Neutral Citation Number: [2022] EWCA Civ 1339

Case No: CA-2022-000662

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
HIS HONOUR JUDGE PEARCE
CC-2021-MAN-000029

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2022

Before:
LORD JUSTICE GREEN
LORD JUSTICE PHILLIPS
and
LORD JUSTICE SNOWDEN

- -

Between:

ALISON KYNASTON-MAINWARING	**Respondent/ Claimant**
- and -	
GVE LONDON LIMITED	**Appellant/ Defendant**

- -

Robert Weekes KC and **Celia Rooney** (instructed by **Knights**) for the **Respondent/Claimant**
Edward Levey KC (instructed by **Malvern Law**) for the **Appellant/Defendant**

Hearing date: 21 July 2022

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Approved Judgment

This judgment was handed down remotely at 2 pm on 19 October by circulation to the parties or their representatives by e-mail and by release to the National Archives,

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Lord Justice Phillips:

1. On 18 March 2022 HHJ Pearce, sitting as a Judge of the High Court ("the judge"), made an order declaring that the respondent had validly rejected a motor car sold to her by the appellant (a company in the business of selling luxury cars) and that title to the car would revest in the appellant on payment of sums due to the respondent. In that regard, the judge ordered that the appellant refund £117,000 to the respondent, being the price paid for the car less a deduction of £5,000 for use pursuant to her rights under the Consumer Rights Act 2015 ("the 2015 Act") and pay £1,334 in damages.

2. The appellant appealed that decision, contending that the judge was wrong as a matter of fact and law to find that the car was not of satisfactory quality[1]. Permission to proceed was granted by Males LJ. In the event, and as explained below, the appeal ultimately boiled down to a challenge to the judge's central finding of fact, namely, that the car had been properly serviced in May 2019.

The essential facts

3. On 8 August 2018 the respondent purchased the car, a Mercedes AMG GTC Roadster 2-door convertible registration number S7 ALY, from the appellant for £122,000. After taking delivery on 7 September 2018, the respondent parked the car in a garage at her home except for a few days in November 2019 when she left it outside. On 22 November 2019, when she came to move the vehicle, she found that the footwell on the passenger side had filled with rainwater. This caused extensive damage to the electrical components and wiring of the car. On 30 September 2020 the respondent commenced these proceedings, seeking relief under the 2015 Act for the supply of a vehicle which was not of satisfactory quality.

4. The case proceeded within the Shorter Trials Scheme. The trial commenced on 14 March 2022, the judge delivering judgment at the end of the trial, on 17 March 2022.

The judgment

5. The judge identified that the "main issue" was the cause of the "ingress of water" [13], which he described as "catastrophic" [3]. He recorded that the appellant had advanced various explanations for this event, each of which had been rejected by both parties' experts [26]-[27]. The judge instead accepted the explanation provided by the experts, namely, that there was a blockage of a drainage channel which runs from the rear of the roof of the car and exits on the underside of the car [29], [33] that resulted in water overflowing into the footwell [98]. The central question, therefore, was what had caused that blockage such that the flooding occurred in November 2019 [68].

6. The judge accepted the respondent's evidence that the car had, on the whole, been stored overnight in the garage which the respondent had adapted for that purpose [74]-[75]. At [91] the judge accepted the respondent's statement that the first occasion on which she had left the car outside overnight was the period of a few days prior to the discovery of the water ingress. He also accepted that, whilst outside, the roof was up and the windows were closed [92]. He also accepted that the vehicle was kept in very

[1] Entailing that the respondent was in breach of the term implied into the contract of sale by section 9 of the 2015 Act.

good condition by the respondent ([77]). On that basis, he concluded that there was no reason to think that the respondent, or the person who valeted the car, did not take appropriate steps to keep the drainage channels clear, a conclusion that was fortified by the experts' agreement that there was no evidence of abuse or neglect of the vehicle ([78]).

7. There was no reason, in the judge's view, to think that the drainage channel was blocked at the time the vehicle was serviced in May 2018, or at the time of delivery to the respondent in September 2018 [124]-[125]. In February 2019, however, there was "relatively extensive condensation" on the inside of the vehicle which caused misting of the windows [15], [81]-[83]. Then, in April 2019, the car went to RSC, a company which specialises in bodywork. Mr Clapton, a director of RSC, stated that there was "dampness to the carpet" [88]. The judge accepted this evidence and found that there was, at the very least, moisture present in the car on that occasion [89]. As a result, the judge concluded that it was more probable than not that these two incidents were caused by "some blockage in the drain" [90], the cause also of the flooding in November 2019. In particular, he accepted the consensus view of the experts that the grill on the top of the drainage channel allowed small items of organic debris to enter, which could accumulate in the channel due to the rubber diaphragm at the bottom, resulting in the blockage and, ultimately, the flooding [108], [113].

8. It was accepted by both sides' experts that this constituted a "potential weakness" of design [113]. It was the appellant's contention, however, that this should be managed by routine servicing and that the problem in this case was that the blockage, which was evidenced by the incidents in February and April 2019, had not been dealt with at the service conducted by the Mercedes-Benz dealer, Lookers, in May 2019 [89], [122]. The judge's decision, therefore, ultimately turned on his finding as to what happened (or did not happen) at the service in May 2019. The appellant supported its submission that the drain cannot have been cleared by reference to the inability of Mr Roberts, the appellant's expert, to find, in an internet search, any references to such a problem apart from this incident [109]. Indeed, the appellant submitted that there are thousands of cars in the world with this feature and yet there appears to be no other recorded incident of this kind [121]. Mr Roberts also mentioned in evidence that he had seen (but could not produce) a "manufacturer's service list" (also referred to by the judge as the "service schedule") which showed the need to clear the body drains to the car during a service [107].

9. The judge addressed the critical issue in the following way:

> "127. I have referred already to the slightly unsatisfactory feature of this case that there is not before the Court the schedule that says that the drain should be cleared annually on the service, or at least checked annually on the service and cleared if it is blocked. It is more likely than not that Mr Roberts is right about what that says. Given my other assessment of him, I have no reason to think that he would be making up reference to a service schedule that did not actually exist.
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> 128. However, then if he is right, that that is what the service schedule said, it is obviously more likely than not that the drain was cleared, if blocked, in May 2019. Of course, the problem

> occurred in November, as we know, when it might be thought, applying Occam's Razor if nothing else, that it was most likely a continuous problem. However, if it was a continuous problem, why was there no water ingress at any other time?
>
> 129. The answer, of course, might depend on when the vehicle was actually in the rain. However, given that we know from what actually happened that it was possible for this problem to arise between a May 2018 service and February 2019, it is equally possible that it arose between a May 2019 service and November 2019.
>
> 130. On that basis, one should not assume that those who carried out the service in May 2019 failed to clear blockage. It is rather more likely that they did clear a blockage, which is why the problem was not apparent again for several months".

10. The judge expressed caution at drawing any inferences from the lack of evidence of any other such incidents given that, as Mr Roberts accepted, a manufacturer would be unlikely to reveal this unless they had to, and one would not necessarily expect the problem to come to light unless it had reached the level at which a recall of the vehicle was being considered [131]-[132].

11. The judge then considered the relevant provisions of the 2015 Act:

> "135. I turn then to the question as to whether that is indicative of this vehicle not being of satisfactory quality. Section 9 of the Consumer Rights Act 2015 provides that:
>
> > "Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory.
> >
> > (2) The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of –
> >
> > (a) any description of the goods,
> >
> > (b) the price or other consideration for the goods (if relevant), and
> >
> > (c) all the other relevant circumstances.
> >
> > (3) The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods –
> >
> > (a) fitness for all the purposes for which goods of that kind are usually supplied;
> >
> > (b) appearance and finish;

> (c) freedom from minor defects;
>
> (d) safety;
>
> (e) durability".
>
> 136. What is of satisfactory quality is, of course, an evaluative judgement."

12. In light of his earlier findings, the judge concluded that a car that is capable of flooding in this way cannot be said to be of satisfactory quality [143].

13. As to remedy, the judge preferred the reasoning of the respondent's expert, Mr Law, on valuation to that of Mr Roberts. He therefore found that the car would only command a salvage valuation in the region of £8,500 [159], [166]. Given this conclusion, the judge held that the respondent's remedy under the 2015 Act ought to be the final right to reject, with the return of the purchase price [168]-[173], subject to a deduction of £5,000 for use [174]-[176].

The issue in the appeal

14. The grounds of appeal essentially raised two challenges to the judgment:

    i) The judge made an error of fact in finding that the car had an inherent defect given the evidence before him; and

    ii) The judge erred as a matter of law in applying the provisions of section 9 of the 2015 Act to the facts of this case.

15. In oral submissions Mr Levey KC, for the appellant, confined his arguments to the first ground, focussing on the judge's finding that the drainage channel had been properly cleared in the service in May 2019. Whilst Mr Levey did not formally abandon the ground that the 2015 Act had been misapplied by the judge, he did not pursue it by way of oral submission. He was right not to do so: on the basis of the facts as found by the judge, he was fully justified in finding that the car was not of satisfactory quality under section 9 of the 2015 Act. It is unnecessary to say anything further about the second ground of appeal.

The relevant legal principles

16. It follows that the only legal principles relevant to this appeal are those relating to challenges to findings of fact. The proper approach was authoritatively explained by Lewison LJ in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] ETMR 26 as follows:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] R.P.C.1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec*

Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 W.L.R. 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 W.L.R. 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii. The trial is not a dress rehearsal. It is the first and last night of the show.

iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done".

17. In *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 Lewison LJ further summarised the principles as follows:

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the

> decision under appeal is one that no reasonable judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract".

18. There was no real dispute between the parties as to these principles. Mr Levey sought to formulate the test in a number of ways, submitting that he did not need to show that the judgment was "perverse" nor that he had to go as far as saying that no reasonable judge could have reached any other conclusion than to reject the respondent's evidence, but that he just had to show that the judge demonstrably failed to take into account relevant evidence. I do not think that these formulations are of assistance. The question is simply whether the decision, and in this case specifically, the finding regarding the service in May 2019, is one that no reasonable judge could have reached, as per point (ii) in *Volpi*. It is also not enough that the judge merely did not mention certain pieces of evidence. It must be shown, per point (v) in *Volpi*, that the judge failed to give the evidence a balanced consideration such that his finding was rationally insupportable. As Mr Levey himself accepted, this is a very high hurdle.

19. Mr Weekes KC, for the respondent, also drew our attention to *Wheeldon Bros Waste Ltd v Millennium Insurance Co Ltd* [2018] EWCA Civ 2403, [2019] 4 WLR 56. Coulson LJ, disposing of an application for permission to appeal after oral hearing, addressed the question of appeals against a judge's evaluation of expert evidence:

> "11. A first instance judge's assessment of, or evaluations based upon, expert evidence adduced at trial must be approached by an appellate court with similar caution. Whilst it has been said that a reconsideration of an expert's opinion may be slightly easier than a finding of fact, because the underlying report will

> be in writing (see *Thomson v Christie Manson & Woods Ltd* [2005] EWCA Civ 555; [2005] PNLR 38), the same case also provides a salutary warning that, since the evaluation of expert evidence is likely to be bound up with a wider evaluation of matters of fact, an appellate court will still be very slow to intervene. At para 141 of his judgement in *Thomson's* case, May LJ said:
>
> > "But, even accepting that individual points such as these are amenable to judicial appellate evaluation whatever the expert opinion, no appellate court should cherry pick a few such points so as to disagree with a composite first instance decision which, in the nature of a jig-saw, depended on the interlocking of a very large number of individual pieces, each the subject of oral expert evidence which the appellate court has not heard.""

20. The appellant did not seek to distinguish this appeal on the ground that the judge's finding was based (or at least based in part) on expert evidence. Even if it had, however, it is clear that similar caution should be applied to reconsidering such a finding.

The appellant's submissions

21. Mr Levey submitted that the critical finding (that the drainage channel had been cleared by the service in May 2019) was based entirely on inference, flawed reasoning and, to some extent, speculation, and therefore can and should be overturned pursuant to the principles set out above.

22. First, Mr Levey submitted that there was no direct evidence to support the judge's finding. There was a record of a 'Service B' being carried out in May 2019, but this did not expressly mention the drainage channel being cleared. Indeed, the respondent accepted at the trial that what happened at the service in May 2019 was surrounded by uncertainty.

23. By contrast, the evidence was said by Mr Levey to point compellingly in the opposite direction. While there was some blockage which caused the incidents in February and April 2019, those were relatively minor issues. Although the car was very well looked after and was not taken out much in the period between May and November 2019, on the judge's findings a blockage must have developed in that time that resulted in catastrophic flooding. The much better explanation of the facts, which was also the opinion of Mr Roberts as set out in his written report, was that the blockage was not cleared in May.

24. This view was said to be fortified by Mr Roberts' internet search. Although there are thousands, if not hundreds of thousands, of cars with this design of drainage channel, Mr Roberts was unable to find any other recorded example of blockage causing flooding on the internet. This weighs strongly in the appellant's favour and yet the judge, at [131]-[132], gave this evidence no weight in his consideration. Moreover, the judge's finding led him to speculate at [133] as to why this seemingly rare event occurred to the respondent's car, espousing a theory (that the lack of use of the car had

contributed to the blockage) which had no basis in the witness or expert evidence. This was said to demonstrate how unnaturally the finding fitted with the evidence.

25. Mr Levey accordingly submitted that the weight of evidence in the appellant's favour meant that the judge was plainly wrong and demanded the overturning of the factual finding.

The respondent's submissions

26. The respondent argued that the evidence in favour of the judge's finding was strong, whilst that in favour of the appellant's contention was weak, or was at least not so overwhelming as to satisfy the test for overturning a finding of fact. The documentary evidence showed that a service was carried out during which in the normal course, as Mr Roberts admitted, the drainage channel would be cleared. The respondent also pointed to evidence that Mr Clapton of RSC informed Lookers of the moisture issue when he delivered the car for the May service, increasing the likelihood that Lookers would have serviced the drainage channel. Taken together, all this evidence makes it highly improbable that the appellant's contention is correct.

27. The evidence as to the widespread use of this drainage channel design and of the internet search for similar problems was given by Mr Roberts during oral evidence at trial and had not been mentioned in his written report. As for the internet search the respondent pointed out that Mr Roberts gave no particulars of what he had searched for or of the precise results. In any event, Mr Roberts also admitted that all complaints to Mercedes-Benz about design flaws would be kept confidential, and so, the respondent submitted, it would be wrong to lean too heavily on the absence of evidence as evidence of absence. Finally, there was no reason to conclude that the car had not been driven much between May and November and, in any event, it would be wrong to assume that debris accumulated in the drainage channel at a uniform rate. The appellant's re-arguing of the respective weight of evidential aspects of the case was simply not enough to overturn the judge's finding.

Was the judge's evaluation of the evidence plainly wrong?

28. The appellant's suggested reading of the evidence is certainly plausible, and it is curious that there is no evidence of a similar problem having occurred, assuming that Mr Roberts' evidence can be taken as accurate. Moreover, the appellant contended for a credible interpretation of the events leading up to the incident. The issues in February and April 2019 were relatively minor in comparison with the incident of November 2019, supporting a hypothesis that the blockage, having not been cleared by the May 2019 service, worsened to the point of causing catastrophic flooding in November. The question, however, is not whether the appellant put forward a plausible, or even preferable, reading of the evidence, but whether the appellant demonstrated that the judge was plainly wrong or, put another way, that the decision under appeal is one that no reasonable judge could have reached.

29. The answer, in my view, is that the appellant's contentions clearly did not meet that test. The judge's finding that the drainage channel was cleared during the May 2019 service was not without evidential foundation. The judge made his decision on the basis of a combination of documentary and expert evidence. Whilst there is no express reference in the documentary evidence to the need for, or the completion of, a clearance

of the drainage channel, it is agreed that a 'Service B' was completed and the appellant's own expert gave evidence to the effect that clearance of the drainage channel was part of such a service. We were taken to a document entitled 'Visual Health Check' which confirmed that the underside of the vehicle, where the rubber diaphragm of the drainage channel is located, had been checked. The judge had also been referred to the evidence of Mr Clapton, who claimed to have told an individual at the front desk of Lookers about the moisture problem, which would have given Lookers particular cause for checking the drainage channel. In my judgment, the combination of these aspects of the evidence was a sufficient basis for inferring that the clearance of the drainage channels had occurred at the May 2019 service, a finding that Lookers had undertaken the tasks required of them in carrying out the service. The cited pieces of evidence were relevant, and linked logically, to the inference the judge drew. It follows that the judge reached a rationally supportable finding.

30. As for the appellant's specific criticisms of the judge's reasoning:

    i) The appellant stressed that the judge's finding was, ultimately, an inference based on an assumption that Lookers carried out a scheduled task when there was no direct evidence that they did so. However, the appellant's preferred scenario is also based on inference, derived from the timing of the blockage earlier in the year, as evidenced by the February and April 2019 incidents, and then a catastrophic incident in November, despite the car not being driven much between May and November, leading to an inference that Lookers did not clear the drain in May 2019. I do not see any basis on which the judge can be said to have been plainly wrong in inferring full and proper performance by Lookers rather than a failure of performance by that company.

    ii) The appellant criticised the judge for failing to place any weight on the evidence of Mr Roberts' internet search; however, the judgment adequately explains the judge's approach to this evidence. First, the judge made it plain that, as evidence emerged belatedly (so that the respondent could not consider, challenge and respond to it), he would give it little weight, expressing the view that it was perhaps to the respondent's benefit that the evidence had emerged in this way [110]-[111]. As stressed in *Volpi*, the weight to be given to evidence was pre-eminently a matter for the trial judge. Second, the judge gave reasons why Mr Roberts' internet search might not have revealed similar problems, in part based on other aspects of Mr Roberts' expert evidence (that a manufacturer would wish to keep such problems confidential). The appellant argued that the judge was engaged in speculation in that regard, but in my judgment the judge was fully justified in considering explanations for the results of Mr Roberts' internet search given the circumstances in which it emerged in evidence.

31. It follows, in my judgment, that the appellant was far from establishing that the judge's key finding of fact in this case was plainly wrong.

Whether this decision has wider implications

32. The judge in this case decided that the particular car in question was not of satisfactory quality. He did so on the basis of findings of fact he reached on the balance of probabilities, doing so on the available evidence, which was far from complete, let alone definitive. My reason for upholding that decision is that there is no basis for

interfering with those findings of fact, which are rationally supportable on such evidence as was before the judge: it does not imply that I would have reached the same decision, and it may well be that other judges will in future reach a different conclusion when considering similar issues and would be fully entitled to do so. It follows that, even if My Lords agree with my judgment, it should not be taken as a more general determination, or even support for a wider view, that this model of car, or this design of drainage channel, has an inherent defect such as to render such vehicles not of satisfactory quality.

Conclusion

33. I would dismiss the appeal.

Lord Justice Snowden

34. I agree.

Lord Justice Green

35. I also agree.