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MAGCO DAILY LEGAL LESSONS #25

LEGAL TOPIC: CONSUMER RIGHTS AND LIABILITY AGAINST MANUFACTURERS AND MERCHANTS FOR DEFECTIVE OR INFERIOR PRODUCTS

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INTRODUCTION

There are various measures in place to safeguard the buyers of products from manufacturers and other salespersons from engaging in unfair practices in law. The **Sale of Goods Act Chap 83:**30 addresses the Rights of Consumers in relation to Products sold to them.

Section 16 of the **Sale of Goods Act** states:

> *"(1) Except as provided by this section and section 17 and subject to any other written law, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.*

(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 merchantable quality****, except that 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.

(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 suppled under the contract are reasonably fit (and where appropriate reasonably durable) 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.*

(4) An implied condition or warranty about quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

(5) Subsections (1) to (4) apply to a sale by a person who in the course of a business is acting as agent for another, as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

(6) Goods of any kind are of merchantable quality within the meaning of subsection (2) ***if they are fit for the purpose or purposes for which goods of that kind are commonly bought (and where appropriate as durable) as it is reasonable to expect having regard to any description applied to them, the price if relevant, and all the other relevant circumstances.****"*

Section 16 of the **Sale of Goods Act** therefore provides that there is an implied condition that the goods supplied under a contract between seller and buyer are of merchantable quality, as described in section 16(6) of the Act or fit for the purpose for which they are being sold. However, no such condition arises in relation to defects specifically drawn to the buyer's attention before the contract is made, or if the buyer examines the goods before the contract is made, as regards defect which an examination ought to reveal.

MERCHANTABLE QUALITY

An important local case involving the purchase of a Mercedes Benz vehicle is ***Danley Maharaj v Sterling Services Ltd. CV2015-00219*** where Seepersad J. observed:

"*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 by 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."

In ***Danley Maharaj v Sterling Services Ltd. (supra),*** it was further stated that in determining merchantable quality, the Court must be guided by the dicta as laid down in ***Rogers v Parish*** and ultimately it is a matter of judgment for the Judge having considered the particular facts of the case. In this case, it was considered whether that particular Mercedes Benz vehicle was of merchantable quality:

"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 the 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 the 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 of 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."

In this case, Justice Seepersad found that the purchaser of a Mercedes Benz vehicle, who had to seek repairs on eight occasions, was entitled to reject the vehicle as it was clearly not of merchantable quality. In this case it was considered that the vehicle was a luxury

vehicle, whose price point was significant, and the vehicle was viewed as an elite brand that had international association with luxury and prestige. The Claimant had purchased an upscale vehicle and in the circumstances, it was reasonable for him to assume that he could have enjoyed a unique driving experience that would have been characterized by comfort and luxury. As the Claimant in that case was never told the nature of the defects and was not informed of the need to replace the hydraulic lifts of the vehicle, the Defendant was found to be in breach at the time the vehicle was delivered to the Claimant as the vehicle was not of merchantable quality, and it could not have been said that the Claimant "accepted" the vehicle. The time period within which the Claimant retained possession of the vehicle afforded him an opportunity to determine whether the vehicle had conformed with contractual expectations.

In ***Gerard Antrobus v Neal and Massy Automative Limited CV2011-03442,*** the Claimant visited the Defendant's showroom and indicated to the employee that he wished to purchase a new Tiida, and also indicated that he wanted a vehicle that would be suitable for use as a taxi. The Claimant obtained financing and conducted a pre-delivery inspection and was told that his vehicle was in good working order. He began to use the vehicle as a taxi, however, two weeks after the purchase the vehicle needed repairs, and the Claimant had to visit the Defendant approximately twenty-five times thereafter for repairs to be done on the vehicle. In that case it stated by Dean-Armorer J:

> *"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 and 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."

In ***Marlon Rose v Routes Auto Limited CV2017-04105*** a claim for breach of contract arose. The claimant entered into an oral agreement with the claimant to purchase a vehicle. The Claimant was assured that the vehicle was a brand-new bus which operated on CNG, that the vehicle was suitable for use as a maxi taxi, and the vehicle was in good working order. The Claimant claimed that it was an implied term of the contract that the bus would be reasonably fit for the aforementioned purpose, however the vehicle was not fit for any of the purposes set out above and therefore he claimed that the Defendant was in breach of contract and sought damages as well as loss of earnings. In that case it was stated:

"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."

In this case it was found that the Claimant was entitled to reject the vehicle and demand a full refund as it was clear that the contract he had with the Defendant was for a new vehicle without defects and capable of being used upon final delivery as a maxi taxi, however the Defendant's mechanic in this case was unable to rectify the problem the vehicle was having and it was found that it was extremely unfair that the Claimant was made to wait two weeks for the Defendant to determine and/or try to repair the vehicle since the Claimant would have then lost out on two weeks of earnings. In this case the Court found that a maxi taxi owner is entitled to operate his vehicle with an appropriate

degree of comfort, ease of handling and pride of the vehicle's outward and inward appearance and he is also entitled to reliability and durability over frequently travelled long distances. It was therefore found that the vehicle was delivered to the Claimant in a manner which breached the implied term of the contract that the vehicle would be reasonably fit for use as a maxi taxi. As such, the Claimant in that case was entitled to reject the vehicle and demand a full refund, and he was also found to be entitled to damages.

Determining merchantability of a product, therefore, is dependent on the various facts and circumstances surrounding the purchase. The guidelines set out in ***Rogers v Parish*** which were outlined in ***Danley Maharaj v Sterling Services Ltd. (supra),*** as well as other relevant factors outlined in the above-mentioned case law such as the specific purpose for which the product was purchased, whether the defect was repairable, and the nature of the defect, among other things, may be used in determining whether the product sold was in fact, merchantable.

RIGHTS OF CONSUMER WHERE PRODUCT NOT MERCHANATABLE

Right to Reject Product

The Claimant may be entitled to reject the product and obtain a full refund, if it is found to not be merchantable, as was done in the above-mentioned case law.

In ***Gerard Antrobus v Neal & Massy Automative Limited (supra)*** Dean-Armorer J stated:

> *"Section 35 of the Sale of Goods Act confers on the buyer, a reasonable opportunity of examining the purchased goods. The section which immediately follows, identifies those situations in which a buyer is deemed to have accepted the goods."*

The **Sale of Goods Act** section 35 states:

> *"(35)(1)Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.*
>
> *(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."*

The Right to Reject, however, is not automatic once it is found that the item is not of merchantable quality. The Court must consider Section 36 of the Sale of Goods Act:

> *"(36) the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or except where section 35 otherwise provides, when the goods have been delivered to him* ***and he does not act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."***

In determining whether reasonable time had lapsed, in ***Gerard Antrobus v Neal & Massy Automotive Limited (supra)*** it was found that the Claimant was struggling and trying to make good his new purchase. The fact that he endured for two (2) years should not be seen as a factor against him, since any benefit which he derived from the vehicle was diminished by the countervailing effect of having to make frequent and repeated visits to the Defendant. Although the complaints were minor, the frequency of

the minor problems over the two-year period assumed a major proportion and in that case, it was found that the Claimant was entitled to return the vehicle and claim its initial value. Therefore, determining whether reasonable time had elapsed would also depend on the circumstances of each case, and the conduct of the Parties during this time.

In discussing the right to reject, Seepersad J in ***Danley Maharaj v Sterling Services (supra)*** referred to the statement of Lord Hope of Craighead in ***J and H Ritchie Ltd. v Lloyd Ltd (2007) 2 WLR:***

> *"In what circumstances does the buyer lose the right to reject, and in what circumstances the right remains exercisable? The problem is not capable of being solved satisfactorily by a preordained code. In the absence of express agreement, the answer must depend on what terms, if any, are to be implied into the contract at this stage, bearing in mind that the seller was in breach at the time of delivery and that the buyer retains the right to resile because the goods were not in conformity with the contract."*

Therefore, section 35 of the Act gives the Buyer a right to reject goods which are found not to be merchantable, however, the buyer must not act inconsistently with the ownership of the seller, or retain the goods without indicating to the seller that he has rejected the goods. Additionally, the buyer must reject the goods before the lapse of too much time, otherwise he may lost his right to do so.

Damages

Section 54 of the Act gives the Purchaser the right to recover interest or special damages or money paid where the consideration for it has failed in the case of a breach of the contract of the sale of goods:

> *"(54) Nothing in this Act shall affect the right of the buyer or seller to recover interest or special damages in any case where, by law, interest or special*

damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

In ***Marlon Rose v Routes Auto Limited (supra)*** in addition to general damages for breach of contract, including the sum paid for the vehicle and costs associated with the vehicle such as insurance, the Claimant in that case was also found to be entitled to **Ten Thousand Dollars ($10,000.00)** representing the loss of earnings which he would have incurred as he could not conduct his business as a maxi-taxi driver.

Duty to Mitigate

The Purchaser, however, is under a duty to take all reasonable steps to mitigate his losses and will not be able to claim damages for any losses which occur due to his own neglect. The onus of proof is on the Defendant to show that the Claimant ought reasonably to have taken certain mitigating steps, and should the Defendant fail to show this then the normal measure of damages will apply.