alleged defect. The Court is not inclined to simply accept his allegation in preference to Mr. Melville. There was no independent evidence with respect to the alignment or any other default which could so easily have been obtained by having another mechanic examine the vehicle and produce the evidence to this court.
32. For the Defendant, the cross examination demonstrated that Mr. Melville is quite a competent and responsible service manager; that he took Mr. Gopaul's complaints seriously; that he contacted Audi international; that he was concerned about the EPC light and did everything to repair any complaints; that he took the time to explain to Mr. Gopaul the details and performance of the vehicle. From his evidence it is unrefuted that it is more probable that the vehicle's performance was being affected by contaminated fuel and not by a latent defect in the vehicle. If it was so defective then why was it repaired and fit for driving after servicing it? Even if the problem recurred, the Defendant has demonstrated that far from a latent defect it has become, at worse, a teething problem which has manifested through age



and usage over time and not unexpectedly with such vehicles.

33. Mr. Gopaul, of course, purchased a luxury vehicle and he should expect and assume that he could enjoy a special driving experience in comfort. Similarly, Mr. Gopaul must admit that he did not experience any material problem with the vehicle until 2014, three years after its purchase. Unlike the cases referred to the Court<sup>10</sup>, the problem with this A4 AP did not manifest until long after the delivery of the vehicle.

### **Conclusion**

34. The alleged defects do not cumulatively amount to a latent defect nor make it unfit for purpose. Many of the problems were rectified. The gripping on the surface was easily explained. The rough idling was dealt with. There were no persistent complaints about these matters and once reported the repairs were effected relatively easily. There was no defect detected with the vehicle for this brand by Audi International. The only problem which occurred after the passage of time was the EPC light coming on signalling the vehicle losing power. This was due to clogged injectors or defective spark plugs caused by the impurity in fuel. Far from it being un-roadworthy, the vehicle's safety features were still functioning and the defect is not attributable to latency in the product or defect in the design. There is no other plausible explanation proffered except for the impurities of the fuel which is a matter over time affects the vehicle's performance. It was not demonstrated that the reason for the loss of power was attributable to some fault beyond the quality of the fuel necessitating the treatment of spark plugs and injectors. These are fairly common matters associated with wear and tear although I accept that it is equally an inconvenience.

35. Mr. Gopaul's continued use of the vehicle demonstrates that he is still obtaining value for it and the lapse of time in this case in rejecting the goods has in these circumstances, made it inequitable for him to claim rescission of the contract.

36. On a balance of probabilities, therefore, the Claimant has failed to prove that the A4 AP lacked

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<sup>10</sup> **Danley Maharaj v Sterling Services Ltd** CV2015-00219, **Marlon Rose v Routes Auto Limited** CV2017-04105, **Rogers and Another v Parish (Scarborough) Limited and another** [1987] 1 QB 933, **Bartlett v Sidney Marcus Ltd** (C.A) [1965] 1. W.L.R. 1013, **Finch Motors Ltd v Quin** (No 2) (1980) 2 NZLR 519, **Gerard Antrobusy Neal & Massy Automotive Limited** CV2011-03442

merchantable quality and is not fit for purpose. It may well be that after the passage of time after wear and tear like most vehicles, the time has come for the consumer to balance the cost of maintaining an aging vehicle with the cost of purchasing a new one. This I can safely leave up to the parties to determine and revert to the Court.

37. The Claimant will pay to the Defendant costs on the prescribed scale quantified in the sum of \$63,000.00.

**Vasheist Kokaram**  
**Judge**