IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA

CIVIL APPEAL

SUIT NO.J4/43/2013

15TH JANUARY 2014

CORAM: ANSAH JSC PRESIDING

OWUSU (MS) JSC

YEBOAH JSC

BONNIE JSC

AKAMBA JSC

G.A. SARPONG & CO.)
HOUSE NO. C 301/3) PLAINTIFF/RESPONDENT/APPELLANT
KANFLAH STREET,)
ACCRA)

VRS

SILVER STAR AUTO LIMITED) DEFENDANT/APPELLANT/RESPONDENT
SILVER STAR TOWERS)
AIRPORT CITY VALLEY)
AIRPORT, ACCRA

JUDGMENT

ANSAH,JSC

Facts of the case.

The plaintiff/respondent/appellant, (hereinafter referred to as the plaintiff), a Firm of Legal Practitioners and Consultants elected to buy a brand new C180 Mercedes Benz Salon car from the defendant/appellant/respondent (hereinafter called "the respondent") in February 2007. The car was bought under a 2 year unlimited warranty. Five months into acquiring the C- 180 Benz, the head gasket cracked. It was agreed between the appellant's officers and the respondent's officers that the appellant surrender the C- 180 Benz for another brand new E-Class Benz after paying Euros 15,000 to the respondent subject to a 2 year unlimited warranty. The E-Class Mercedes Benz Saloon car with Registration Number GN 2266Y is the subject matter of this Appeal.

In May, 2008, the car suddenly stopped in the middle of the road on a rainy day at East Legon, and appellant's officer notified respondent whose agents subsequently towed the car to respondent's workshop for repairs. The respondent claimed after diagnosis that water had entered the engine compartment and damaged some parts in the engine. The car remained in the workshop of the respondent for three months because respondent claimed it had to import the new parts for the engine.

On August 8th, 2008 the respondent submitted an invoice of GH₵7,498.77 as cost for the repair of the car to Appellant's insurers. The Insurers paid GH₵6,748.89 (Representing 90% of the total cost of repairs) under the insurance policy to respondent and appellant paid the remaining GH₵748.89 before respondent released the car to the appellant and appellant took delivery of same.

On December 1, 2008, two months after the respondent repaired the car, it broke down again whiles it was being driven by the appellant's Director on the Korle Bu Mortuary Road on a clear and sunny day. This time round, there was a loud noise beneath the car and after appellant's official had parked the car off the road, he discovered that all the oil in the car had drained onto the road. The respondent was notified after which its agents towed the car again to the workshop. The appellant was informed through its insurers that the engine of the car was damaged beyond repairs.

Subsequently, plaintiff commenced an action in the High court (Commercial Division) in Accra, against the respondent claiming, inter alia.

a. A brand new Mercedes Benz car (E Class) as replacement for Plaintiff's damaged car, or in the alternative a refund of the purchase price of the vehicle.
b. Compensation for loss of use of Plaintiff's Mercedes Benz Saloon Car No. GN 2266 Y
c. Further and/or in the alternative, damages for breach of condition and/or deceit."

In its Amended Statement of Defence filed on October 19, 2009 respondent denied appellant's claim and alleged that the cause of the damaged was attributable to the May 2008 incident and that appellant was not entitled to the claims as endorsed on the Writ of Summons. After the trail, the learned trial judge held that appellant was entitled to a delivery to it of a brand new Mercedes Benz car (E-class) as replacement for the damaged car. The court therefore entered judgment in favour of the appellant in terms of relief (a) as endorsed on the amended writ of summons but refused to grant reliefs (b) and (c) thereof.

Dissatisfied with the judgment of the High Court, the respondent appealed to the Court of Appeal, on 17th May, 2012 affirmed the judgment of the trial court in part, but reversed the order that appellant was entitled to a brand new E-Class Mercedes Benz Saloon car as a replacement for the damaged car. In lieu thereof the Court of Appeal ordered that the appellant was rather entitled to a replacement only of the damaged engine with a new engine under 2 year warranty.

This appeal has been brought at the instance of the plaintiff who is dissatisfied with the Court of Appeal's holding that the appellant was only entitled to a replacement of the engine and not to a brand new car.

The Grounds of Appeal are that:

> "a. The Court of Appeal erred in holding that the Plaintiff was not entitled to a brand new Mercedes Benz E-Class Saloon car but only a replacement of the engines as a result of the two(2) year warranty.
>
> a. Further Grounds of Appeal to be filed upon receipt of the Record of Appeal."

No further Grounds having been filed the sole ground outstanding in this Appeal is Ground (a).

What is latent manufacturer's defect?

According to *Black's Law Dictionary (8thed)* a hidden or latent defect is defined as "a product imperfection that is not discoverable by reasonable inspection".

Black's Law Dictionary (6th ed) defines latent defect as:

> "hidden or concealed defect, one which could not be discovered by reasonable or customary observation or inspection; one not apparent on the face of the goods, product or document…Defect which the owner has no knowledge of."

In *US v Lembke Const Co Inc* (CA Ariz 786 F 2d 1386-87) the term 'latent defect' has been described as 'one which cannot be discovered by observation or inspection made with ordinary care'. *Stroud's Judicial Dictionary* (5th ed, Vol 2, page 663) describes the term 'latent defect' as:

> "A latent defect is not simply any defect not discoverable through ordinary use and maintenance, but a defect or a flaw, generally in the metal or material itself, which could not be discovered by known and customary test."

A manufacturer's defect is defined as "an imperfection in a product that departs from its intended design." In *Parente (Robert A) v Bayville Marine Inc and General Insurance of America* (1975) 1 Lloyds Reports 333), it is defined as "a defect generally in the metal or material itself which could not be discovered by any known and customary test".

In *Georgia Hotel Ltd vrs. Silver Star* [2012] 2 SCGLR, Sophia Adinyira JSC, stated on page 1283 as follows:

> In the view of this court, by the mere definition of "latent defect", it means the defect is a manufacturing defect, which must exist at the time of production and delivery of the product. By being hidden or latent defect both the seller, and most importantly, the buyer, could not detect or be aware of the defect upon reasonable examination at the time of conveyance.

Were there latent defects in the vehicle?

Findings made by the learned trial judge on the strength of the evidence on record, which were affirmed by the court below, are as follows;

i. That the defect on the vehicle engine was latent.
ii. A buyer of a brand new Mercedes Benz E-Class vehicle will not be able to detect a latent defect in the vehicle by ocular examination of the vehicle or with a test-drive.
iii. The buyer will be able to detect such defect only after the contract has been concluded.
iv. It is in the light of (ii) above that it has become a common practice in the automobile industry for the seller to give a warranty that should such a defect manifest itself during the period of warranty, the seller is prepared to either repair the vehicle at no cost to the buyer or if it is a major defect replace the vehicle.
v. There was no evidence that appellant's G. A. Sarpong Esq., in May 2008 drove the vehicle into a ditch at East Legon as alleged by the Respondent.

vi. The damage to the car in December 2008 had nothing to do with the flooding incident of May 2008.
vii. The defect of December 2008 was not a minor defect but a grave one.

Additionally, the Court of Appeal held that;

viii. The Trial Judge did not proprio motu introduce a case contrary to that put forth by the Appellant as alleged.
ix. The trial Judge did not change the basis of the defence neither did he allocated to Respondent a burden of persuasion on a point Respondent had not pleaded as alleged.

There is thus, much common ground in the decisions of the High Court as well as the Appeal Court in terms of the finding of fact that there was a defect in the engine of the vehicle and that the defect in the vehicle engine was latent, constituting a breach and that the breach was not of a trivial nature. This is what the trial Judge said on the events of 1st December 2008.

> *"...but first the events in December 2008 whilst he was driving the said vehicle in very clear weather on the Korle-Bu Mortuary Road there was a loud explosion underneath the car. He stopped and thereafter realized that oil was leaking from the vehicle. He informed the Defendants who towed the vehicle to their workshop the next day. On examination the defendant informed the plaintiff through his insurers that the engine was damaged beyond repair. It is this damage that has provoked the present litigation.*

It is settled law that an appellate court such as this ought not to disturb findings of fact by two lower courts unless the findings are perverse. Since the High Court and the Appeal Court are agreed on the facts, it is not open to this court to upset or reverse those findings.

However the two lower courts diverge on the question of remedies and award of damages. This court (per Georgina Wood CJ) said in *Continental Plastics Engineering Co Ltd v IMC Industries-Technik* GMBH [2009] SCGLR 298 that:

> *"An appeal being by way of hearing, the second appellate court is bound to choose the finding which is consistent with the evidence on the record. In effect, the court may affirm either of the two findings or make an altogether different finding based on the record"*

See also Tuakwa v Bosom [2000] SCGLR; Achoro v Akanfela [1995-1996] SCGLR [1996-97] SCGLR 209; Obrasiwa II v Otu. [1996-97] SCGLR 618; In re Krobo Stool (No.1); Nyamekye (No. 1) v Opoku [2000] SCGLR 347; Ababio v Bekoe [1996-97] 392; Barclays Bank Gh. Ltd v Sakari 1996-97 SCGLR 639

As the two courts below are agreed on the facts as itemized above, it is not pertinent to set out the evidence produced at the trial in much detail except to affirm the finding that there were latent defects in the engine of the vehicle.

Is there a breach of the Sale of Goods Act, 1962?

It is provided by section 13(1) and 49 of the Sale of Goods Acts, 1962 (Act 137), respectively as follows:

> 13 (1) Subject to the provisions of this Act and any other enactment there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows—
>
> > (a) There is an implied condition that the goods are free from defects which are not declared or known to the buyer before or at the time when the contract is made:
> >
> > Provided that there is no such implied condition—
> >
> > > (i) where the buyer has examined the goods, in respect of defects which should have been revealed by the examination;
> > >
> > > (ii) in the case of a sale by sample, in respect of defects which could have been discovered by a reasonable examination of the sample;
> > >
> > > (iii) where the goods are not sold by the seller in the ordinary course of his business, in respect of defects of which the seller was not, and could not reasonably have been aware.
> >
> > (b) Where the goods are of a description which are supplied by the seller in the course of his business and the buyer expressly or by implication makes known the purpose for which the goods are required there is an implied condition that the goods are reasonably fit for that purpose.
>
> 49 (1) Subject to the provisions of this Act the buyer is entitled to reject the goods and to refuse to pay, or as the case may be, to recover, the price where —
>
> > (a) the seller is guilty of a breach of a fundamental obligation; or
> >
> > (b) the seller is guilty of a breach, not being of a trivial nature, of a condition of the contract, whether the breach is in respect of all of the goods or, subject to subsection (2), of part only; or

(c) the buyer has entered into the contract as a result of fraudulent or innocent misrepresentation on the part of the seller.

The fundamental obligation of the seller in this case as stated in section 8 of the *Sale of Goods Act 1962* is to deliver those goods, the specific goods of the 'E class' Mercedez benz, which substantially correspond to the description or sample by which those goods were sold to the buyer. The section read:

8 Fundamental obligation of the seller

(1) In a sale of specific goods the fundamental obligation of the seller is to deliver those goods to the buyer.
(2) In a sale of unascertained goods the fundamental obligation of the seller is to deliver to the buyer goods substantially corresponding to the description or sample by which they were sold.
(3)

It must be observed that delivery of goods having been complied with, this is not an issue in this case and that point will not be commented upon in this delivery.

In G.H Treitel's "*The law of Contact"*, 8th ed., p 689, a condition is defined as:

> *"A term of a contract which is so essential to the very nature of the contract that its breach entitles the injured party to rescind the contract and sue for damages."*

Upon a breach therefore of a condition, the innocent party is entitled to treat the contract as terminated and consider himself discharged from the obligation of further performance of the contract.

In Rogers v Parish (Scarborough) Ltd [1987] QB 933, [1987] 2 All ER 232, the brief facts were that a new car was, when bought, faulty in several respects, but none of the faults was irreparable or was of itself enough to put the car off the road. The question arose whether the car was of merchantable quality, i.e. fit for the purpose for which cars of that type were commonly bought, within the meaning of the *Sale of Goods Act 1979 s 14(6)* of the English law. It was held that (i) the purposes for which the car had to be fit concerned not only driving but also comfort, handling, reliability and general appearance. Thus it was relevant to consider the price and the expected advantages of the particular car. The fact that a fault could be, and indeed had been, repaired, did not mean that the car was merchantable, although that fact was relevant to the buyer's right to reject the car. (ii) It was irrelevant that the car was the subject of a warranty, since a buyer would expect no difference in performance between a car with a warranty and a car without one; the warranty did not govern the buyer's rights, but added to them. In all the circumstances, the car could not be said to be of merchantable quality.

In *Godley v Perry*[1960] 1 WLR 9; the defendant was a newsagent who sold also children's toys; some plastic toy catapults were displayed in his shop window. The plaintiff, a boy aged six, saw the catapults in the window, came into the defendant's shop and purchased one of them. While using it to fire a stone, the catapult broke and the plaintiff was struck in the left eye either by a piece of the catapult or by the stone; at the time of the accident he was using the catapult as it was expected to be used, pulling back the elastic to a proper extent. The plaintiff lost his left eye as a result of the accident. The defendant was found liable for damages of £2,500. There are two further relevant factors when framing this test.

- First, that claimants will have placed reliance on the defendant's skill and judgment in choosing which implants to offer.

- Secondly, the existence of a regulatory system which aims to deliver the highest possible levels of safety.

Under the English legal system it was held that if goods are of unsatisfactory quality, the consumer is entitled, within a reasonable time, to a repair or replacement (s 11M, SGSA 1982), unless this would be disproportionate. This right stems from the 1999 Consumer Sales Directive (1999/44/EC) and the choice is the consumer's.

This court held in *Social Security Bank Ltd v. CBAM Services Inc.* [2007 -2008] 2SCGLR 894 that a breach of a fundamental or essential term is one of the grounds upon which a contract may be terminated.
Where an allegation that a term is essential or fundamental is disputed, a court is bound to determine the issue as a primary fact. A breach of an obligation that would of necessity call for an election on the part of an innocent party to exercise his right of determination in the contract must fit into one of the following: (i) that which goes to the whole root of the contract and not merely part of it; or (ii) that which makes further performance impossible; or (iii) that which affects the very substance of the contract.

Under Ghana law, as opposed to the English law under the *Sale of Goods Act1979*, the issue for consideration is whether the appellant could repudiate the contract on the ground of latent defects. The relevant portion of section 13 of the Sale of Goods Act, which has a direct bearing on the present case, provides as follows:

Section 13—Quality and Fitness of Goods.

(1) Subject to the provisions of this Act and any other enactment there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows—

(a) There is an implied condition that the goods are free from defects which are not declared or known to the buyer before or at the time when the contract is made:

Provided that there is no such implied condition—

(i) where the buyer has examined the goods, in respect of defects which should have been revealed by the examination;

(ii) in the case of a sale by sample, in respect of defects which could have been discovered by a reasonable examination of the sample;

(iii) where the goods are not sold by the seller in the ordinary course of his business, in respect of defects of which the seller was not, and could not reasonably have been aware.

(b) Where the goods are of a description which are supplied by the seller in the course of his business and the buyer expressly or by implication makes known the purpose for which the goods are required there is an implied condition that the goods are reasonably fit for that purpose.

(2) The condition implied by paragraph (a) of subsection (1) is not affected by any provision to the contrary in the agreement where the goods are of a description which are supplied by the seller in the ordinary course of his business and the condition implied by paragraph (b) of subsection (1) is not affected by any provision to the contrary in the agreement unless the seller proves that before the contract was made the provision was brought to the notice of the buyer and its effect made clear to him.

The import of the foregoing provision is summarized as follows: the general rule under the Ghana *Sale of Goods Act 1962,* distinguished from the English *Sale of Goods Act 1979*, is that a seller of goods in Ghana, whether new or second-hand, is liable for all defects in them. This duty is an implied condition of the contract of sale. The seller is, however, not liable for those defects which he declares or makes known to the buyer before or at the time of the contract. Again, where the buyer has examined the goods, the seller is not liable for defects, which should have been revealed by the examination. It would appear then that where the defects complained of were not declared or made known to the buyer before the contract and could not have been revealed by the buyer's examination, if any, the seller is liable. But even so, where the seller is not a dealer in the kind of goods sold and it is established that he did not know or could not reasonably have been aware of the defects complained of, he escapes liability.

Under section 13 of the Sale of Goods Act of Ghana, the seller has the duty to deliver goods of the right quality and fitness.

It can be seen from the foregoing summary that the rules to be applied under Ghana law where a buyer complains of latent defects are completely different from those existing under English law and under which most of the cases relied on by both parties have been decided. It is also worth observing that under the Ghana provisions dealing with defects in goods, no determination as to the merchantability of the goods is required. Indeed, nowhere in the Ghana *Sale of Goods Act* is

the term "*merchantable quality*" used. Ghana law imposes a heavier responsibility on sellers of goods than is the case under English law. Moreover, the duty imposed by the Ghana law is the same for sellers of both new goods and second-hand goods. In short, the Ghana law approaches the topic of Sale of Goods with a *Caveat Venditor* gloveson rather than the *Caveat Emptor* approach of the English common law.

In the case of *Continental Plastics Engineering Co Ltd v IMC Industries-Technik* GMBH [2009] SCGLR 298 supra, Georgina Wood, CJ, said:

> *The legal position can therefore be summed up as follows: a seller of either first or second hand goods is by an implied condition, liable for all defects in them. Based on what we believe is pure common sense the seller is however not liable for defects which he fully disclose or declares to the buyer at the time of the contract of sale. When the buyer has examined the goods the seller cannot be held liable for defects which ought to have been discovered on examination, as for example, patent defects. It does follows that if there were defects particularly latent defects which are not discoverable on examination, and which are not disclosed to the buyer before the conclusion of the contract, the seller cannot escape liability for the breach of an essential condition of the contract"*

The questions to be asked then in a sale of goods are these; first, were the defects complained of by the appellant declared or known to him before or at the time of the contract? Second, if they were not declared or known to him, did he examine the goods and should the examination have revealed those defects? Thirdly, was the respondent, a dealer in cars, aware or should he reasonably have been aware of the defects complained of?

Taking the questions *seriatim*, I will answer the first question in the affirmative and say that the defects complained of was not declared or known to the appellant. In fact, as borne by the evidence, Exhibit M and Exhibit 1K, the appellant only knew of the defect after the incident on 1st December 2008. Mr. Hussein Noubani, as general manager of the defendant company, responded through email on 12th July 2008 to Mr. Sarpong's e-mail the previous day, Exhibit 1L, as follows:

> *"Subject: Re Damaged Mercedes Benz car No. GN2266Y.*
>
> *Dear Mr. Sarpong,*
>
> *We regret to inform you that the delay is not due to ignorance or our interest to delay the completion of your vehicle. Unfortunately some of the parts such as the connecting rod bearings reported as short landed items arrived July 07 and the timing case cover oil seal is back ordered by the factory and expected to arrive next week. Upon the arrival of*

the back ordered item, the engine will be completed within three working days. With best regards.

Hussein Noubani.

Silver Star Auto

G M After Sales."

Under cross-examination, Mr. Hussein Noubani gave conclusive responses to questions asked by counsel for the appellant that establishes the fact that the repairs after the May 2008 East Legon damage to the vehicle had been fully completed:

Q. So you agree with me that when you released the vehicle to Mr. Sarpong, you were undertaking that the work had been completely done.

A. Yes.

Q. So you would agree with me that it will not be appropriate for you to come back few months later to tell the customer that the work that was done was not complete.

A. The work was completely done.

Q. That you cannot make reference to the earlier defect that you certify that have been completely done five months down the line. You agree with me.

A. Yes I agree.

And yet this was the discourse during the examination-in-chief of the appellant in respect of the 1st December 2008 incident:

Q. ....Did anything happen to the car again?

A. Yes. I parked the car throughout the month of November and again I was on an international assignment in East Africa and came back at the end of November. On 1st December 2008 from Court, I visited a friend at Korle Bu hospital and on my way back, I stopped at the traffic light at the Korle Bu junction mortuary road and turned left along the mortuary road in the direction of Obetsebi Lamptey Circle. Barely a minute after turning, I heard a loud explosion underneath the car and I parked by off the road and what I saw was that all the oil underneath the car had drained on the road and the car was rendered incapable of being driven. ...

Q. *Did they give you any report after they examined the car? Did they give you any report or did they inform any other interested party of the report on the situation on the car?*

A. *I notified the insurers and they informed the insurance company that the engine was totally damaged in fact beyond repairs.*

Any information, which came to the appellant about the engine of the vehicle, came from his insurers after the damage had occurred and not before or during the contract. It was on this date that any evidence as to the latent defect would become apparent to the appellant by which time the contract had already been executed.

On the second question of whether he examined the vehicle and should the examination have revealed the defects, the evidence shows that the appellant did not examine the vehicle and even if he examined the vehicle, the latent defect would not have been apparent to him. A cue is taken from the very definition of 'latent defect'. *Black's Law Dictionary (6th ed.)* defines latent defect as:

> "hidden or concealed defect, one which *could not be discovered by reasonable or customary observation or inspection;* one not apparent on the face of the goods, product or document…Defect which the owner has no knowledge of."

In a question asked Mr. Noubani, the General Manager after sales, this was his answer:

Q. So if you with an engineering eye, if you cannot see a problem then you will agree with me that Lawyer Sarpong, he may be a professor in Law but he may not be able to know better than you in the engineering side. Is that not correct?

A. It is correct.

Q. You will

On the third question of whether the respondent, a dealer in cars, was aware or should he reasonably have been aware of the defects complained of? It is trite knowledge that a dealer in specialized upmarket cars like Mercedes Benz should be aware of the defects complained of.

It has been determined by the trial Judge and the court below that the breach of the defendant is a breach of a kind not being trivial but of condition of sale of the brand new E-Class Mercedes Benz Saloon car by reason of the fact that the engine having a latent defect rendered the car in a non-propulsion state, that was to say that it was incapable of self propulsion. This breach goes to

the whole root of the sale of the E-Class Mercedes Benz Saloon car and that it affects the very substance of the contract. The Court of Appeal, while agreeing that the breach was fundamental, proceeded to award damages in the form of a replacement of the defective engine. In my opinion, the approach of their Lordships at the Court of Appeal has been to treat the breach as a warranty as opposed to a condition. The finding of the trial judge has been that the breach was indeed a condition. This court finds that the breach occasioned was a condition as the Mercedes Benz E-Class had been rendered non-propulsive due to defects in the engine. The vehicle retained the defects after the repairs had been done by the respondents and it is therefore rightly urged that it was inferior and fundamentally different from what the appellants had bargained for when purchasing the vehicle and the respondent could not be said to have fulfilled their obligations under the Sale of Goods Act. It seems to me that the right to reject is not lost by any unreasonable delay in doing so as the vehicle remained with the respondents for the entire period when they had intimated rejection. Benjamin's Sale of Goods (5th ed.), states that intimation for a rejection of goods not necessarily be express, but must be clear. Under section 50 of the Sale of Goods Act, 1962 the buyer is not necessarily bound to return the vehicle to the seller.

In relation to the present case, under normal and ordinary circumstances, it would be difficult to find that the vehicle had not been rejected after delivery. From the evidence, the conclusion by the Court of Appeal was unjustified, whilst that of the High court was justified: see Fisher, Reeves & Co., Ltd. v. Armour & Co., Ltd. [1920] 3 K.B. 614, C.A. and Chao v. British Traders and Shippers [1954] 1 All E.R. 779.

The Sale of Goods Act, 1962, states the following:

> **Section 55—Damages for Breach of Condition or Warranty.**
>
> Where the seller is guilty of a breach of his fundamental obligation or of a condition or warranty of the contract the buyer may maintain an action against the seller for damages for the breach complained of or may set up a claim to such damages in diminution or extinction of the price.
>
> **Section 56—Assessment of Damages Under Sec. 55.**
>
> The measure of damages in an action under section 55 of this Act is the loss which could reasonably have been foreseen by the seller at the time when the contract was made as likely to result from his breach of contract.

In this case, the logical assessment of damages is what the respondent foresaw would be the natural result of the breach, which is to ask for a replacement of the new vehicle which the appellants bought, with a brand new one. This is what the respondent has sought to contract themselves out of by an exclusive clause in the form of a warranty. At the material time of executing the contract, the details of the warranty had not been made known to the appellant as

seen from the facts established at trial and therefore I find that the respondents have not been able to successfully exclude themselves from the reasonable foreseeable result of the breach, which is a replacement with a brand new vehicle.

In conclusion, a latent manufacturer's defect is generally defined as a hidden or latent "product imperfection that is not discoverable by reasonable inspection". A complaint should be made within a reasonable time and after reasonable inspection. If the vehicle is new, it is reasonable to expect that it be free from defects. The appellant has been able to discharge the burden of proof that the vehicle had latent defects. The High Court and the Court of Appeal are agreed on the type of breach of contract as a condition.

It is settled law that an appellate court ought not to disturb concurrent findings of fact by two lower courts unless the findings were perverse. Where the Court of Appeal agreed with the lower court that the breach was not of a trivial nature, it could only vary the award of damages where it was manifestly perverse; Where they have not found any legal basis for altering the damages awarded by the court of first instance, it was not open to the Court of Appeal to vary the damages awarded. The Court of Appeal's posture changing the award has resulted invariably in finding that the non-propulsion of the car did not go to the root of the contract. We disagree with the greatest respect with the Court of Appeal on this point and hold that this cannot be the finding of this court.

From the foregoing we would affirm the decision of the High Court and allow the appeal against the decision of the Court of Appeal. Consequently, we restore the judgment of the High Court.

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

COUNSEL

J. OPOKU BOATENG FOR THE PLAINTIFF/RESPONDENT/ APPELLANT.

KIZITO BEYUO WITH HIM NAA ODOFOLEY NORTEY FOR THE DEFENDANT /APPELLANT/RESPONDENT.