

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
(COMMERCIAL DIVISION)  
[SUIT NO: D22-675-2005]**

**NATURE'S LAB SDN BHD**

**v.**

**1. AUTO BAVARIA SDN BHD**

**2. TRACTORS MALAYSIA (1982) SDN BHD**

***SALE OF GOODS:** Motor car - Claim against dealer - Whether 1<sup>st</sup> defendant was a division of the 2<sup>nd</sup> defendant - Whether 2<sup>nd</sup> defendant was the seller/vendor, distributor and agent of BMW vehicles in Malaysia and not the 1<sup>st</sup> defendant - Whether plaintiff's claim against 1<sup>st</sup> defendant was wrong and misconceived*

***SALE OF GOODS:** Merchantable quality - Alleged breach of warranty that the BMW purchased by plaintiff was not safe nor reliable - Whether there was a breach of warranty by 2<sup>nd</sup> defendant - Whether BMW purchased was not of merchantable quality and unfit for use - Whether all plaintiff's complaints had been attended to and rectified by 2<sup>nd</sup> defendant - Whether the car was in good condition and roadworthy after repairs were done*

**[Plaintiff's claim against the 2<sup>nd</sup> defendant dismissed with cost; 2<sup>nd</sup> defendant's counterclaim for storage charges pursuant to plaintiff's failure to collect the car from the Service Centre allowed with cost and plaintiff ordered to collect and/or remove the BMW from the 2<sup>nd</sup> defendant's workshop.]**

**Case(s) referred to:**

*Asia Pacific Information Services Sdn Bhd v. Cycle & Carriage Bintang Berhad & Anor Mercedes Benz Malaysia Sdn Bhd [2010] MLJU 233 (refd)*

*Seng Hin v. Arathoon Sons Ltd [1968] 2 MLJ 123 (refd)*

## **GROUND OF JUDGMENT**

The Plaintiff is a company registered under the Companies Act 1965 with its principal place of business at Kawasan Perindustrian Bandar Kinrara, Puchong, Selangor and is the registered owner of a BMW 529iA bearing registration no. WJM4678.

The 1<sup>st</sup> Defendant registered address is at Komplek Kejuruteraan Tractors, 1 Jalan Puchong Taman Perindustrian Puchong Utama, Selangor.

The Plaintiff purchased a BMW 520iA car from the Defendants on 21 September 2001 for the use of the Plaintiff's Managing Director and his wife. The Plaintiff claimed that the car is unroadworthy and unsafe to drive due to several mechanical and electronic problems that the

Plaintiff had encountered while driving the said car. The Plaintiff's claims against the Defendants for the following:-

- i. Damages for the breach of warranty of the BMW;
- ii. Damages for the loss of prestige of the Plaintiff;
- iii. Loss of use of the BMW in the sum of RM9600;
- iv. Loss of road tax and insurance premiums of the BMW while it was in the workshop;
- v. Replacement of a brand new BMW of the same series as the BMW purchased by the Plaintiff and the Defendants shall give an undertaking that it would indeed, truly be 'ultimate driving machine';
- vi. Alternatively, to repay the plaintiff the sum of RM282,420.26 being the price of the BMW;
- vii. Interest at the rate of 8% per annum on RM9600 from 26.4.2004 (the date when the Plaintiff purchased the Naza Ria) to the date of judgment;
- viii. Interest on the judgment sums at the rate of 8% per annum from the date of judgment to the date of realization;
- ix. Cost; and
- x. Such further relief which the Court deem fit and proper to grant.

The Defendants stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are separate incorporated companies with separate legal entity. "Auto Bavaria" is a division of the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant is not a division of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is in fact the seller, distributor and agent of BMW vehicles in Malaysia. The BMW Sungai Besi

service centre at 330, Jalan Sungai Besi, 57100 Kuala Lumpur belongs to the 2<sup>nd</sup> Defendant. The Defendants denied any breach of warranty or that the BMW was not safe, not reliable or not the ultimate driving machine. The BMW was delivered to the Plaintiff in good and merchantable condition and all the Plaintiff's complaints have been attended to and rectified by the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant filed a counterclaim against the Plaintiff claiming storage charges of RM20.00 per day from August 2004 up to the date of collection or removal of the BMW from the 2<sup>nd</sup> Defendant's workshop.

### **The Plaintiff's Case**

The Plaintiff purchased the brand new BMW520JA from the 2<sup>nd</sup> Defendant on September 2001. The purchase price of the said BMW 520iA was RM291,508.33. The BMW was duly delivered to the Plaintiff on 21.9.2001.

According to PW1 who is the Managing Director of the Plaintiffs company the Plaintiff bought the BMW car because PW1 was influenced by the world wide advertisement that described BMW cars as the ultimate driving machine. PW1 in his Witness Statement said:

*“Q5. What attracted the plaintiff company to buy a BMW car in 2001?*

*A5. BMW had extensive worldwide advertisements, portraying that BMW cars were “the ultimate driving machine” which were safe, reliable, excellent, of high quality and comfortable.”.*

In his answer to Question 6 PW1 further explained the reason he was attracted to the BMW car:

*“A6. When my wife and I were in the Sungai Besi BMW Centre, D1’s sales personnel besides repeatedly assured us that BMW cars were safe, reliable, excellent, of high quality and comfortable, and also strongly recommended to us to purchase The Car; they also emphasizes the world wide slogans “the ultimate driving machine” to convince are that BMW was THE car that we must buy. In short, BMW’s worldwide extensive advertisements, “the ultimate driving machine”, and the strong recommendations of D1’s salesmen and personnel, had influenced us to decide to buy The Car.”.*

Based on PW1’s evidence the obvious pulling factor for him to purchase the BMW was because of the worldwide advertisement that described the BMW as the “ultimate driving machine”. After test driving the car PW1 and his wife were convinced that the BMW was a reliable and safe car and decided to buy the said BMW520iA. However according to PW1 immediately upon delivery there was a very irritating noise. In his Witness Statement PW1 states that:

*“A20. Upon delivery of The Car, we (my wife and I) immediately noticed that there was a very irritating high pitch noise emanated from the engine compartment which irritated us and also hindered our driving concentration.”.*

PW1 said in that he had immediately notified the Defendants of the problem and had sent the BMW car to the Sungai Besi BMW Center to repair the problem. However, according to the Plaintiff the Defendants did not rectify the problem that PW1 had complained of.

## **The Complaints of the Plaintiff**

A. High Pitch Sound

According to the Plaintiff upon taking delivery of the BMW a high pitch noise emanated from the engine compartment.

B. Stalling Incidents on Wet Conditions

The BMW had stalled several times in the rain.

C. Stalled Without Warning

On numerous occasions without any apparent reason the BMW had stalled and the engine had restarted after sometime on its own.

D. Final Complaint

On 19.4.2004 the BMW was sent back to the 2<sup>nd</sup> Defendant for repairs. The 2<sup>nd</sup> Defendant notified the Plaintiff that the BMW was repaired. The Plaintiff demanded from the 2<sup>nd</sup> Defendant a written undertaking or assurance that the various defects and/or complaints would not recur. The 2<sup>nd</sup> Defendant refused to give such undertaking and/or assurance.

## **The Defendant's Case**

The Defendants denied any breach of warranty or that the BMW purchased by the Plaintiff was not safe and not reliable. The Defendants contended that the BMW delivered to the Plaintiff was in good and merchantable condition. The Defendants contended that there is no breach of warranty by the 2<sup>nd</sup> Defendant. Further, the Plaintiff is not entitled to claim under the warranty as the one year warranty period had expired on 21.9.2002. The Defendants further

contended that the Plaintiff's complaints have been duly attended to and rectified by the 2<sup>nd</sup> Defendant.

It is the contention of the Defendants that the 1<sup>st</sup> Defendant is not a division of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is the seller/vendor, distributor and agent of BMW vehicles in Malaysia and not the 1<sup>st</sup> Defendant. It is the contention of the Defendants that the Plaintiff's claim against the 1<sup>st</sup> Defendant is wrong and misconceived.

### **Issues to be tried**

1. Whether the claim against the 1<sup>st</sup> Defendant is wrong and misconceived as the 1<sup>st</sup> Defendant is not the seller and distributor and agent of BMW vehicles in Malaysia;
2. Whether there was a breach of warranty by the 2<sup>nd</sup> Defendant and the BMW purchased was not of merchantable quality and unfit for use; and
3. Whether if liability is established the Defendants are also liable to the damages as claim in the Statement of Claim.

### **Findings and Decision**

***Whether the claim against the 1<sup>st</sup> Defendant is wrong and misconceived as the 1<sup>st</sup> Defendant is not the seller and distributor and agent of BMW vehicles in Malaysia***

The Defendants contended that the 1<sup>st</sup> Defendant is not a division of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is the seller/vendor, distributor and agent of BMW vehicles in Malaysia and not the 1<sup>st</sup> Defendant.

The learned counsel for the Plaintiff however submits that the at all material time the Plaintiff has always been under the impression that they are dealing with the 1<sup>st</sup> Defendant in so far as the sales of the vehicle is concerned. This is because all advertisements in the newspapers or other form of media projected Auto Bavaria. Furthermore the 2<sup>nd</sup> Defendant also used, on their letterhead and website, the words “Auto Bavaria.”.

The company search on Auto Bavaria Sdn. Bavaria (page 34 Bundle A) described the “jenis perniagaan” of Auto Bavaria Sdn. Bhd. as ‘dormant’. The “jenis perniagaan” of Tractors Malaysia (1982) Sdn. Bhd. (page 40 Bundle A) is described as:

*“sales of Equipment, spare parts and service support for Caterpillar business and the import and distribution of BMW Motor vehicles and installation of Kawasaki Co-generation system.”.*

Based on the documentary evidence it is clear that it is the 2<sup>nd</sup> Defendant that imports and distributes BMW vehicles. In all the documents shown and issued it is stated that Auto Bavaria is a division of the Tractors Malaysia (1982) Sdn. Bhd. (re: Receipts issued for the purchase of the vehicle pg 1 Bundle A and all the Repair Orders in Bundle A).

DW4 who is presently the branch Manager of Auto Bavaria Glenmarie gave evidence confirming that fact. DW 4 explained in his Witness Statement that:

*“Prior to 2003, Auto Bavaria was the franchise holder of all BMW cars in Malaysia.*



*After 2003, Auto Bavaria only became one of the many dealers of BMW cars in Malaysia.”.*

DW4 further explained in his Answer to Question 7 that Auto Bavaria is a division of Tractors Malaysia (1982) Sdn. Bhd and not Auto Bavaria Sdn. Bhd:

*“The 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant are separate incorporated companies with separate legal entity and separate company registration number. “Auto Bavaria” is a division of the 2<sup>nd</sup> Defendant Company. The 1<sup>st</sup> Defendant is not a division of the 2<sup>nd</sup> Defendant. The BMW Sungai Besi service centre .... belongs to the 2<sup>nd</sup> Defendant.”.*

Therefore the claim against the 1<sup>st</sup> Defendant is wrong and misconceived as the 1<sup>st</sup> Defendant is not the seller and distributor and agent of BMW vehicles in Malaysia as the 2<sup>nd</sup> Defendant (1982) Sdn. Bhd. is the authorised seller, distributor and agent of BMW vehicles in Malaysia.

*Whether there was a breach of warranty by the 2<sup>nd</sup> Defendant and the BMW purchased was not of merchantable quality and unfit for use*

The Plaintiff filed this suit against the Defendants because of a breach of warranty of the sale of the BMW520i (A). The Plaintiff bought the BMW on 21 September 2001. It is contended by the Plaintiff that the said BMW car was bought by the Plaintiff based on the representations and the extensive advertisement portraying the BMW cars as the ‘the ultimate driving machine’ which were safe,

reliable, excellent, of high quality and comfort. PW1 who is the Managing Director explained in evidence that he bought the car:

*“... to enhance the image of our company, which happened to be a China Investment company, and also for the use of their staff, ie, my wife and I.”*

In its Statement of Claim the Plaintiff stated that the Plaintiff had expressly or by implication made it known to the Defendants the purposes the BMW was purchased, namely:

- i. For the use of PW1 and his wife who are business personnel;
- ii. That the Plaintiff was buying ‘the ultimate driving machine’ to enhance its image and status in the business world; and
- iii. Providing PW1 and his wife and child with a reasonably reliable and safe car.

(Refer to paragraph 7 of the Statement of Claim).

The Plaintiff contended that there was a breach of the warranty by the Defendants when the Plaintiff encountered so many problems with the BMW car which they had purchased. The main grievances are as follows:-

- i. The High Pitch Noise Mystery,
- ii. Stalling Incidents on wet condition,
- iii. Stalling without any warning.
- iv. The Plaintiff had demanded for a written undertaking/assurance that the various defects would not recur. This demand was refused by the Defendants.

The BMW car was purchased and delivered to the Plaintiff 21.9.2001. The car was delivered to the Plaintiff on the same date (re; pg 4 of

Bundle A). When the car was duly delivered the Plaintiff had inspected the car and had acknowledged that the car was in good order and condition. The Plaintiff had signed the Delivery Order as shown on pages 10 -14 Bundle B. A Service and Maintenance Contract was also signed between the Plaintiff and the 2<sup>nd</sup> Defendant. The Service and Maintenance Contract (page 16 Bundle B) provides that the duration of the Contract is:

*“... for a period of two years from the date of registration of the vehicle of 50,0000 km, whichever comes first”.*

Clause 1(b) further provides that the vehicle warranty and the local manufacture warranty is 12 months. Any complaints noticed must be corrected before the expiry of the 12 months:

*“The Vehicle Warranty and the local manufacture Warranty is 12 months. Any complaints noticed must be therefore corrected before 12 months after the first registration of the vehicle.”.*

Since the registration date of the BMW car purchased by the Plaintiff is 21 September 2001 the expiry date of the vehicle warranty is 21 September 2002. It is further stipulated in clause 3 of the contract that the service and maintenance would include the replacement and or repair of all parts rendered necessary through wear and tear.

PW1 the managing director of the Plaintiff in his Witness Statement said that:

*“Upon taking delivery of the car, we (my wife and I) immediately noticed that there was a very irritating high pitch noise emanated from the engine compartment which irritated us and also hindered our driving concentration.”.*

PW1 then said that they had sent the car to the Sungai Besi BMW Center to attend to the problem. According to PW1 the problem was not rectified. There is however no record adduced by the Plaintiff that they had encountered problem with the BMW immediately upon taking delivery of the car. PW1 had stated in his Annexure to his Witness statement that:

*“When the Car was delivered to the Plaintiff company, we (my wife and I) immediately notice the irritating High Pitch Problem of The Car. We sent The Car back to the Defendants at the Sungai Besi BMW Centre [“SBC”] and complained about the High Pitch Problem (at that time we suspected the problem came from the air - condition). However, after inspection, the findings of the SBC was that there was no problem whatsoever. They did not hear any irritating sound, and told us that probably it was because we were driving (BMW) 318i previously and after switching to drive (BMW) 520iA, we were not used to it. Hence, we were asked to drive The Car back. (the personnel attending to me was Mr. Liew).*

*After that, for more than 8 times, I sent The Car back to SBC and complained about the High Pitch Problem, they kept telling us that The Car was normal. So, each occasion I was disappointed and drove The Car back.*

*We kept on suffering from the High Pitch Problem everyday. Finally, we found it unbearable any further, a few days before 5.3.2003, we complained to BMW HQ at Shah Alam, and told them that if they still could not rectify the High Pitch Problem, we would take other actions. After that BMW sent different personnel to check The Car (those who tested The Car including: Mr. Kany Foil; Mr. Vickey and a salesman); this time they identified the cause as “high-pitch sound from the fans”, they then changed spare parts*

*and the High Pitch Problem was finally solved. (see BMW Invoice No. SB 3040677 WSB dated 05/03/2003).”.*

PW1 stated in his Witness Statement that the BMW car had problems immediately when the car was delivered to him. There is however no record of the complaints as alleged by the Plaintiff. Based on the correspondence and Repair Orders the first time PW1 sent the BMW car to the workshop was on 19.10.2002. This is recorded in Repair Order no SB1021839 dated 19.10.2002 (D5; pg 25 of Bundle C). The Service Centre did not receive any of the 8 complaints which PW1 referred to.

The Plaintiff did not call any technical witness or tendered any expert report or opinion to ascertain the cause or causes of the problems with the BMW vehicle that he had purchased. Neither was there any evidence adduced to prove that the BMW was not safe, reliable, excellent, high quality car. No evidence was adduced by the Plaintiff that PW1 and his wife together with their child suffered “... heartbreaks, stress, fears, discomfort and tremendous humiliations in the eyes and fraternity of acquaintances, friends and neighbors, commercial circles and the general public”.

The 2<sup>nd</sup> Defendant called 4 witnesses to prove that they had in fact taken all reasonable actions to rectify all the problems complained of by the Plaintiff when the said BMW car was brought to the service centre. In their evidence the witnesses testified that the problems were diagnosed and the necessary repairs were done to the BMW car. After the repairs were done the 2<sup>nd</sup> Defendant had tested the

BMW car and found the car to be functioning well after the repairs were done.

DW1 is a Diagnostic Specialist at the Sungai Besi Service Center. His job function is to diagnose and trouble shoot BMW cars including electronic, mechanical and electrical problems and is familiar with the Plaintiff's BMW. During cross examination DW1 explained that the Repair Order list out and explained the complaints made. DW1 was asked to diagnose the problem as to the transprogramme light of the vehicle. He conducted the diagnosis and asked his colleague Saliahin bin Tawil (DW2) to replace the automatic transmission. In his Witness Statement (Q6/A6) DW2 said:

*“BMW Plaintiff yang bernombor WJM4678 (“Kenderaan tersebut”) telah didiagnos oleh rakan kerja saya, Ho Soo Kee ..... beliau telah memaklumkan kepada saya bahawa masalah Kenderaan tersebut adalah “auto trans fail safe light on” dan memandangkan masalah itu, saya telah menukar dan menggantikan satu (1) unit kotak “automatic transmission” untuk kenderaan tersebut”.*

After having done the replacement of the automatic transmission the vehicle was sent to be tested. The test drive was conducted by Shahrarun Hassim (DW3). DW3 conducted the test drive and found the car to be in good condition:

*“Saya telah “test drive” kenderaan tersebut dan mendapati Kenderaan tersebut adalah sempurna dan tidak ada apa-apa masalah yang timbul semasa “test drive”. Selepas itu, saya telah meluluskan Kenderaan tersebut.”*

During cross examination that DW3 explained how he conducted the test drive:

*“Saya test drive lebih dari 1/2 jam. Jarak saya tidak pasti. Sebelum keluar workshop saya akan jot down. Ada rekod mengenai test drive. Ada dalam buku test drive .... normal road ... kelajuannya mengikut limit jalan raya. Tidak lebih 100km/h. Saya akan lihat semua function. Apabila puas hati saya akan lulus.*

*Kaedah ... sebelum test drive kita lihat diagnostic report sebelum dan selepas. Jika tiada apa saya akan lulus. Lansung tidak ada apa masalah. Selalunya kalau ada masaalh saya akan kemukakan kepada ketua saya. Jika tidak ada masalah saya akan lulus ... catat atas job card.”*

DW4 who was the Branch Manager of the Sungai Besi Centre and had handled the complaints of the Plaintiff. In his Answer to Question 13 of his Witness Statement he explained the history of the complaints made by the Plaintiff and the rectifications/repairs undertaken by the 2<sup>nd</sup> Defendant:

(A) *The High Pitch Noise Mystery*

*The high pitch was actually the air conditioner fan noise. The Vehicle came to the Defendant’s workshop on 7<sup>th</sup> August 2003 (please refer to pg 20 of AB for the repair order No. SB 1050621). The 2<sup>nd</sup> Defendant has checked the air conditioner fan operation and filled up the air con gas and also refix the steering column insulator. As such the complaint has been rectified. There was also no subsequent complaint by the Plaintiff about the high pitch noise.*

(B) *Stalling Incidents on wet condition*

(C) *The Vehicle stalled without any warning*

(i) *On 18<sup>th</sup> October 2002, the Vehicle was caught in flood waters and broke down. On 19<sup>th</sup> October 2002 the Vehicle was*

*brought to the 2<sup>nd</sup> Defendant Sungai Besi workshop. The 2<sup>nd</sup> Defendant Repair order dated 19<sup>th</sup> October 2002 (please refer to page 25 of NAB for the repair order No. SB 102839) shows the following comments ...:-*

*“Vehicle through flood”*

*“removed out water outside the lamps”*

*(ii) The 2<sup>nd</sup> Defendant’s workshop record shows that the Plaintiff only complained about the stalled engine on 2 occasions ie, on 31<sup>st</sup> March 2003 (please refer to page 16 of AB for the repair order SB1037192) and 2<sup>nd</sup> March 2004 (please refer to pages 24 and 25 of AB for repair order No. SB 1068969). The Plaintiff did not mention about rain for both occasions.*

*(iii) On the first occasion ie, 31<sup>st</sup> March 2003, the Plaintiff only complained that the engine stalled at slow speed. The 2<sup>nd</sup> Defendant believes that the stalling of the engine was connected to the flooding incident that happened on 18<sup>th</sup> October 2002. The 2<sup>nd</sup> Defendant’s record shows that the 2<sup>nd</sup> Defendant carried out the following:-*

*“- troubleshoot with testing equipment - found to “fault” stored”*

*“we reprogrammed DME control unit”*

*“check battery charging rate”*

*...*

*...*

*(iv) For the second occasion ie, 2<sup>nd</sup> March 2004, 2<sup>nd</sup> Defendant’s record shows as follow:-*

*2.3.2004 - Car came into workshop*

- Complaint car lost power and engine die-off at slow speed.*
- Carried out troubleshooting procedures with BMW*



- Malaysia Technical Specialist - found no "fault" stored, further check found some water stain in air filter housing. We suspect the car could have gone through a fairly substantial mass of water but customer denied.*
- *Carried out further engine compression test and found ok.*
  - *As recommended by BMW Malaysia Technical specialist, we have replaced the engine wiring harness, air flow sensor, petrol filter, air filter and spark plugs.*
  - *Quotation was given to customer the above as the Warranty & Maintenance Package already expired but customer did not agree, therefore refused to pay. We carried out the repairs at our own expenses."*

These were all duly recorded in the Repair Orders. DW4, during cross examination, explained that the Repair Order is the complaint sheet. He also confirmed that the cost of the auto transmission (gearbox) is at least RM20,000. He also said that even though the warranty had lapsed the 2<sup>nd</sup> Defendants had replaced the gearbox.

The Plaintiff had sent the BMW to the workshop on 22 July 2004 with a complaint that the transprogramme light was continuously on. The BMW was ready for collection on 18 August 2004 and the Plaintiff was asked to collect the car. DW4 himself contacted the Plaintiff by telephone in September 2004 to collect his BMW. However the Plaintiff refused to collect the BMW as they wanted a written undertaking from the 2<sup>nd</sup> Defendant that the car is roadworthy and that the various defects and/or complaints would not recur.

The terms and conditions of the Repair Order clearly provides that if the customer fails to collect the vehicle after being notified that the vehicle is ready for collection the customer will have to pay storage charges of RM20/- per day:

*“(v) The Customer shall pay to the Company Storage Charges of RM20.00 per day in respect of the vehicle where the customer fails to collect the vehicle after being notified that the vehicle is ready for collection.”.*

Since the Plaintiff have not collected the BMW car therefore the Plaintiff will have to pay the storage charges of RM20.00 per day.

Mah Weng Kwai, JC in *Asia Pacific Information Services Sdn. Bhd. v. Cycle & Carriage Bintang Berhad & Anor Mercedes Benz Malaysia Sdn. Bhd.* [2010] MLJU 233 referred to the Federal Court case of *Seng Hin v. Arathoon Sons Ltd.* [1968] 2 MLJ 123 where it was held that:

*“in order to show that the goods were not of a merchantable quality it had to be shown that the goods were of no use for any purpose for which such goods would normally be used and were therefore not saleable under that description.”.*

The Plaintiff failed to show that the BMW car which they had bought could not function, unfit for purpose and was not of merchantable quality. Furthermore BMW Germany had vide their letter dated 15.3.2005 (D15) confirmed and assured the Plaintiff of the roadworthiness of the BMW and had also indicated that there was a possibility of a trade in which the Plaintiff had declined:

*“We sincerely regret the experiences regarding your client’s BMW 520iA as mentioned in your correspondence and can understand their disappointment with this situation.*

*As the concerns of the customers are of utmost importance to us, we have forwarded your correspondence to our subsidiary, BMW Malaysia, for their review. We have since been informed that the mentioned vehicle has regained its expected functionality after the repairs have been carried out. Furthermore, your client has been invited to meet with the responsible dealership and BMW Malaysia in order to discuss a possible trade in of the car, an offer which your client has declined.”.*

Based on the documents and the evidence adduced I am of the opinion that there was no breach the warranty by the 2<sup>nd</sup> Defendant. In fact the 2<sup>nd</sup> Defendant had at all material times when there were complaints by the Plaintiff taken steps to rectify the problems. The 2<sup>nd</sup> Defendant had in fact taken steps to replace the auto transmission even though the warranty period had expired. After every repair work done the BMW was tested to ensure that there were no more problems as per the complaints of the customer. The BMW vehicle purchased by the Plaintiff was in good condition and was roadworthy after the repairs were done. No evidence was adduced by the Plaintiff to show and prove that the BMW was not roadworthy and unfit for use. The BMW car after the repairs was in good condition, roadworthy and in a useable condition.

The vehicle warranty is only for a year expiring on 21<sup>st</sup> September 2002. The Plaintiff had sent the BMW car for repairs after the vehicle

warranty period had expired and on all occasion the 2<sup>nd</sup> Defendant had repaired the car accordingly.

I have considered all the evidence given the documents tendered the submissions as well as the authorities of the Counsels. I find that the Plaintiff has failed to prove its case against the Defendants on a balance of probabilities. Therefore, the claim of the Plaintiff against the 2<sup>nd</sup> Defendant is dismissed with cost. The 2<sup>nd</sup> Defendant is entitled to the counterclaim for the failure of the Plaintiff to collect the car from the Service Centre. Therefore the counterclaim of the 2<sup>nd</sup> Defendant is allowed with cost. The Plaintiff is also ordered to collect and/or remove the BMW from the 2<sup>nd</sup> Defendant's workshop two weeks from the date of this order.

Cost of this matter is fixed at RM30,000/-.

**(HASNAH MOHAMMED HASHIM)**  
Judicial Commissioner  
High Court of Malaya  
Kuala Lumpur.

**Dated:** 31 MARCH 2011

**Counsels:**

*For the plaintiff/appellant - M/s Chang Aik Ming & Co*

*For the defendant/respondent - M/s Ariffin & Partners*