Koh Wee Meng *v* Trans Eurokars Pte Ltd
[2014] SGHC 104

Case Number : Suit No 873 of 2011

Decision Date : 27 May 2014

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Davinder Singh SC, Jaikanth Shankar, Lim Chingwen and Samantha Tan (Drew & Napier LLC) for the plaintiff; Tan Chee Meng SC, Josephine Choo and Quek Kian Teck (WongPartnership LLP) for the defendant.

Parties : Koh Wee Meng — Trans Eurokars Pte Ltd

Contract – Contractual terms – Sale of Goods Act

Equity – Defences – Acquiescence

Contract – Remedies – Liquidated damages

Contract – Remedies – Mitigation of damage

27 May 2014 Judgment reserved.

Judith Prakash J:

1 On 23 December 2008, the plaintiff, Dr Koh Wee Meng, took delivery of a "Christmas present" – a Rolls-Royce Phantom SWB automobile ("the Rolls") – from the defendant, Trans Eurokars Pte Ltd. On Christmas Day itself, the plaintiff took his new car out for a spin. In the course of the drive, he made a three-point turn. As he moved forward out of the turn, and while he was turning the steering wheel, he heard "a loud moaning noise" and also felt a significant vibration from the steering wheel. On 26 December 2008, the plaintiff took the car back to the defendant's premises and explained his problems with it to the defendant's staff. He asked them to make sure that the noise and vibration problem was fixed.

2 That was the start of a whole series of visits by the plaintiff and the Rolls to the defendant's premises and of a series of actions taken by the defendant in respect of the Rolls. These interactions have culminated in the present proceedings. Briefly, the plaintiff's position is that the Rolls is defective and because of the defect, the defendant is in breach of its obligation to supply a vehicle of satisfactory quality. He claims substantial damages for this breach of contract.

3 As far as the defendant is concerned, the Rolls was always of satisfactory quality and it had completely fulfilled all its obligations to the plaintiff. It had diligently attended to the plaintiff's complaint but had not been able to detect the defect complained of. It asserts that any noise and vibration experienced by the plaintiff when moving the Rolls out of a three-point turn are normal for a Rolls-Royce automobile of this model.

4 The issues that arise are:

(a) Whether the noise and vibration experienced by the plaintiff constituted a breach of the

defendant's obligation to deliver a vehicle of satisfactory quality;

(b) In the event that there has been a breach, whether the defendant can show that the plaintiff is not entitled to claim damages because he has "acquiesced" in the breach;

(c) If the plaintiff is entitled to claim damages, how should the amount of the same be determined; and

(d) Was the plaintiff under a duty to mitigate his loss in the manner that the defendant now alleges.

The background

5 The defendant is a dealer in motor vehicles and is the authorised dealer in Singapore for Rolls-Royce automobiles. Its principal is Rolls-Royce Motor Cars Limited ("Rolls-Royce"), the manufacturer of these automobiles. The Rolls belongs to a line of vehicles made by Rolls-Royce known as the "Phantom" model. In the course of the proceedings various comparison cars were examined by the experts. All belonged to the Phantom range and will be referred to as "Phantoms" where necessary.

6 On 8 August 2008, the plaintiff entered into a Vehicle Sales Agreement ("VSA") with the defendant. By the VSA, the plaintiff agreed to buy the Rolls from the defendant for the amount of $1,407,150. The plaintiff regarded the Rolls as a prestigious vehicle that was extremely high-end and which could give its users a high degree of comfort and ease of handling. He wanted a car with an outward and interior appearance and performance that he could take pride in.

7 The Rolls was collected by the plaintiff on 23 December 2008. When he returned to the defendant's premises on 26 December 2008, he complained to Mr Derrick Ng ("Mr Ng"), the defendant's workshop supervisor, and to one Ms Carena Chen, about the noise and vibration experienced when the steering wheel was at or near the "full-lock" position. The plaintiff made the same complaint two days later to Mr Wong Chin Yong ("Mr Wong") who was then the defendant's After-Sales Manager. Mr Wong assured the plaintiff that the defendant would look into the complaint. The Rolls was left with the defendant and returned to the plaintiff on 29 December 2008.

8 The plaintiff alleged that despite what had been done to the Rolls in December 2008, the noise and vibration were not rectified but got worse. He asserted that when he complained, the defendant told him to drive the car and get used to it. He did so but the problem persisted over the next four months.

9 In April 2009, the plaintiff asked his solicitor, Mr Denis Ong ("Mr Ong"), to help him handle the problem. On 30 April 2009, a meeting took place between the plaintiff, Mr Ong and the defendant's representatives. According to Mr Ong's letter of the same date, at the meeting Mr Wong had informed the plaintiff that he would speak to Rolls-Royce in the United Kingdom ("UK") concerning the plaintiff's complaint and would revert with the defendant's advice and proposal regarding rectification of the problem.

10 Subsequently, an appointment was arranged for Mr George Rowlands ("Mr Rowlands"), the Rolls-Royce Asia Pacific After-Sales Manager, to inspect the Rolls. This inspection took place on 13 May 2009. According to the plaintiff, he drove Mr Rowlands and Mr Wong in the Rolls and demonstrated the problem with the car. Mr Wong's recollection, however, was that the Rolls was driven by Mr Ng of the defendant. Mr Ong's letter of the same date to the defendant confirmed that he understood that Mr Rowlands had put a process in place to deal with the plaintiff's complaint and would be taking

advice on the problem from Rolls-Royce's head office after which he would revert.

11 On 15 May 2009, Mr Rowlands sent an e-mail to Mr Ong, stating that Rolls-Royce would be arranging for additional investigations and works to be carried out on the Rolls to resolve the plaintiff's complaint. Power steering pipes were arranged to be flown into Singapore and the investigation works were focused on the hydraulic portion of the power steering system.

12 On 26 May 2009, after arrival of the new pipes, the Rolls was left at the defendant's premises. Rectification works were carried out on the Rolls and parts were replaced. On 30 May 2009, the plaintiff complained that despite the work, the problem with the Rolls persisted and had become worse. In response, Mr Rowlands wrote that he shared in the plaintiff's disappointment that the noise had reappeared. He promised to speak to Rolls-Royce's engineers about it and asked Mr Ong to confirm that "the noise/vibration is of the nature that I experienced". Mr Ong confirmed the next day that the noise/vibration of the Rolls remained the same as shown to Mr Rowlands by the plaintiff. Two days later, on 4 June 2009, Mr Rowlands informed Mr Ong that the steering rack in the Rolls needed to be replaced and the part was expected to be in Singapore the following week. Subsequently, on 13 June 2009, the defendant fitted new parts to the car and did a re-alignment check as well.

13 On 25 June 2009, Mr Ong reported that the noise and vibration persisted. Replying the same day, Mr Rowlands asked for a session at which he and Mr Wong could test drive the Rolls with the plaintiff. This test drive took place on 29 June 2009. The Rolls was driven by Mr Ng, with Mr Wong and Mr Rowlands in the car. The plaintiff was not present. After the test drive, Mr Rowlands wrote to Mr Ong informing him that they had not been able to clearly identify any noise despite driving the Rolls for almost an hour. Mr Rowlands wanted to conduct another test drive in the plaintiff's presence but the plaintiff did not see any point in replying to Mr Rowlands since it was clear to him that there was a noise and vibration defect.

14 On 20 July 2009, Mr Wong sent an e-mail to Mr Ong to arrange for further testing of the power steering noise on 22 July 2009. The plaintiff agreed to give the defendant one last opportunity to resolve the problem. If it could not be resolved, he wanted the defendant to take back the Rolls and refund all money paid by him.

15 On 28 July 2009, a further wheel alignment check was carried out and the power steering pump was replaced. An oil carrier and two return pipes were also fitted to the Rolls with a further expansion hose, a suction pipe and another set of mountings. The steering rack also appeared to have been replaced. However, to the plaintiff's disappointment, the noise and vibration remained.

16 On 3 August 2009, the defendant was informed that the plaintiff was seeking an independent assessment of the problem with his car. The plaintiff demanded a written report on what steps had been taken by the defendant already and what other steps were to be taken to rectify the problem.

17 On 7 August 2009, Mr Rowlands informed Mr Ong that he wanted to test drive the vehicle again and had arranged for technicians from Germany and from the UK to attend to the Rolls. This test drive took place on 3 and 4 September 2009. The persons involved were Mr Rowlands, Mr Ng, Mr Wong and Mr Alexander Uphoff ("Mr Uphoff") of ZF Lenksysteme GmbH ("ZF"), the German supplier of the power steering system. The tests were conducted by Mr Uphoff who examined the steering component of the Rolls by comparing it against a comparison Phantom. The cars were tested whilst performing the three-point turn on the tiled surface of the workshop floor and on dry asphalt road and the results were measured in accordance with the *Berwertungsindex* ("BI Index"), an index used in the motoring industry to assess performance of motor vehicles.

18 Mr Uphoff testified that on this occasion he did not detect any "noise" and "vibration" which constituted a defect. He also concluded that there was no defect whatsoever in the steering system of the Rolls. In his written report given to Rolls-Royce on 6 September 2009 ("the ZF Report"), he did state that the Rolls had "showed low-frequency noise and vibration on the steering wheel when performing a three-point turn or steering lock-to-lock while rolling".

19 Mr Uphoff considered that the noise and vibration he observed was the result of the "stick-slip effect" between the wheels and the road surface which was inevitable for any motor vehicle. No improvement of this noise and vibration was possible unless there was a replacement of a major component. He noted in his report that it might be possible to investigate into the front suspension parts since they interfaced with the steering system. He stated definitively that the noise and vibration were not produced by the steering system. The defendant then proceeded to replace the entire front suspension of the Rolls and this was completed on 18 September 2009.

20 The plaintiff collected the Rolls on 19 September 2009. When he drove it around, he found that the problem had not been rectified: the noise and vibration were, instead, more pronounced. A few days later, Mr Ong informed the defendant of the plaintiff's disappointment at its failure to resolve the problem. Further work was carried out on the Rolls in late September 2009. Some parts were replaced and some parts were repaired.

21 On 14 October 2009, a meeting took place between the plaintiff and Mr Ong, and Mr Rowlands, Mr Wong and one Ms Mei Ling of the defendant. The plaintiff complained that he had wanted to reject the Rolls on 26 December 2008 but, because of the representations made by the defendant's staff to him, he had given them the opportunity to rectify it instead. Numerous rectification attempts having failed, the plaintiff was considering rejecting the Rolls. Ms Mei Ling suggested that the Rolls be sent back to the UK for further repairs. The plaintiff did not agree. Instead, he proposed that the defendant take back the car and either refund him the purchase price or replace it with a similar vehicle that was defect free.

22 The defendant's substantive response to the plaintiff's demands was contained in its letter of 27 October 2009. The defendant proposed two options:

(a) Option 1: The defendant would buy back the car at $1,055,000 as there was no other complaint except for the vibration of the car during a three-point turn; or

(b) Option 2: The defendant would accept a trade-in of the Rolls from the plaintiff for a new car based on a discounted price. The cost to the plaintiff would be an extra $250,000.

23 On 4 November 2009, the plaintiff rejected both these options. He also sought to reject the Rolls and obtain a full refund of its price. The defendant replied some three weeks later to state that it disagreed that the Rolls was defective upon delivery. It did not accept the plaintiff's rejection of the car.

24 Two years later, on 29 November 2011, the plaintiff started these proceedings. He explained the lapse of time as being due to his search for an expert and having had to attend to his business affairs. Thereafter, both parties took steps to gather further technical evidence. These included two further inspections of the Rolls.

25 The first inspection, carried out on 28 and 29 February 2012, had as its purpose the measurement of the extent of the noise and vibration as alleged by the plaintiff. Present at the inspection were the defendant's expert witness, Mr Kelvin Koay ("Mr Koay"), Mr Uphoff, Mr Rowlands,

Mr Ng, Mr Wong and one Mr Phillip Marshall ("Mr Marshall") of Rolls-Royce who came to Singapore from the UK for the inspection. Also present was one Mr Errol Tan, an independent assessor employed by the plaintiff.

26 During his inspection, Mr Koay recorded the noise and vibration (which I will sometimes call "the noise vibration harshness" or "NVH", applying a term that was used in court) of the Rolls and two comparison Phantoms of similar ages. He used a test wheel to obtain some measurable and objective readings. The results showed that between the Rolls and the comparison Phantoms, the difference in vibration was negligible and did not exceed 0.2Nm.

27 The second inspection was by the plaintiff's expert, Mr David John Bellamy, an Advanced Automotive Engineering Consultant and Assessor/Valuer ("Mr Bellamy"), based in the UK. During the inspection, carried out on 21 and 22 June 2012, Mr Bellamy observed that there was a low frequency but loud "moaning" noise emanating from the Rolls, with significant vibration. This happened when the plaintiff performed several three-point turns and when the steering wheel was turned from the central position to a full-lock on the right, back to the central position and to a full lock on the left. The noise and vibration began once he turned the steering wheel out of the full-lock on the right and continued until the steering wheel reached the central position again.

28 At the VICOM Inspection Centre, Mr Bellamy examined the undercarriage of the Rolls. The same moaning noise was heard. On 22 June 2012, the test was performed at Stamford Tyre Shop on a heavy-duty ramp to eliminate the "stick-slip" effect caused by the friction between the road surface and the tyres. The noise and vibration were present when the test was performed with the engine on. However, the noise and vibration were absent when the test was performed with the engine off.

29 Mr Bellamy concluded that there was a major and fundamental defect in the Rolls when executing three-point turns, which was due neither to the "stick-slip" effect nor to the mechanical component of the steering system. The noise and vibration must therefore be due to the power steering system of the Rolls. Mr Bellamy also stated that the ZF Report supported the finding that the Rolls was defective, though he disagreed with its observations on the cause of the NVH.

30 Subsequently, Mr Bellamy inspected two comparison Phantoms in the UK. He gave a rating of 6 to the Rolls while giving scores of 9 and 10 respectively to the comparison vehicles. In his opinion, a score of 6 was unacceptable for a high-end luxury vehicle like the Rolls.

31 The third piece of additional technical evidence was obtained from Mr Robert Johann Matawa ("Mr Matawa"), an engineer in the Vehicle Dynamics/Safety and Reliability Department of TUV SUD Automotive GmbH. He was appointed by the defendant's solicitors to assess whether the Rolls was in line with its technical specifications as laid down by Rolls-Royce or if it had a technical defect.

32 Mr Matawa did not examine the Rolls itself. He relied on the data obtained by Mr Koay during the latter's inspection in February 2012. Mr Matawa compared this data with data obtained by him from an inspection of six Phantoms at the Rolls Royce factory in Goodwood, United Kingdom. In his report dated 24 August 2012, he stated that during parking manoeuvres, the Rolls-Royce Phantom RR01, including the plaintiff's Rolls, emits a certain amount of noise and vibration. He referred to this as the "Parking Phenomenon" and concluded that while some vehicles had more pronounced noise and vibrations than others, all were acceptably BI rated and none had technical defects. The Parking Phenomenon could not be seen as a defect. During the inspection by Mr Koay, the Rolls had been found to be well within the technical specifications of vehicles of its model and also well within the objectively measured performance of the comparison Phantoms.

Was there a defect in the Rolls?

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33 I have set out the issues raised by this case in [4] above. In order to deal with them, I have first to determine whether there was a defect in the Rolls when it was delivered to the Plaintiff. This is a question of fact and law. I will deal with the evidence first before discussing the legal requirements.

Why does the plaintiff believe there was a defect?

34 The plaintiff considers that a high-end luxury vehicle such as the Rolls should not display the level of noise and vibration that he experienced when he drove the Rolls out of the three-point turn. His case is that this level of noise and vibration constitutes a defect. In summary, the plaintiff relies on the following evidence:

(a) Mr Bellamy's expert testimony that the noise and vibration in the Rolls is a major defect which should not occur in a high-end luxury vehicle;

(b) Mr Marshall's testimony that whilst Rolls-Royce normally aims for a BI rating of between 8 and 10, out of 10, the Rolls was given a BI rating of between 4 and 6; and

(c) The defendant's recognition and acknowledgment of the problem demonstrated by the series of repairs and part replacements that it effected to the Rolls between December 2008 and the end of September 2009.

Why does the defendant say there was no defect?

35 The defendant says the following:

(a) It never acknowledged that the Rolls was defective. The repairs and replacements were undertaken because the plaintiff persisted in his complaints and as the vendor of a luxury brand the defendant sought to provide quality after-sales service to the plaintiff by identifying the problem, if any, through an elimination process;

(b) It had test driven the Rolls on at least three occasions and told either the plaintiff or his lawyer that it was defect-free and the noise and vibration were within the normal range; and

(c) The evidence of Mr Bellamy was entirely subjective. He did not have knowledge of the science of measuring sound and his subjective assessment contrasted with Mr Koay's evidence which was an objective measurement of the sound in the cabin of the Rolls. The average sound level was 53dB and this was within reasonable limits as confirmed by the defendant's other expert, Mr Matawa, as against six other Phantoms.

What did the witnesses say?

36 Before I start, I should emphasise that by the end of the case it was clear that the defendant was not disputing that there was some level of noise and vibration experienced when the Rolls moved out of a three-point turn. Its position was that this level was entirely normal for a Phantom like the Rolls and could not be called a defect. Thus, the analysis has to determine whether the degree of noise and vibration was such that it could be classified as a defect. In this respect, I am conscious that the plaintiff has argued that it is irrelevant to the inquiry whether there is a defect in a technical sense. He says that if, as a whole, the Rolls is not of satisfactory quality or fit for its purpose, it will as a matter of law be regarded as defective. Whilst I agree that the plaintiff does not have to identify

the cause of the problem that he has complained of or point to any particular part of the Rolls which is defective, it is clear from the applicable legislation that one of the elements which establishes that an item is not of satisfactory quality is when it contains defects. It is therefore relevant to the inquiry to determine whether the matter complained of is a natural characteristic of the item concerned or has to be regarded as a defect.

37 The witnesses whose evidence I shall be discussing in this section are: the plaintiff himself, Mr Wong, Mr Uphoff and the independent experts Mr Bellamy, Mr Koay and Mr Matawa. I do not think it is necessary to discuss the evidence of Mr Marshall because although he was instrumental in various works that were done to the Rolls and investigations that were carried out, he was only present at the February 2012 inspection and that occasion is sufficiently covered by the other witnesses.

The plaintiff

38 As far as the plaintiff was concerned, from the very beginning the noise and vibration levels were not acceptable. He said in court that whenever he did a three-point turn there would be a continuous "tut tut tut tut tut" sound. This had been present from day one and nothing that the defendant had done to the Rolls had changed the noise. He also insisted that although at different times he had given different descriptions of the noise, at all times he had been referring to the same noise. It should be noted that in the Statement of Claim the noise was described as a "loud thumbing (*sic*), clunk sound with a whirring noise". The plaintiff affirmed that this description and the "tut tut tut tut tut" description referred to the same noise. The plaintiff emphasised that he had paid a lot of money for the Rolls and did not expect to have such an experience when driving it.

39 The plaintiff's evidence is neutral in relation to the existence of the defect. I say this because the plaintiff is a dissatisfied customer who was expressing what it was about the Rolls that caused him dissatisfaction. His observations of how it performed cannot, in a case like this, by themselves establish that it was defective: they simply show what he thought was not in line with his expectations of the driving experience. In this connection, it is relevant that the plaintiff did not rely on any representation made to him in relation to the performance of the Rolls before he purchased it. His complaint was based primarily on how he expected a Rolls-Royce Phantom motor car to perform. It is also material that the plaintiff confirmed that except for the noise and vibration experienced, he had no issue as to the performance, safety and reliability of the Rolls.

Mr Wong Chin Yong

40 In his affidavit, Mr Wong testified that on three occasions, being 26 December 2008, 29 December 2008 and 30 April 2009, when the plaintiff complained about the noise and vibration, he or one of his colleagues had test driven the Rolls. None of them had been able to detect any defect as the NVH experience was within the normal range based on their experience with Phantoms of the said make and model. Further test drives were carried out on 13 May 2009 and 29 June 2009 when the Rolls was driven by Mr Ng with Mr Rowlands and Mr Wong being passengers. On those dates too, Mr Wong was unable to detect any defect as the NVH level was within the normal range. Mr Ng test drove the vehicle again on 11 August 2009 with Mr Rowlands and Mr Wong as passengers. Once again, no abnormal NVH was detected. Mr Wong reached the same conclusion after Mr Uphoff's test drive on 3 September 2009.

41 At the end of the inspection in September 2009, the defendant replaced the entire front suspension system of the Rolls in order to eliminate all possibilities of any defect in it. After this replacement was effected, Mr Wong was unable to detect any difference in the NVH of the vehicle.

42 During cross-examination, it became apparent that Mr Wong's frequent references to the NVH being "within the normal range, based on our experience with Rolls-Royce Phantoms of similar make and model" were somewhat suspect. He told the court that although he had joined the defendant in mid-2007, when he met the plaintiff on 29 December 2008, he had only just been transferred to the Rolls-Royce division and the plaintiff's complaint was the first time he had encountered a complaint in relation to a Phantom. Before that he had not driven a Phantom. Nor had he received any training in relation to such vehicles. On 29 December 2008, the Rolls was test-driven by Mr Ng and Mr Wong was a passenger. He commented that there was noise when the car was turning left and right but to him it was "a normal noise". When questioned further as to how he could describe the noise as "normal" when this was the first time he had sat in a Phantom, Mr Wong conceded that his noise perception had been based on his experience with other cars. Upon being pressed, Mr Wong further conceded that at that time he could not have known what was normal for a Phantom.

43 Despite the above concession, when questioned by the plaintiff's counsel, Mr Wong maintained that he had not observed any abnormal noise in the Rolls. Later he was asked about a claim form he had filled up for the defendant in connection with a claim that it wished to make on Rolls-Royce under the warranty agreement from Rolls-Royce. In this form dated 30 June 2009, he had written the following:

> To replace steering rack to rectify the noise.
>
> To replace power steering pump.
>
> To replace expansion hose.
>
> The above repairs are authorised by George Rowlands.
>
> The change was recommended by George as the noise/defect was eminent.

When asked what he meant by saying that the noise was "eminent", Mr Wong's reply was that it meant that the noise was "loud" and he confirmed that this was his own description of the noise. He then tried to clarify the sentence by stating that he had written this because the plaintiff had complained in a letter that the noise had become more pronounced so he had had to put that in the form for the purpose of the defendant's warranty claim. Mr Wong was referring in this evidence to Mr Ong's e-mail of 30 May 2009. As plaintiff's counsel pointed out to him, that e-mail did not refer to the noise but asserted that the vibration was more pronounced. He agreed subsequently that the noise produced was detectible by him and Mr Rowlands.

44 On an overall consideration of Mr Wong's evidence, I am satisfied that he was never in any position to confirm that the NVH he experienced in the Rolls was normal for Phantoms, much less that it was a characteristic of the Rolls itself. Mr Wong considered the noise "eminent" but thought that it was normal based on his experience of other, lower-range vehicles. Mr Wong's evidence tends to support the plaintiff's case in that the noise was plainly perceptible and even "loud". Further there was no evidence that Mr Wong himself ever told the plaintiff that the noise was normal.

Mr Alexander Martin Albert Uphoff

45 Mr Uphoff is employed as a vehicle test engineer of ZF, the steering component supplier to Rolls-Royce. He testified that he had worked as an automotive engineer for more than 11 years and had routinely carried out noise and vibration evaluations using both subjective and objective methods. Based on his experience, a reasonable amount of noise and vibration is present in all vehicles and is

known in the industry as NVH. He inspected the Rolls in early September 2009 and again in February 2012. On both occasions he did not detect any noise and vibration which constituted a defect. After the first occasion, he had produced the ZF Report dated 6 September 2009.

46 Mr Uphoff testified that he is familiar with the use of the BI rating which is commonly used in the automotive industry to rate the performance of a car, including the NVH issue. The BI rating measures noise and vibration in vehicles on a scale of 1 to 10, with the rating of 1 being the worst (*ie*, very bad noise and vibration) and a rating of 10 being the best (*ie*, noise and vibration are not noticeable). To conduct a BI rating exercise in respect of a vehicle, it is necessary to have at least one comparison car.

47 The September 2009 inspection was carried out by recording the BI rating of the Rolls against the BI rating of a comparison Phantom. According to the ZF Report, Mr Uphoff's inspection of the Rolls and the comparison car produced the following results:

(a) The Rolls showed low frequency noise and vibration on the steering wheel when performing a three-point turn or steering lock-to-lock while rolling. The noise and vibration were most critical on tiled workshop floor (BI 4) but also clearly present (BI 6) on dry asphalt road.

(b) The comparison Phantom also showed some vibration in the steering wheel on the asphalt road but to a much lower degree (BI 8). The noise was almost not audible (BI 9), and the steering manoeuvres had to be performed much faster to create the noise.

(c) On tiled floors, both cars showed nearly the same behaviour.

48 In the conclusion to the ZF Report, Mr Uphoff observed that the noise and vibration in the Rolls was not produced by the steering system; it was a result of a stick-slip effect between the wheels and road surface. The front axle transmitted this effect into the steering gear and the steering wheel. He also commented that as "*this car is the only one car known to show this problem*, the special tolerance stack-up of this individual car seems to be the reason for the situation" (emphasis added). In his affidavit, he modified this statement by saying that one of his conclusions was that based on his experience, the Rolls was:

> [T]he only one car known to me to have *this problem of the owner complaining about* " ***noise*** " and " ***vibratio*** **n**". [emphasis added in italics and bold italics]

49 As regards the February 2012 inspection which he attended, Mr Uphoff commented that this was carried out by measuring and comparing the vibrations experienced in the steering wheel of the Rolls against that of two Phantoms of similar age but different mileage. The measurements were made by detaching the steering wheel from each tested vehicle and replacing it with a development steering wheel containing a combined steering angle and torque sensor together with a signal booster ("the Test Wheel"). Based on the readings recorded, there was no unusual NVH in the Rolls that sounded like "loud thumbing, clunk sound with a whirring noise" and/or any "significant vibration from the steering wheel" when it was moving forward and out of a three-point turn. The Rolls had behaved within its specifications and the noise level and intensity of the vibration were comparable to the two comparison cars.

50 In his closing submissions, the plaintiff made much of the ZF Report, calling it a critical document and emphasising the BI 6 rating given to the performance of the Rolls on asphalt roads. Also, the plaintiff referred to Mr Uphoff's comment that the Rolls was the only car known to show the problem and that further improvements required major part changes. In the plaintiff's submissions, the

ZF Report was at odds with the case that the defendant ran at trial – that the noise and vibration were normal and characteristic of all Phantoms. The plaintiff also relied on Mr Uphoff's replies to cross-examination questions.

51 Mr Uphoff agreed in court that his BI rating meant that his subjective evaluation was that the Rolls was only satisfactory and a person driving it in September 2009 would have noticed the noise and vibration more than if he had driven the comparison Phantom at that time. However, Mr Uphoff also said that when he stated in the ZF Report that the Rolls was the only car known to show this problem, he meant that the people present at the inspection and "the guys back in Germany" had never heard about another customer complaint of this type. The plaintiff submitted that this evidence had been tailored to explain away a damaging statement in the ZF Report. It should be noted that Mr Uphoff himself denied this suggestion: his explanation was that he had been sent to investigate a customer complaint of steering noise and that is why at the top of his report he stated that what he investigated was a customer complaint and he only had one car that showed this complaint. He further explained that he had rated the noise situation as BI 6 and that level was a level that a customer could notice and complain about. He was then asked whether what he was really saying was that the Rolls, as far as he knew, was the only car which had this intensity of noise and vibration which can be noticed by the customer and was owned by a customer who had complained about it. Mr Uphoff replied that that formulation was correct.

52 The upshot of Mr Uphoff's evidence in regard to the September 2009 inspection in my view is that it showed that the Rolls performed worse than the comparison Phantom and was the only car he had come across which produced a level of NVH which the driver would notice. Mr Uphoff might not have thought that level of NVH to be a defect but he did think that the noise might be reduced if certain parts were replaced. As for the 2012 inspection, Mr Uphoff's evidence confirmed that the data collected by the Test Wheel showed the performance of the Rolls to be about the same as that of the two comparison Phantoms tested at that time.

Mr Kelvin Koay

53 Mr Koay holds the position of "Principal Forensic Consultant" of Koays Accident Reconstruction. According to his curriculum vitae he has over 30 years of professional experience in automotive mechanical engineering, motor vehicle traffic investigation and reconstruction, vehicle fire investigation, failure analysis and other transport engineering services. He is a professional engineer.

54 Mr Koay was instructed by the defendant's solicitors to:

(a) carry out an independent inspection and test on the Rolls together with two comparison cars using a vibration meter and a sound meter; and

(b) supervise, understand and verify the condition of the Rolls and comparison cars during the collection of data.

55 Data in relation to vibration and noise was collected in two ways. Rolls-Royce collected vibration data by use of the Test Wheel and other connected equipment. Whilst data was being collected by Rolls-Royce, Mr Koay conducted instrumentation tests using a vibration meter and a sound meter to record the vibration of the steering wheel and the noise inside each tested vehicle during repeated three-point turns.

56 The testing procedure was as follows: first, the defendant and Rolls-Royce carried out a mechanical inspection of the Rolls and the two comparison Phantoms. Then, a full-wheel alignment

measure was carried out on all three cars in order to confirm that the suspension geometry and tyre pressure of each tested car were within design specifications. The next step was that the three cars were driven by Mr Ng to the multi-story car park (cement/concrete flooring) of the Singapore Turf Club in order to ensure that the Rolls and the comparison cars were driven by the same person and tested in an identical environment. Under Mr Koay's supervision, three-point turns were then negotiated repeatedly by Mr Ng and the vibration in the steering columns in each of the three vehicles was captured by the Test Wheel. At the same time, Mr Koay operated his vibration and sound meters. In order to obtain a separate set of comparative readings between the Rolls and the comparison cars on a tarmac surface, the same tests were also conducted under Mr Koay's supervision on a flat tarmac road within the Turf Club premises.

57 The results of the tests were set out in chart form in Mr Koay's report. For example, the vibrations as detected by the Test Wheel were set out by Mr Koay in the following table:

Car	**Mileage [km]**	**Max. Vibration Amplitudes on cement/concrete floor [Nm]**	**Max. Vibration Amplitudes on tarmac road [Nm]**	**Vehicle Identification Number**
Plaintiff's vehicle	43.204	3,9	1,1	UH00927
1st Comparison Car	5.050	4,0	0,9	UH01081
2ndComparison car	14.510	3,8	1,1	UH00923

58 Mr Koay did not use the BI rating for the inspection because first, he was not trained in the application of this rating. Second, the purpose of the tests was to capture and record the noise and vibration in measureable form by independent instrumentation. Third, the data collected through the Test Wheel was to be analysed by Mr Matawa.

59 In relation to vibration, Mr Koay concluded that the test results of the Rolls and the comparison cars from the Test Wheel showed that the vibration on the steering wheel of the Rolls was similar to and did not exceed the vibration on the steering wheel of the comparison cars. The steering vibration results obtained from all three vehicles using his vibration meter were also within good and acceptable industrial standards. The noise level recorded in the Rolls using his sound meter was similar to and did not exceed the noise levels recorded in the comparison cars. The readings of all three vehicles were between 53 and 54dB, and were within acceptable norms.

60 The plaintiff criticised Mr Koay's conclusions on the basis that they did not take into account the subjective assessments and senses of customers and persons driving the cars. Mr Marshall had agreed that a customer will only be concerned with the impression he got, what his senses would pick up, and not with whether a sound meter and vibration meter would have hit certain readings. The plaintiff also suggested that Mr Koay's credentials made it doubtful that he was a suitable expert in this case. Accident re-construction and vehicle accident investigations would be quite different from inspections from performance of a vehicle according to a passenger's or driver's perception. Further, Mr Koay had admitted that he had never inspected a Phantom prior to this occasion.

61 The plaintiff also submitted that the inquiry was not whether there was a level of noise and vibration in the Rolls that was greater than that in other Phantoms. The inquiry was whether there was a level of noise and vibration subjectively felt and perceived by a reasonable person who had purchased the Rolls that would justify the view that it was not of satisfactory quality or was fit for

the purpose for which it was supplied. There was no evidence that Mr Koay's objective measurements actually translated to the kind of noise and vibration that was felt by a customer and therefore the objective expert's evidence was irrelevant and would not assist the court in its determination of the issues.

62 The defendant's response was that Mr Koay's evidence, based on objective measurement of the noise and vibration, would provide the court with an objective sense of what a passenger might perceive. Mr Koay's sound meter measured the sound level in the cabin of the Rolls and not just the sound produced from the steering. The sound within the cabin would include the sound produced by the people in the cabin and sound from steering the steering wheel and other movements. The average sound level of 53dB recorded is the sound level between "whisper quiet at a library" and "normal conversation from a 3-foot distance". The defendant further submitted that the pattern of behaviour from the Rolls and the two comparison cars tested in February 2012 supported its contention that the noise and vibration is the characteristic of the Phantom and the Rolls did not behave any differently from other vehicles of its model.

63 As for Mr Koay's qualification, and competence as an expert, he was not challenged on this in court. In any case, he is suitably qualified in the area of automotive engineering. Mr Koay had also noted that the vibrations that were recorded were those that would be felt through the hands holding the steering wheel and the decibel readings were taken with the sound meter held close to the driver's ear level so as to simulate the noise level. Thus, it was incorrect for the plaintiff to argue that there was no evidence that Mr Koay's measurements translated to the kind of noise and vibration which would be felt by a passenger.

64 I accept that Mr Koay was qualified to carry out the tests that he did on the Rolls and the comparison Phantoms and to testify as an expert on the results. Whilst his main professional focus may be on accidents, he is an automotive engineer with many years of experience and could opine on the method and results of the tests. He was careful not to become involved in any subjective rating exercise since he had no experience in the same.

Mr Robert Johann Matawa

65 Mr Matawa is an engineer in the Vehicle Dynamics/Safety and Reliability Department of a company called TUV SUD Automotive GmbH. It specialises in providing products and process improvements for the automotive industry. His technical responsibilities include the development of chassis and steering components; subjective evaluations of components including chassis and steering; and being the engineer responsible for EHPS Steering Systems. He was instructed by the defendant's solicitors to prepare an expert report on the following issues:

(a) whether the plaintiff's complaint about the Rolls emitting a "loud thumbing, clunk sound with a whirring noise" when moving forward and out of the three-point turn and his experience of "significant vibration from the steering-wheel" constitute defects; and

(b) whether the noise and vibration levels in the Rolls are within the reasonable acceptable range.

66 Mr Matawa's report was based on his consideration of various documents, including the pleadings, Mr Koay's draft report, the ZF Report, various technical documents, and also the test results that he obtained from his August 2012 comparison testing of six other Phantoms in the UK. His report makes the following main points:

(a) The Rolls is not defective. In February 2012, it was checked in detail and found to be in line with all technical specifications. It was operating in its optimum technical range and no defect was found.

(b) The term "Parking Phenomenon" is defined as a resonance frequency phenomenon triggered by high forces in the contact path between the tyre and the road surface, the kinematics of the front axle, especially the steering kinematics, as well as the soft bearings which can store and emit high energies. Towards the end lock of the steering, this elasticity creates a stick/slip effect in the natural (resonance) frequency of the steering components and vibration is transmitted through the steering rack and steering column towards the steering wheel, thus creating noise in the process. It is not possible to avoid a resonance phenomenon without putting at stake the requirement of isolation that is paramount to achieving the comfort and quality intended during its usual operating modes – that is, while driving at all speeds and also when coming to a stop. The Parking Phenomenon cannot be seen as a defect.

(c) No defect in the Rolls was found in September 2009 or in February 2012. Although he did not examine the Rolls, he was provided with sufficient information to assess it, including the ZF Report and the data from the February 2012 inspection. To him, the charts were comparable to x-rays of a patient and enabled him to understand the behaviour of the Rolls.

(d) The technical performance of the Rolls matched the performance of the comparison Phantoms tested in February 2012.

(e) The Parking Phenomenon, which could be observed in all Phantoms which share the same technical platform as the Rolls, exists and is most likely linked to the complaint of the plaintiff. The Parking Phenomenon was experienced personally in all the comparison Phantoms driven by Mr Matawa.

(f) The noise which is audible during parking consists of end lock noise which is a wanted design element and acoustically feeds back the mechanical stop to the driver. All vehicles tested by Mr Matawa achieved acceptable BI ratings. The testing in August 2012 was done using the same standard evaluation methodology as that done in Singapore in February 2012.

(g) In relation to the ZF Report, Mr Matawa noted that the Rolls was rated as BI 6 while the comparison Phantom rated BI 8. He commented that a BI rating of 6 for a parking noise would be a weaker performance for that particular car but that it would still be at an acceptable level.

(h) Mr Matawa carried out a BI rating on the six comparison cars he tested in August 2012. His highest rating was BI 7.75 given to one car and the lowest was 5.75, also given to one car. The other 4 cars were rated 7.25, 7.00 and 6.75 (two vehicles). He commented that on some vehicles the noise/vibration during parking is more pronounced. Most likely, the individual adding of tolerances can be a reason for the different detection levels. But all vehicles were acceptable BI rated. None of them had a technical detect.

67 The plaintiff submitted that Mr Matawa's expert evidence and his BI rating of the six comparison cars should not be given any weight. A large part of the report emphasised his conclusion that the Rolls was in line with the technical specifications. It therefore appeared that his position was that there was no technical defect in the Rolls because it was in line with technical specifications and that was all he was saying. Such a statement would not help the court determine the issues.

68 This position was suggested to Mr Matawa in court. He then explained that he used the phrase

"technical specifications" in a slightly different manner from the way it is usually understood here. Mr Matawa said that in German, technical specifications means that a vehicle should perform in its optimum range:

> You do have some values; for example, as a technical value the top speed of a vehicle may be specified as 250km/h and that would be easy to measure. But when one has to say something about ride comfort, there is no meter value for that – that is what the customer would perceive as a comfortable ride.

Mr Matawa elaborated that in order to understand whether a vehicle lived up to the German technical specifications two approaches would be taken: to measure values and to give BI ratings to things that could not be measured. He agreed when questioned that he knew the difference between "technical specifications" of the Rolls and the concept of measurement of performance. He had come to tell the court that the Rolls was in line with technical specifications and that based on the analysis he made and the data obtained from the Phantoms in the UK, the latter performed exactly the same way as the Rolls did.

69 In his report, Mr Matawa also explained the methodology used in the subjective assessment of vehicles. According to him, the BI rating is the basic method used to evaluate the perceived performance of a vehicle in terms of performance, appearance, quality, noise and general NVH. The methodology is taught to evaluators in the automobile industry to ensure that the evaluation is in line with the principles and is thus repeatable and comprehensible. On a scale between 0 and 10, trained evaluators rate a vehicle on certain defined criteria to an accuracy of 0.25 points. The methodology includes a precise description of the criteria and the applicable rules.

70 In relation to the testing he himself did, Mr Matawa testified that he had asked Mr Marshall at the premises of Rolls-Royce to arrange for as many comparison cars as possible. Six Phantoms were produced and inspecting them took an entire day. He asked about the history of the cars and detailed information was given to him but he did not ask to see their job cards (*ie*, the records of work that had been done at the workshop on these vehicles). The plaintiff's comment on this evidence was that none of the cars was brand new (except possibly for one) and since Mr Matawa did not undertake an independent verification of the work done on the cars, there was a real possibility that they had a history of complaints.

71 In relation to the statement in his report that I have paraphrased at [66(b)] above, Mr Matawa was asked whether he was saying that while the Phantom is marketed as being silent and is indeed silent when driven at all speeds and also when coming to a stop, the exception is during parking or a three-point turn. His response was he was not saying that exactly. What he was saying was that the Phantom's character is defined by a maximum ride comfort and the customer expects maximum isolation from all things he would drive over and also when he wants to stop at a traffic light. That involves a very soft set-up of the car in general. In his opinion, modifying the Phantom towards a stiffer bushing set up would lead to an unacceptable change of the vehicle's characteristics in its usual operating situations – driving straight at all speeds and coming to a stop. He subsequently disagreed with the suggestion that the distinction he was seeking to draw between the customer's perception during driving on the one hand and parking and doing a three-point turn on the other was a false distinction.

72 It was also pointed out to him during cross-examination that Mr Marshall had given evidence that for noise and vibration, Rolls-Royce aimed to achieve a rating of BI 8 for its cars. In this respect, Mr Marshall had said that a rating of 8 means "very good, noticeable by critical customer under some circumstances" and the rating of 10 means "outstanding, not noticeable at all". In court, Mr Matawa

had to agree that all six cars he tested in August 2012 had not met BI 8 but he did not agree that that made them below Rolls-Royce standards or unsatisfactory according to the BI scale.

73 The plaintiff submitted that Mr Matawa's conclusion that the Rolls was performing in its "optimum range" was not reliable. It was based on his inspection of the six comparison cars but he did not know independently whether those cars had a history of complaints. Further, the BI rating of the six cars that Mr Matawa inspected all fell short of Rolls-Royce's standards for its cars. The ratings also fell short of the BI rating which Mr Uphoff gave to the comparison car that he inspected in September 2009. That in itself, the plaintiff said, casts doubt on the reliability of Mr Matawa's rating of the six comparison cars in August 2012.

74 The plaintiff suggested that there were serious questions about Mr Matawa's independence because he had been, at one time, seconded to the BMW motor-car company during a time when it owned Rolls-Royce. I should state immediately that I do not accept this aspersion on Mr Matawa's independence. Mr Matawa was not questioned by the plaintiff's counsel regarding the nature and scope of his secondment. The secondment was to BMW and not to Rolls-Royce directly and was disclosed by Mr Matawa in his Curriculum Vitae. The plaintiff could have found out more about the secondment had it wanted but did not do so. The mere existence of the secondment does not show any relationship between Mr Matawa and Rolls-Royce that would have an impact on his independence.

Mr David John Bellamy

75 Mr Bellamy is an advanced automotive engineering consultant and assessor/valuer based in the UK. He has been a self-employed vehicle examiner for 35 years. Over the years, he has examined many types of vehicles for the purpose of giving expert evidence in litigation. He is a member of several associations relating to the automotive industry and has inspected many prestigious vehicles during his career.

76 Mr Bellamy was instructed by the plaintiff's solicitors to provide an expert opinion. He was given copies of the pleadings and various documents set out in the list of documents filed by both parties between March and July 2012. Mr Bellamy's specific task was to ascertain the level of noise and vibration produced by the Rolls. Thereafter, he was to give his opinion as to the existence, nature, cause and effect of the same. He was also asked to opine on whether the noise and vibration constituted a defect in the Rolls.

77 Mr Bellamy inspected the Rolls on 21 and 22 June 2012 in Singapore. In summary, his conclusions as contained in his report are:

(a) There is a major and fundamental defect in the Rolls.

(b) He noticed a noise (*ie*, a low frequency "moaning" noise) which consistently came from the vehicle. He also experienced significant vibration in the vehicle's steering rim when the steering wheel was turned from the central position into full right-hand steering lock and back to the central position at low travelling speed whilst the vehicle's engine was running.

(c) The plaintiff, as a driver of the most luxurious vehicle in the market, should not have been subjected to excessive noise and vibration on each and every occasion on which he needed to park the Rolls using steering lock turns from the right to the left and/or do three-point turns. A three-point turn is a manoeuvre which the Rolls would have to do often, given that the Rolls is a very long vehicle and does not have a tight turning circle.

(d) The noise and vibration encountered in the Rolls were not at tolerable or acceptable levels. They were significant noise and vibrations that in Mr Bellamy's opinion would significantly affect the overall satisfaction that a purchaser of a high-end luxury vehicle like the Rolls would be entitled to expect.

(e) Whilst a defect lay in the power steering system of the vehicle, the exact cause of the defect was unclear.

78 Mr Bellamy filed a supplemental affidavit-in-chief in which he stated that he had subsequently test driven two Phantoms in the UK. He gave his ratings of the noise and vibration he experienced in the Rolls and in the two additional Phantoms ("the Test Cars"). He scored the Rolls at BI 6 and gave the Test Cars ratings of BI 9 and BI 10 respectively. These scores were based on the noise and vibrations detected when the cars were performing three-point turns on a dry level tarmac surface at a very low speed of less than 10km/h. He explained that he deducted one point from the first Test Car on account of the slight squeaking noise which he heard. He gave the perfect score of BI 10 to the second Test Car because all he detected was a barely audible hiss when the steering wheel was at full-lock. This was a normal characteristic of vehicles.

79 In Mr Bellamy's opinion, a score of 6 out of 10 was completely unacceptable in high-end luxury vehicles, let alone a Phantom which is expected to transport its drivers and passengers from place to place with a high and appropriate degree of comfort, ease of handling and pride in the vehicle's outward and interior appearance and performance that is commensurate with the price of such vehicles and the fact that it is regarded as the most luxurious vehicle in the market. This was particularly so as the Rolls-Royce Phantom was marketed as being a "magical carpet ride" and "whisper quiet".

80 The defendant made a number of criticisms of Mr Bellamy's evidence. It noted that under cross-examination Mr Bellamy had agreed that driving the Rolls on different road surfaces can produce different vibrations and noise. Yet, he did not test the Rolls and the Test Cars on the same road surfaces. Also, he did not test them on non-tarmac surfaces as Mr Uphoff had done. The defendant submitted that a comparison of readings based on different surfaces was necessary to demonstrate the noise and vibration produced by the Rolls was atypical.

81 When Mr Bellamy first tested the Rolls he did not apply any scale to it. It was only after he had seen a copy of Mr Uphoff's report that he used an index rating. The ratings scale which he applied subsequently after inspecting the Test Cars was called the B1 ("B-One") scale. He was asked in court whether he had had any scales of subjective assessment in mind when he was carrying out his assessment. His answer was in the negative. In re-examination, he was asked to explain how he had come to write his supplemental report and give and ratings he had given there. His response was as follows:

> I received instructions to go and test two more cars along with a lot more documentation. In among that documentation was the report of Mr Uphoff of sometime in when he inspected the car with Mr Rowlands, I believe. I then saw that he had based his report on the [B-One]. So I felt appropriate that I should give my opinion on the [B-One] on the two cars which I tested in England and that is how those figures came into my supplementary report. I wasn't aware of the Uphoff report when I came to Singapore in June.

82 It was clear from Mr Bellamy's testimony that he was unaware of the BI scales in June 2012 and could not have applied his mind to carrying out any BI rating when he tested the Rolls at that time. When he read Mr Uphoff's report he became aware of the scale Mr Uphoff had applied but erroneously

referred to it as the "B-One" scale. Since he did not have any rating in mind in June 2012, the defendant questioned how he could have, three months later, in the UK, rated the Rolls as 6 out of 10. The defendant also criticised the time lag in that the tests in Singapore and those in the UK were carried out about three months apart. Bearing that in mind, how was Mr Bellamy able to rate and compare the noise and vibration he heard and experienced in the Rolls while he was in Singapore in June with the noise and vibration he heard and experienced in the Test Cars three months later?

83 Mr Bellamy informed the court that he intended to carry out a subjective assessment and that he was a subjective assessor, not an objective one. To him, it was the feel of the car and his experience while handling it that were the most important factors because he was assessing what the reasonable driver or passenger would experience. However, even on this basis, the defendant argued, his assessment would have been more persuasive had he followed his own advice which was:

> … if you are going to do a comparison test between a number of cars, you need to do it on the same piece of road so there's no deviation and probably you need to use it on the same cars also. …

Mr Bellamy did not assess the Rolls and the Test Cars over the same stretch of road at about the same time and in the same weather conditions.

84 Under questioning, Mr Bellamy maintained that his rating of B-One 6 (on the condition of the Rolls in June 2012) was a rating that was similar to Mr Uphoff's rating in the ZF Report prepared in September 2009. The defendant pointed out that Mr Uphoff's rating of BI 6 was given prior to the suspension system being replaced. It argued that two years later, when Mr Bellamy tested the Rolls, he probably simply plucked his rating from the ZF Report (and even then he did not pluck it accurately, calling it B-One 6 instead of BI 6) and claimed that he did a subjective assessment on the Rolls.

85 The defendant also submitted that even if Mr Bellamy's subjective assessment using the B-One rating scale was a genuine attempt to determine the state of the Rolls, it was clear from his evidence that he did not know how to subjectively assess the vehicle with any rating scales. He accepted that the problem with subjective evaluation was that it depended solely on the person driving the car. The defendant noted that relevant literature produced by the experts explained the need to carry out a calibration of all the assessors in order to ensure that one assessor does not adopt different criteria which might render the assessment out of whack. Mr Matawa himself did a harmonisation workshop with Mr Uphoff to calibrate the assessment criteria before he went on to subjectively assess the six Phantoms in August 2012. Mr Bellamy, however, had had no criteria, let alone calibration, to assist him when he assessed the Rolls and the two Test Cars at different times and on different roads in different locations.

86 The defendant contended that Mr Bellamy had admitted that subjective assessment to him was simply driving the car, listening to the noises, and telling people what's wrong with it. He did not understand that even with a subjective assessment, before carrying it out, one must set the criteria of the assessment. He said that he had had no criteria or idea that he set for himself before testing the Rolls. In fact, Mr Bellamy said that you do not set out criteria until you know what the evidence is and have tried the product. When asked if the only criteria he had before he tested the Rolls was whether there was noise and whether there was vibration, he agreed that that was it.

87 I consider there is little doubt that Mr Bellamy had difficulty with the principles of subjective assessment adopted by Mr Matawa and Mr Uphoff. He had no experience in applying subjective rating scales. This may be because he was never involved in developmental analysis of various components

of a vehicle. He admitted that he had never used the B-One scale that he referred to and that the last time he had used a rating scale was in the 1970s. In my view, Mr Bellamy's attempt to rate the Rolls on the BI scale was strained and difficult to give much credence too. His comparative ratings of the two Test Cars are also unacceptable as true comparisons since the ratings were done at different times and in different conditions.

What are the legal principles?

88 Before I consider the overall effect of the factual evidence, it may be helpful to discuss the applicable legal principles.

89 As a dispute between a buyer and seller of goods over the quality of the goods sold, this case is governed by the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the Act"). The applicable section is s 14 and, in particular, sub-sections (2), (2A) and (2B). To paraphrase the relevant provisions of the section, by virtue of sub-s (2), whenever a seller sells goods in the course of the business, that contract contains an implied condition that the goods sold are of satisfactory quality. Under sub-s (2A), goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory taking into account the description of the goods, the price and all other relevant circumstances. Under sub-s (2B), among the aspects of quality of goods to be looked at is whether they are fit for all the purposes for which goods of the kind are commonly supplied and whether they are free from minor defects.

90 The requirements of s 14 have been considered in many cases and textbooks. It is well known that the formulation "satisfactory quality" is a relatively new addition to the section and replaced the previous requirement that the goods be of "merchantable" quality. Whilst the cases on merchantability are still relevant, the new test of "satisfactory quality" was regarded by one commentator as shifting the focus away from the marketability of the goods to the criterion of satisfaction with the goods and that this choice of language makes it clear that the emphasis is on the quality of the goods from the consumer's point of view: see Erin Goh, "Sale and Supply of Goods Law: Recent Amendments" (1997) 17 ABLR 73. The guidelines are also more recent insertions. It has been commented that the reference there to freedom from minor defects should make it clearer to all tribunals at every level that such defects may render goods of unsatisfactory quality: *Benjamin's Sale of Goods* (Sweet & Maxwell, 8th Ed, 2010) ("*Benjamin's Sale of Goods*") at para 11-038.

91 A local case which considered the meaning of "satisfactory quality" is *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd* [2006] SGHC 242 ("*Compact Metal*"). There, Sundaresh Menon JC (as he then was) had to deal with an allegation that the paint supplied by the defendant to the plaintiff for application on aluminium panels forming the cladding of a prestigious new building was not of satisfactory quality. In considering this allegation, the judge made the following observations on the standard of satisfactory quality at [101]:

(a) the inquiry whether the goods are of a satisfactory quality is an objective one to be undertaken from the viewpoint of a reasonable person;

(b) the reasonable person in question is one who is placed in the position of the buyer and armed with his knowledge of the transaction and its background;

(c) the burden of proof is on the buyer who is alleging that the goods were not of satisfactory quality;

(d) the inquiry is a broad based one directed at whether the reasonable person placed in the

situation of the buyer would regard the quality of the goods in question as satisfactory; and

(e) at every stage of that inquiry, the Act clearly contemplates that the court should consider *any and all factors* that may be relevant to the hypothetical reasonable person.

92 On the evidence produced in *Compact Metal*, the judge held that the paint supplied was not a satisfactory quality because when it was applied, there was an inconsistency in tonality between panels as well as within particular panels. A reasonable person in the position of the plaintiff and with knowledge that the project was a prestigious one and that much time was taken to select the desired colour would have expected that the paint supplied by the defendant to be such as to be capable of being applied on the panels and producing a consistent finish.

93 Drawing on the principles established in *Compact Metal*, the question I have to determine is whether a reasonable person who, like the plaintiff, had paid $1.4m to purchase luxury motor vehicle touted for its ride comfort and quiet performance, would have considered the quality of the car to be unsatisfactory because of the noise and vibration experienced during a three-point turn.

94 There are a number of cases under the English equivalent of the Act which deal with the issue of merchantability or satisfactory quality of motor vehicles. Two in particular were cited by the parties: *Rogers v Parish (Scarborough) Ltd* [1987] 1 QB 933 ("*Rogers*") and *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220 ("*Bernstein*").

95 In *Rogers*, the plaintiffs purchased a Range Rover motor vehicle from the defendants for more than £14,000. Upon delivery, the engine, gear box and body work of the vehicle were substantially defective and oil seals at vital junctions were unsound causing significant quantities of oil to escape. For six months, the first plaintiff drove the vehicle and a number of attempts were made by the defendants to rectify the defects. At the end of that period, the engine was still misfiring at all road speeds, excessive noise was being admitted from the gear box and substantial defects remained in the body work. The plaintiffs rejected the vehicle. The judge found that since none of the defects had rendered the vehicle unroadworthy, unusable or unfit for the normal purposes for which a Range Rover was used, it had been of merchantable quality and reasonably fit for its purpose. The plaintiffs appealed and were successful. The Court of Appeal ruled that goods that were defective on delivery were not to be taken to be of merchantable quality just because the defects had not destroyed the workable character of the goods. In respect of any passenger vehicle, the purpose for which goods of that kind were bought, would not just include the purchaser's purpose in driving it but also his being able to do 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.

96 The plaintiff naturally relied on *Rogers*. He argued that as *Rogers* suggested, the inquiry into the Rolls was not simply whether it worked but whether it displayed the appropriate degree of comfort, ease of handling and reliability. *Rogers* had indicated that relevant factors in determining these matters included whether the vehicle was sold as new; the description of the vehicle and the price of the vehicle. Here, the car was new and the Rolls-Royce brand conjured up a particular and high set of expectations about performance especially since the car was marketed as "a magic carpet ride" and having "a whisper quiet" interior. Further, no buyer of a Phantom costing over S$1.4m would tolerate the slightest blemish though the buyer of a car at the humbler end of the range might be less fastidious. In this last observation, the plaintiff was quoting the judge in *Bernstein*.

97 *Bernstein* was a case in which a new Nissan Laurel automobile purchased by Mr Bernstein broke down on a motorway after doing only about 140 miles. The car would not re-start and had to be collected by the emergency services. Mr Bernstein rejected it the next day but the defendants had it

repaired at no cost to him. After repair the car was as good as new but the plaintiff still refused to have it back and contended that it was not of merchantable quality. It was found that the cause of the original defect was that a blob of sealant had entered the lubrication system and cut off the oil supply to the camshaft, which then seized up. Rougier J held that the car was unmerchantable. He was influenced by safety considerations: he considered that when the camshaft began to seize up, a situation of considerable potential danger had arisen. He was also influenced by the extent and the area of the potential damage and consequently the risk that such damage might still exist. The car had had a major breakdown and it was not reasonable for the buyer of a new car of this type (according to the judge it was in the medium executive range) and price (£8,000) to expect to sustain a major breakdown in the first 150 miles. The judge came to this decision despite recognising that on delivery, there was only a tiny blemish – "a blob of sealant that could and did have a dramatic effect", that the defect was repairable and was in fact repaired after which the car was as good as new.

98 In the course of his judgment, the judge made an observation which the present plaintiff relied on. He said (at p 228) that:

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

99 That was very much a statement made *obiter* and did not apply to the facts before him which involved an apparently minor matter but that had serious and potentially dangerous consequences. The judge also did not say that it would be reasonable to reject a car on the ground of a slight blemish on its paintwork which could easily be removed. He recognised that the cumulative effect of a series of relatively minor defects could render a car unmerchantable because they would be evidence of such bad workmanship in the manufacture or, on the assembly line generally, as to amount *in toto* to a breach of the condition of merchantability.

Discussion

Was there a defect?

100 In the present case, the defect complained of does not affect the safety or reliability of the Rolls. Nor does it have the potential to cause damage to any part of the engine or other component of the car. It is a defect that may affect the driver's enjoyment of the driving experience but certainly there is no other impact on the performance of the car or its comfort. It was pointed out in *Rogers* that certain brands of vehicles come with certain expectations and in this case the plaintiff has emphasised that he had very high expectations of the Rolls on the basis of how it is marketed.

101 In *Bernstein*, it was observed that it would not be fair to hold the manufacturers or their agents too firmly to the "exuberance of their Admen". This is the point to be considered here as well. Notwithstanding the way in which Phantoms generally are marketed, the plaintiff cannot really expect the experience of driving in the Rolls to be the same as flying on a cloud, which is the impression some may get from the term "waftability" made up many years ago to describe the experience of travelling in a Rolls-Royce automobile. In this analysis of whether the plaintiff's expectations were reasonable, it is important to see if the Rolls' performance is consistent with the performance of other similar vehicles. Whilst the plaintiff may think that the noise and vibration that he experienced should not be present in a car like the Rolls, if it turns out that in fact this is the general experience of Phantom drivers, the plaintiff will have nothing to complain about except that he did not get perfection.

102 I think that the starting point of the discussion has to be Mr Matawa's evidence. In my judgment, Mr Matawa was generally a convincing witness and his expertise as an automotive engineer cannot be doubted. As I have said earlier, I also have no reason to question his independence.

103 Mr Matawa tested six cars and this testing enabled him to understand the typical behaviour of a Phantom. Mr Matawa found that each of the Phantoms he examined exhibited noise and vibration during the execution of three-point turns which he labelled as "the Parking Phenomenon". Mr Matawa gave a technical explanation as to the cause of the Parking Phenomenon based on his examination of the specifications and design of Phantoms. This explanation was not challenged by the plaintiff. Additionally, Mr Bellamy, after considerable questioning, agreed that the Phantom emits noise and vibration because of the effect of resonance frequency triggered by the high forces in contact with the path between the tyres and the road, *ie*, the stick-slip effect. Mr Matawa also opined that in order to reduce the noise and vibration at a three-point turn, the bushing of the vehicle would have to be modified and this would change its characteristics when it was driving straight at all speeds and coming to a stop, which would be the most frequent situations encountered by the vehicle. Mr Bellamy agreed that the Parking Phenomenon could be due to the result of the kinematic of the front axle and of the soft bearings (*ie*, tyres) which can store and emit high energies.

104 The effect of Mr Matawa's evidence is that typically a Phantom will exhibit the Parking Phenomenon when it is executing a three-point turn. The plaintiff submitted that his ratings of the six comparison Phantoms showed that they all fell short of Rolls-Royce's own standard for its cars and of the BI rating which Mr Uphoff had given to the comparison car that he inspected in 2009. The plaintiff argued that that in itself cast considerable doubt on the reliability of Mr Matawa's ratings of the six comparison cars. However, in my view this argument does not take the plaintiff very far. Mr Marshall emphasised that Rolls-Royce aims for a BI 8 rating, he did not say that a BI 6 rating made a car unsatisfactory. From Mr Matawa's perspective all six comparison cars were within industry standards of satisfactory performance and I have no reason to doubt this assessment. Whilst no doubt both Rolls- Royce itself and a purchaser of any particular would prefer its performance in three-point turns to reach BI 8 rather than falling at the lower end of the range-BI 5 to BI 6, that would not turn a Phantom at the lower end of the accepted industry standard into a Phantom that is defective.

105 In this assessment, the objective readings of the Rolls and the two other vehicles which Mr Koay tested in February 2012 are also significant. These showed by that date, the performance of the Rolls in terms of vibration and noise levels was barely distinguishable from that of the comparison cars. There is no reason to doubt these objective readings. The plaintiff had a representative present during the testing and therefore would have been in a position to question the methodology and the results had he found any basis to do so. The plaintiff did not call Mr Errol Tan to testify however. Mr Koay was well qualified to carry out the objective tests and his independence was not questioned.

106 It bears mention that on the tarmac surface, the Rolls achieved readings that were comparable to the comparison cars tested by Mr Koay, despite it having clocked the highest mileage. A cross-comparison of the vibration amplitude charts from the three vehicles carried out by the defendant's lawyers showed that the vibration amplitudes of the Rolls compared favourably with those from the comparison vehicles. As for the noise levels, the Rolls clocked in at 53dB, which was lower than or the same as the readings from the other cars.

107 I am not convinced by Mr Bellamy's evidence. His expert opinion was entirely subjective. He admitted to his lack of training in objective testing even of such subjective things as noise and vibration perceptions during normal operations. As such the veracity of his subjective assessment is doubtful as he admitted it was highly dependent on him driving cars, listening to noises and telling people what was wrong with the car. He also agreed that the problem with subjective evaluation is

that it depends solely on the person driving the car. It is due to this that the BI index which is a subjective test in the ultimate analysis still contains a number of assessment criteria and a specific methodology that any tester must pay regard to. It is hard for me to accept Mr Bellamy's accuracy in regard to the rating he gave the Rolls since he knew nothing of the BI index and had no criteria or scale of subjective rating on which he based his assessments. Even in a subjective assessment there must be some objective criteria. Mr Matawa was able to testify as to these criteria in the BI scale but Mr Bellamy had no idea. For the same reason, I do not accept his assessment that the Test Vehicles he drove in England some three months after testing the Rolls reached much higher BI levels than the Rolls had. Without a proper scale and objective criteria he was in no position to carry out comparisons of the performances of the three vehicles much less when he did so at different times and in different conditions.

108 The evidence showed that the plaintiff used the Rolls extensively for three and a half years between end 2008 and mid-2012, clocking up more than 45,000 km. He was able to drive it for all the usual purposes for which cars are used, albeit with some irritation when it performed a three-point turn. This is unlike *Rogers* and *Bernstein* in which the cars were not reasonably fit for their purpose: in those cases there were real defects from the reasonable driver's perspective which affected the performance, safety or reliability of the car. There was no such problem here.

109 What I have said above is based on the reports and oral testimony of the expert witnesses given in relation to their examination of the Rolls in 2012. I am cognisant that by then, the defendants had carried out a great deal of work on the Rolls in relation to the plaintiff's complaints and had, by the end of September 2009, made a number of significant part replacements. Whether the Rolls would have performed as well on all the subjective and objective tests and in comparison with other vehicles had all these tests been performed in January 2009 when the plaintiff first complained, I cannot say. At that stage the defendant took the plaintiff's complaints seriously enough to carry out a whole series of inspections and replacements and to call in experts like Mr Rowlands and Mr Uphoff. The defendant says that it was only providing good customer service but it seems to me on the evidence to have gone quite a bit beyond this in its efforts to satisfy the plaintiff.

110 I am also cognisant of the fact that the defendant did not call Mr Ng and Mr Rowlands as witnesses. While Mr Rowlands may not live here and may not be subject to a subpoena, the same does not go for Mr Ng. The latter was involved in the testing and inspection of the Rolls from the very first complaint and he drove it many times in 2009 and in 2012. His evidence would have been very helpful in deciding whether in 2009, the NVH experienced and complained of by the plaintiff was simply the Parking Phenomenon or went beyond that into minor defect territory. As for Mr Rowlands, from his own correspondence, he certainly seems to have experienced some of the plaintiff's complaints. I am inclined, as the plaintiff urged me to, to draw an adverse inference from the absence of Mr Ng and Mr Rowlands. I conclude that in 2009, they certainly considered that the plaintiff's complaint was one of substance that needed to be attended to and resolved free of charge to the plaintiff.

111 Whatever may have been the views of Mr Ng and Mr Rowlands which the defendant did not adduce in evidence, however, the same would have made little difference in the final analysis. The defendant did carry out a great deal of work on the Rolls in an attempt to reduce the noise and vibration and whether it was as a result of that work or not, by the time the testing of the car was carried out in 2012 by independent experts, the NVH of the Rolls was found to be at a level experienced by other cars as well. Additionally, Mr Matawa's BI ratings given to the six test cars which demonstrated the Parking Phenomenon were comparable to that Mr Uphoff gave to the Rolls. In the light of the evidence, I hold that the Rolls was not defective. Any buyer of a Phantom would experience the Parking Phenomenon and therefore could not complain even though the huge price tag on the car may have led him to believe no such thing would exist. As an aside, it may be wise for

Rolls-Royce to moderate its advertising puffery since the Parking Phenomenon is a feature of every Phantom and contradicts the "waftability" and "magic carpet ride" claims. In no fairy tale has any magic carpet exhibited the Parking Phenomenon.

112 I should state here that the plaintiff argued that the defendant was not entitled to contend that it had cured the defect in the Rolls by 2012 because it had not explicitly pleaded this case. I do not accept this argument. The defence was widely enough drafted to encompass the idea that even if there had been any defect initially, the work carried out by the defendant in 2009 had dealt with this and the Rolls was not defective when the action was commenced. In any case, even if there had been a defect initially in that the level of the NVH made the Rolls unsatisfactory in the plaintiff's eyes, this was, on the findings I have made, a defect that could be remedied and was so remedied.

113 A defect that can be remedied so as to put a vehicle back into an as new position cannot render that vehicle of unsatisfactory quality unless there are exceptional circumstances. In *Bernstein*, what led the judge to find the car unmerchantable, despite the defect having been repaired so as to make the car as good as new, was that its existence had meant a major breakdown in the first 150 miles while the car was being driven on a highway and there was great potential for extensive damage. In this case, there never was any breakdown, even a minor one, caused by the defect and the plaintiff accepted that it remained safe and reliable throughout and the level of its performance at all times, apart from the three-point turn occasions, was up to expectations.

Was the Rolls reasonably fit for the purpose for which it was supplied?

114 The plaintiff submitted that the Rolls did not comply with the implied condition under s 14(3) of the Act that it had to be reasonably fit for the purpose for which it was supplied. In *National Foods Ltd v Pars Ram Brothers (Pte) Ltd* [2007] 2 SLR(R) 1048, it was held that where the purpose for which the goods are normally supplied coincides with the particular purpose for which they are purchased, a breach of s 14(2) would usually mean a breach of s 14(3). In this case, there was such a coincidence of general purpose with the particular purpose that the plaintiff had in purchasing the Rolls. I have found that there was no breach of s 14(2) and thus the plaintiff cannot use the allegation of unsatisfactory quality to establish that the Rolls was not fit for the purpose for which it was purchased.

115 Apart from a breach of s 14(2), the protection afforded by s 14(3) is invoked where the buyer makes known to the seller any particular purpose for which the goods are being bought and it turns out that the goods are not fit for that purpose. In this case, there was no evidence that the plaintiff made known to the defendant any particular purpose for which the Rolls was being purchased which was different from the usual one for which a Phantom is supplied. The plaintiff argued that from the advertisements put out by Rolls-Royce, he expected that in using the Rolls he would enjoy a much higher level of comfort and performance than he in fact received when the Rolls performed a three-point turn.

116 I am satisfied on the evidence that the Rolls was fit to be used, and did indeed perform, as a luxury vehicle to transport the plaintiff and his friends and family in safety and comfort. The plaintiff complained that it did not meet his expectations but although there was a great deal of puffery in the advertisements put out by Rolls-Royce for Phantoms, there was no promise of absolute silence. It is also relevant that the plaintiff did not himself make known to the defendant prior to the purchase that noise and vibrations were of particular concern to him and that his purpose in purchasing the Rolls would only be satisfied if it was noiseless and vibration free.

117 I find that there was no breach of the implied condition in s 14(3).

Other issues

118 As I have found that neither s 14(2) nor s 14(3) of the Act have been breached by the defendant, the plaintiff's action fails and must be dismissed. There are, however, three other issues which would have had to have been addressed had I found in favour of the plaintiff. In the event that this case goes on appeal, it may be helpful to the appellate court if I briefly state my views on these issues.

Did the plaintiff acquiesce in any breach?

119 The defendant's position was that even if it was in breach of contract, the plaintiff's silence between end September 2009 and the commencement of the action signified that he had acquiesced in the breach. The plaintiff had asserted that the defence of acquiescence was a non-starter because a person could only acquiesce in the breach after the breach had been committed. The defendant did not agree. It argued that acquiescence occurred when a person abstained from interfering while a violation of his legal rights was in progress. All that the defendant needed to plead was that the plaintiff, having a right, and with knowledge of his right, stood by and saw the defendant dealing with property in a manner inconsistent with the right of the plaintiff: *S Pathmanathan v Amaravathi & Ors* [1979] 1 MLJ 38 ("*S Pathmanathan*").

120 I do not accept the defendant's position. There are two situations in which acquiescence can be established. The first is where a person abstains from interfering while a violation of his legal rights is in progress. The second is where he refrains from seeking redress when a violation of his rights, which he did not know about at the time, is brought to his notice (this is the situation with which *S Pathmanathan* deals).

121 The defendant must be relying on the first basis because on the facts the plaintiff was aware from the beginning of the alleged violation of his rights. Where the first basis is concerned, the defence applies only to a continuing violation of the plaintiff's rights and not to a situation where the breach has already taken place before the plaintiff allegedly "stands by". The second situation is inapplicable because the plaintiff never stood aside and allowed the defendant to deal with the Rolls in a manner that was inconsistent with his ownership. The plaintiff gave up his efforts to reject the Rolls in late 2009 and any work that the defendant did on the Rolls thereafter in relation to servicing was completely consistent with the plaintiff's ownership of the vehicle. There was no change of position on the defendant's part when it serviced the vehicle.

122 The defendant relied on the plaintiff's lack of complaint about the noise and vibration for two years and his use of the Rolls during this period as proof of his acquiescence. However, it is unlikely that the plaintiff's conduct during this period could have induced the defendant to believe that it would not be sued. The plaintiff had explained in court that he saw no point in raising the issue since the defendant had failed to solve the noise and vibration after a year. During this time, he had sent the Rolls back for servicing on a total of eight occasions but had not indicated that he would not sue on the noise and vibration. Nor did he give the defendant an indication that he would not enforce his rights. The plaintiff's conduct did not demonstrate any acquiescence nor did the defendant demonstrate any reliance on the alleged acquiescence. Therefore, there was no acquiescence in this case.

What compensation would the plaintiff have been entitled to?

123 The plaintiff's position is that he had affirmed the VSA and elected to treat the implied condition of quality as a warranty under s 11(1) of the Act. His submission was that he was entitled

to be awarded damages in the sum of $1,057,159.33 according to the diminution in value measure prescribed by s 53 of the Act. As an alternative, he submitted that damages of $996,343.48 should be awarded if the court thought that he had to account for his use of the Rolls from November 2009 to October 2011.

124 Section 53 of the Act prescribes the damages payable in the case where a seller of goods is in breach of warranty. Under s 53(2), the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. This is a re-statement of the well-known rule in *Hadley v Baxendale* (1854) 9 Ex 341. In *Bence Graphics Ltd v Fasson Ltd* [1998] 1 QB 87 ("*Bence Graphics*"), the English Court of Appeal emphasised that this rule is the starting point for the assessment of damages and that the *prima facie* rule set out in s 53(3) should not be applied if it would give the buyer "more than his true loss". This *prima facie* rule in s 53(3) is that the loss for breach of warranty of quality is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

1 2 5 *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474 at 481 decided that in assessing the value of a defective car sold in a consumer sale and assessed in its defective state, it must be asked what the market value of the defective car would be if buyers and sellers had known of the defects.

126 The plaintiff relied on the evidence of his witness, Mr Benjamin Tan, to support his assertion that because of its defective state, the Rolls had no value at the time of delivery. Mr Tan is a director and shareholder in a luxury automobile broker which deals with both new and second-hand high-end luxury cars. He has sold five second-hand Phantoms. He gave an expert report in which he stated that if a potential purchaser had been made aware in December 2008 of the noise and vibration in the Rolls, there would have been no second-hand market for the Rolls. Unless that noise and vibration were rectified completely, no second-hand market for the Rolls would exist at all. Thus, the value of the Rolls, as at December 2008 and at August 2012 when he filed his expert report, was nothing more than its scrap value. The scrap value of the Rolls was approximately $353,846 as at December 2008, and $349,990.67 as at August 2012.

127 During cross-examination, Mr Tan was asked whether the defendant's offer to buy back the Rolls in October 2009 established a market value for the Rolls. He responded that it did not. His first reason was that the defendant had a vested interest in the dispute. His second reason was that the defendant is a dealer and not an end-user and the market value from the point of view of a second-hand car dealer would, in any event, be lower than the market value from the perspective of the end-user and customer.

128 The plaintiff submitted that as there was no market for the Rolls in its defective state, its value had to be the difference between the price that the plaintiff had paid and the scrap value. This difference was $1,053,304. The plaintiff acknowledged that a deduction should be made from this sum as an allowance for the value of the components of the Rolls. He did not, however, give me the amount of that value.

129 The plaintiff's position is difficult for me to accept. The basis for an award of damages is compensation to a plaintiff for the loss that he has suffered. As noted, the buyer of defective goods is not entitled to rely on the measure in s 53(3) if, in doing so, he would recover more than his true loss.

130 The plaintiff paid $1.4m for the Rolls. He took delivery in December 2008 and he drove the Rolls from then until he commenced this action in November 2011. By end August 2011, the Rolls had

clocked more than 37,000km and by end November 2011, it had probably clocked another few thousand kilometres. The plaintiff continued using the Rolls after the action started. When the hearing commenced, he still had it and there was no indication that he was going to scrap it before it reached the end of the Certificate of Entitlement term. In these circumstances, it appears to me that the plaintiff has received most of what he bargained for when he purchased the Rolls and he would be greatly overcompensated if I were to award him $1,053,304 in damages. That would mean, effectively, that he would have obtained a free vehicle.

131 However, the measure in s 53(3) requires me to award the difference between the value of the Rolls when it was bought, which here all parties accept as being the purchase price paid by the plaintiff, and its value in its defective state. The plaintiff sought to convince me that I could only look to the second-hand market value and therefore, based on the evidence of Mr Tan, the Rolls had no such value in its defective state. I do not think that the section requires me to employ such a narrow definition of value.

132 As *Benjamin's Sale of Goods* states at para 17-053, normally there is no market in the ordinary sense for damaged or defective goods and thus other evidence is frequently needed to fix the value of the goods at the time and place of delivery. In *Bulkhaul Ltd v Rhodia Organique Fine Ltd* [2008] EWCA Civ 1452 at [29], it was observed that a court can find that a market exists not just by identifying a willing buyer at a specified price but also by inferring from any sufficient evidence relevant to the issue.

133 In this case, I do have such sufficient evidence. It is provided by the offer of the defendant in October 2009 to re-purchase the Rolls at $1,055,000. The fact that the defendant was willing to re-purchase the Rolls in the condition in which it was, for whatever reason, indicates that the vehicle had a value to the defendant. That value was fixed at $1,055,000. It is irrelevant, in my view, that the defendant is a dealer in motor vehicles rather than an end-user of the same. There is nothing in the law that requires me only to have regard to the values attributed by end-users. The defendant was willing to purchase the Rolls at a reasonable price representing its depreciated value (as assessed by the defendant) after one year of use and this willingness, although it was expressed for the purchase of settling the plaintiff's complaint, is still evidence that there was a value to the Rolls. It was not worthless despite its defects.

134 Therefore, if I had found the Rolls to be defective and had had to assess the damages claimable by the plaintiff, I would have assessed them as being $352,150 (*ie*, the difference between $1,407,150 and $1,055,000).

135 The plaintiff also had a small claim for loss of amenity in respect of the 12 days when the Rolls was undergoing inspection and repair by the defendant in 2009. The plaintiff said that he could not use the Rolls during those days and for that loss of amenity he should be awarded damages of $2,000. I do not accept that contention. The evidence showed that the plaintiff had a large stable of expensive vehicles. Whilst the Rolls was in the workshop, he had a selection of other vehicles that he could use. The plaintiff made a bare assertion that he lost an amenity when he was not able to use the Rolls. There was no evidence that during those 12 days the plaintiff had intended to use the Rolls and not any of his other vehicles. There was no evidence that once the plaintiff bought the Rolls he used it to the exclusion of his other vehicles and thus felt the loss of amenity when it was not available for his use. Much less was there evidence that during those 12 days, or any of them, the plaintiff had a particular need to use the Rolls rather than any other of his vehicles. In my judgment, the plaintiff did not prove his loss of amenity.

Was the plaintiff obliged to mitigate his damages in the way asserted by the defendant?

136 The defendant pleaded that the plaintiff had failed to mitigate any loss of damage caused by the breach of warranty because he had continued to use the Rolls or, alternatively, because he had refused to accept the defendant's offer made in October 2009 to send the Rolls to Rolls-Royce's UK workshop for further investigation. The reason for this submission is that if the defendant could establish that the plaintiff had failed to mitigate his loss, the defendant would not be liable for damages.

137 The plaintiff submitted that the mitigation contention could not succeed. It was common ground that the burden was on the defendant to prove that the plaintiff ought reasonably, but failed, to take certain mitigating steps. I accept the plaintiff's argument that the steps which the defendant contended the plaintiff should have taken were either, not mitigating steps or not reasonable.

138 First, I deal with the assertion that the plaintiff could have mitigated his loss by accepting the offer to send the Rolls back to the UK for further investigation. This could not have been a mitigating step because on the defendant's case, the NVH experienced was part of the Parking Phenomenon and thus normal to Phantoms. On that premise, there was no reason to send the Rolls back to the UK because there was nothing to investigate and nothing to repair. This premise also puts paid to any argument that the plaintiff should not have continued to use the Rolls. Since in the defendant's opinion the Rolls was not defective, the plaintiff had no basis on which to stop using it.

139 Next, in its closing submissions, the defendant contended that the plaintiff should have mitigated by accepting the defendant's buy-back offer of $1,055,000. The defendant said that the purpose of mitigation is to put parties into a position where the plaintiff's loss is made good. Therefore, if the plaintiff had accepted the buy-back offer, he would not have been in a worse off position as he would have sold a defective Rolls at a non-defective price to the defendant.

140 I do not accept that argument either because it would mean that the plaintiff would have had to sell the Rolls at a loss and deprive himself of the remaining years during which he could have used and enjoyed it, given that the defect was a minor one. It is not reasonable to expect the plaintiff to pay 25% of the purchase price of the Rolls for one year of use. It may be that in the market cars depreciate by 25% in their first year of use but luxury cars, like the Rolls, are bought to be used and enjoyed over their operational life time and not to be re-sold within a year. Selling the Rolls back to the defendant would simply compound the plaintiff's loss of his bargain in having been supplied with a defective vehicle.

141 To elaborate, if the Rolls had been defective, the plaintiff would have been entitled to damages of $352,150. He would also have kept the car and been able to drive it until the COE expired. If the plaintiff had accepted the defendant's offer, he would have no Rolls and only $1,055,000 in his hands. He would have suffered a loss of $352,150 plus had the car for only one year. It cannot be seriously argued that it would be reasonable to require the plaintiff to mitigate in this way.

Conclusion

142 For the reasons given above, I dismiss the plaintiff's claim with costs.