previous conviction. Thereafter he answered further questions about growing cannabis insisting that it was for personal use.

[18] We do not see any basis for miscarriage of justice in this respect and we are fortified in that view by the frank admission advanced through the pre-sentence report in mitigation of sentence.

[19] The other matters which counsel seek to argue are assertions of various breaches of the appellant's rights under the New Zealand Bill of Rights Act 1990. They are not matters that were raised prior to, or in the course of, the trial. The primary contentions of an unlawful and unreasonable search and the appellant's lack of comprehension of his rights are without any factual foundation. This Court has consistently declined to entertain such arguments where no sufficient evidential base has been laid. It is no answer to say that this Court now could embark on the necessary factual investigation.

[20] Mr Ellis in addition seeks to argue certain "generic" matters of principle including two matters on which there are relatively recent decisions of this Court which he seeks to revisit. We are not persuaded that leave to appeal out of time to argue such issues in a case in which there can be no concern for a miscarriage of justice is warranted. Leave is refused.

Appeal against sentence allowed: leave to apply for home detention granted.

Solicitors for the respondent: *Crown Law Office* (Wellington).

Reported by: Shaun O'Neill, *Barrister*

Nesbit v Porter

Court of Appeal Wellington
30 March; 20 April 2000
Thomas, Keith and Blanchard JJ

Commercial law – Consumer guarantees – Whether a purchaser of goods which are most frequently purchased for commercial use can be a "consumer" – What is "reasonable time" in which to exercise right of rejection – Whether rejection of goods must be in writing – Whether "merchantable quality" and "acceptable quality" are same standard – Meaning of "ordinarily" – Consumer Guarantees Act 1993, ss 2, 6, 7, 18, 20 and 22 – Sale of Goods Act 1908, s 16(b).

The Nesbits purchased a four-wheel drive utility motor vehicle from Porter Motors, the trading name of Kelmar Holdings Ltd, a licensed motor vehicle dealer, of which Mr Porter was the director. Five months after the purchase the Nesbits were advised of certain defects in the vehicle. They approached Porter Motors and sought either to return the vehicle or to be refunded the cost of repairing the defects. The Nesbits did not receive an affirmative response and made a complaint to the Motor Vehicle Dealers Institute. This was rejected one month later on the grounds that the vehicle was classified as a commercial vehicle and was not covered by a warranty under the Motor Vehicle Dealers Act 1975.

The Nesbits took the dispute to the District Court, which found that the vehicle fell under the definition of a "commercial vehicle" and therefore the Nesbits did not fall within the definition of a "consumer" under the Consumer Guarantees Act 1993.

An appeal to the High Court was subsequently dismissed and leave was granted to appeal on confined issues relating to the Consumer Guarantees Act 1993. Those issues were:

(a) Whether the Nesbits purchased as a "consumer" so as to attract the protection of the guarantee of acceptable quality in s 6;
(b) Whether the right of rejection was lost, in terms of s 20, because it was not exercised within a "reasonable time";
(c) Whether the manner of rejecting the goods complied with the requirements of s 22; and
(d) Whether, in view of the finding that the vehicle was of merchantable quality, it could still be said not to have been of "acceptable quality" in terms of s 7.

Held: 1 The appellants were a "consumer" and were entitled to the benefit of the guarantee of acceptable quality in s 6. The definition of "consumer" clearly contemplated that some goods could be acquired for private or for commercial use. Whether an item could be said to be ordinarily acquired for private

purposes when only a small proportion of sales of that item was for such purposes was a matter of fact and degree. The purchase of such a vehicle for private purposes was not unusual or idiosyncratic (see paras [26], [27], [29], [30], [31]).

2 A reasonable time for the exercise of the right of rejection was a period which sufficed to enable the consumer to become fully acquainted with the nature of the defect, which, where the cause of a breakage or malfunction was not apparent, the consumer could be expected to do by taking the goods to someone, usually and preferably the supplier, for inspection. In assessing what was a reasonable period the Court had to take account of the practical utility of the right of rejection as opposed to a right to damages; the loss in value to the vendor through depreciation; the type of goods and their history if not new; the likely use to which the goods would be put; the length of time that it would be reasonable to use the goods, if applicable; and the amount of use it would be reasonable to expect before the particular defects became apparent. In the case of a second-hand vehicle of this nature it was reasonable to expect such defects to become apparent soon after purchase, and at the latest when it next underwent a mandatory six-monthly warrant of fitness inspection. Additional time might have been required if the defect had been such as to be unlikely to be uncovered by the warrant of fitness inspection. The reasonable period had therefore expired before the date of actual rejection by the appellants. The right of rejection was lost and the purported rejection was legally ineffective (see paras [39], [41], [42], [44], [45], [46], [47], [48], [49], [50]).

3 It did not follow from the finding that the goods were of merchantable quality that there was no breach of the warranty of acceptable quality. The test of whether goods were of an acceptable quality was whether the goods were fit for all purposes for which goods of the type in question were commonly used, were free of minor defects and met the other standards referred to in s 7(1) (see para [52]).

Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 AC 31; [1968] 2 All ER 444 at pp 77/486 referred to.

Appeal dismissed.

Other case mentioned in judgment

Cooper v Ashley & Johnson Motors Ltd [1997] DCR 170.

Appeal

This was an appeal by Tony Walter Clive Nesbit and Selina Kelly McLachlan Nesbit from the judgment of Anderson J, reported at (1998) 8 TCLR 493, dismissing an appeal by the Nesbits from a District Court judgment in favour of Roderick Russell Porter, the first respondent, and Kelmar Holdings Ltd, the second respondent, in actions taken under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.

Neil Collis and *Rae Nield* for the appellants.
Michael Keall for the respondents.

Cur adv vult

The judgment of the Court was delivered by

BLANCHARD J. [1] This appeal is about the interpretation and application of the Consumer Guarantees Act 1993 which has not previously been considered by this Court.

[2] On 14 July 1995 the appellants, Mr and Mrs Nesbit, purchased from a motor vehicle dealership operating in West Auckland under the name Porter Motors a Nissan Navara 720 double-cab four-wheel drive utility. They took delivery on that day. The sale price was $10,990. The Navara was an 11-year-old vehicle recently imported from Japan. Porter Motors was the trading name of the second respondent, Kelmar Holdings Ltd, a licensed motor vehicle dealer. Its director was the first respondent, Mr Rod Porter.

[3] The Nesbits lived near Opotiki. They had come to Auckland with a view to acquiring a utility from a specialist dealer, which Porter Motors was. They were made aware that the Navara was a Japanese import. It was well known that odometer readings for such imports were likely to be inaccurate. The Nesbits agreed to purchase on the basis that Porter Motors made no representation about the accuracy of the reading of 78,900 km.

[4] By December 1995, some five months later, there had been some small problems with a leaking windscreen and the water hoses had needed replacement. The vehicle had also been involved in a minor accident early in November. It required panel beating. The panel beater pointed out that there was a problem with rust. The Nesbits also became aware at about this time that the Navara had defective shock absorbers and bushes. They approached Porter Motors about this matter seeking payment for the cost of the necessary repairs or that Porter Motors should take the vehicle back. They did not receive an affirmative response and lodged a complaint with the Motor Vehicle Dealers Institute on 11 January 1996.

[5] The Nesbits had previously noticed that the steering seemed heavy. On 16 January 1996 they had the wheel alignment checked and discovered problems with the steering box. Three days later the vehicle failed a warrant of fitness check because of rust in the door hinges, a member below the radiator, front-inner sills (both sides) and the cab mount at the driver's feet. It was noted by the inspector that the extent of rust and wear in the lower-arm mounts indicated that the condition had existed for some time. The rust must have been present when the Nesbits bought the vehicle. The warrant of fitness checklist also mentioned the steering box.

[6] The Nesbits had paid for the cost of remedying the defect in the shock absorbers ($466) and obtained quotations for fixing the other problems. The total of the quotations was about $3250. They sent copies to Porter Motors. Mr Nesbit spoke to Mr Porter who offered to pay $1200.

[7] The Motor Vehicle Dealers Institute wrote to the Nesbits on 7 February 1996 stating, correctly, that as the vehicle purchased was classified under the Motor Vehicle Dealers Act 1975 as a commercial vehicle, it was not covered by any warranty under that Act. Therefore the institute was unable to assist the Nesbits with the dispute. (The obligations of a licensee under that Act do not apply to a sale of a "commercial vehicle" (s 93(8)(b)) which is defined in s 2 as one designed exclusively or principally for the carriage of goods. As will be seen, this is a completely different test from that to be found in the Consumer Guarantees Act which focuses not on design but on the use of particular goods.)

[8] The Nesbits then took their complaints to the Disputes Tribunal in Opotiki. There was a hearing on 10 April 1996. The referee recommended that the Nesbits should return the vehicle to Porter Motors. They decided to do so and to seek a refund of the money which they had paid. Mr Porter was aware of this development because he participated in the hearing by telephone from Auckland. In a decision issued on the same day the referee purported to make

an order that "pursuant to section 22 of the Consumer Guarantees Act" the contract was cancelled, "it being held that the failure is of [a] substantial character." The Nesbits returned the vehicle to Porter Motors in Auckland on 13 April 1996, having written the previous day advising that they would do so.

[9] It then transpired that the Disputes Tribunal had exceeded its jurisdiction. On 15 April it therefore cancelled the order and transferred the matter to the District Court under s 36 of the Disputes Tribunals Act 1988.

[10] The Nesbits' solicitors wrote to Mr Porter on 17 April 1996 enclosing a copy of the Disputes Tribunal's order of 15 April and saying that their clients regarded the previous (cancelled) order and the letter preceding the return of the vehicle as the notification of rejection of the goods. Neither of the documents referred to gave any detail of the alleged defects which were the basis of the rejection.

[11] Between the date of supply of the Navara (14 July 1995) and the date of the solicitors' letter a little over nine months had elapsed. During that time it had been driven for some 16,000 km prior to failing the warrant of fitness check and for about 5000 km thereafter. The evidence does not support the view that any of the problems the Nesbits encountered resulted from their manner of use of the vehicle. This appeal has been argued on the basis that all the defects existed, but were latent, at the time of purchase.

The District Court judgment

[12] The hearing in the District Court at Tauranga before Judge Thomas took place over some three days in January and March 1998. A reserved decision was delivered on 1 April 1998 (NP 54/96). Five causes of action were pursued but in respect of two of them the Court had no jurisdiction and they were quickly dismissed. The remaining causes of action were claims under the Consumer Guarantees Act, the Fair Trading Act 1986 and the Sale of Goods Act 1908. Judge Thomas was not satisfied on the evidence that there had been any misleading or deceptive conduct or false representation in terms of the Fair Trading Act. He also found that there were no breaches of the conditions as to fitness for purpose or merchantable quality under the Sale of Goods Act.

[13] Judge Thomas found it necessary to deal with one only of the issues with which this appeal is concerned, namely whether the Nesbits were a "consumer" as defined in the Consumer Guarantees Act. If they were, then in terms of s 6 there was an implied guarantee that the vehicle was of "acceptable quality" (as defined in s 7). The relevant definition in s 2(1) and the meaning of "acceptable quality" in s 7 are as follows:

> "Consumer" means a person who –
>
> (a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
>
> (b) Does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of –
>
> (i) Resupplying them in trade; or
>
> (ii) Consuming them in the course of a process of production or manufacture; or
>
> (iii) In the case of goods, repairing or treating in trade other goods or fixtures on land.
>
> **7. Meaning of "acceptable quality" –** (1) For the purposes of section 6 of this Act, goods are of acceptable quality if they are as –

> (a) Fit for all the purposes for which goods of the type in question are commonly supplied; and
>
> (b) Acceptable in appearance and finish; and
>
> (c) Free from minor defects; and
>
> (d) Safe; and
>
> (e) Durable, –
>
> as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to –
>
> (f) The nature of the goods:
>
> (g) The price (where relevant):
>
> (h) Any statements made about the goods on any packaging or label on the goods:
>
> (i) Any representation made about the goods by the supplier or the manufacturer:
>
> (j) All other relevant circumstances of the supply of the goods.
>
> (2) Where any defects in goods have been specifically drawn to the consumer's attention before he or she agreed to the supply, then notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defects, the goods will not fail to comply with the guarantee as to acceptable quality by reason only of those defects.
>
> (3) Where goods are displayed for sale or hire, the defects that are to be treated as having been specifically drawn to the consumer's attention for the purposes of subsection (2) of this section are those disclosed on a written notice displayed with the goods.
>
> (4) Goods will not fail to comply with the guarantee of acceptable quality if –
>
> (a) The goods have been used in a manner, or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and
>
> (b) The goods would have complied with the guarantee of acceptable quality if they had not been used in that manner or to that extent.
>
> (5) A reference in subsections (2) and (3) of this section to a defect means any failure of the goods to comply with the guarantee of acceptable quality.

[14] There was evidence from a Mr Farmer who had been called on behalf of the Nesbits. He was a franchise dealer for Nissan in Tauranga. He pointed out that one of the attractions of a twin cab to a family is that it seats five persons. He was able to produce a Navara buyer profile covering the period December 1996 to November 1997. It was not suggested that the position was likely to have been significantly different in 1995. Mr Farmer described Navaras as "multi-use". The profile indicated that 59.5 per cent of purchases were described as company purchases and 40.5 per cent as private purchases. The Judge said that of those private sales 49.5 per cent were sold to farmers and tradespersons and by inference some of them would be putting their vehicle to commercial uses. Thus about 20 per cent of all Navara sales over the period (to 189 purchasers) could be regarded as entirely for personal use as opposed to a business use. Although the definition of "consumer" contains the expression "of a kind ordinarily acquired", Judge Thomas looked at the definition of "ordinary" in the *Concise Oxford Dictionary* (8th ed, 1990)

("regular, normal, customary, usual") and said at pp 6 – 7 that "ordinary" must be given its ordinary meaning:

> "Although the use to which the subject vehicle was put is probably domestic, again it was multi-purpose. The vehicle was described as commercial on the vehicle sale agreements. On all the evidence before me the view I have taken is that the use for which this vehicle is 'ordinarily' acquired is for a commercial purpose. On that basis it does not fall within the definition of goods ordinarily acquired for personal or domestic use and therefore the Consumer Guarantees Act does not apply."

The High Court judgment

[15] There was an appeal to the High Court at Rotorua. Anderson J delivered an oral judgment on 18 September 1998 [reported at (1998) 8 TCLR 493]. Looking at a photograph of the vehicle and considering the other evidence, he concluded that the Navara was a commercial vehicle for the purposes of the Motor Vehicle Dealers Act. (There is no dispute about this point but, as noted, the relevant definition in that Act is quite different.) He said at p 497 that it was "the sort of vehicle that one does not customarily see as the first choice of families for personal use, although it may be the first choice of some families who may wish to transport recreational equipment or tow horse floats or travel off-road for hunting or fishing purposes." The Judge referred to the evidence of Mr Farmer and examined the *Oxford English Dictionary* (2nd ed, 1989) definition of "ordinarily", noting that it defined that word as " '[I]n conformity with rule or established custom or practice' ". The dictionary definition also said, more appropriately the Judge thought in the present case, "In the ordinary or usual course of events or state of things; in most cases; usually, commonly."

[16] Counsel for the appellant had submitted to Anderson J that there may contemporaneously be many ordinary uses or that there may ordinarily be acquisition for personal use, commercial use and trade use, all existing concurrently. Anderson J accepted that. But he said it was more germane to the appeal whether such a situation existed in the present case. He saw this as being very much a matter of degree in any particular case depending upon the available evidence, common sense, and matters of which a Court might be entitled to take judicial notice. He said that the onus was on the appellants to demonstrate that the Judge was wrong in the sense that there was no proper evidential basis or legal justification for his conclusions. In Anderson J's judgment the appellants failed on that point. The evidence was sufficient to support a finding that the vehicle in this case was of a kind ordinarily acquired otherwise than for personal, domestic, or household use in that it was ordinarily acquired for commercial, trade or other business use.

[17] Lest he be wrong in that determination, and without finding it necessary to determine whether there had been a breach of the guarantee of acceptable quality and, if so, whether it gave rise to a right of rejection, Anderson J turned directly to the question of whether the vehicle had been rejected within a reasonable time. Section 18 of the Consumer Guarantees Act confers options by way of remedy against suppliers, including a right of rejection, but, in terms of s 20, it is lost if not exercised within a reasonable time. Those sections are as follows:

> **18. Options against suppliers where goods do not comply with guarantees** – (1) Where a consumer has a right of redress against the

> supplier in accordance with this Part of this Act in respect of the failure of any goods to comply with a guarantee, the consumer may exercise the following remedies.
>
> (2) Where the failure can be remedied, the consumer may –
>
> (a) Require the supplier to remedy the failure within a reasonable time in accordance with section 19 of this Act:
>
> (b) Where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time, –
>
> (i) Have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
>
> (ii) Subject to section 20 of this Act, reject the goods in accordance with section 22 of this Act.
>
> (3) Where the failure cannot be remedied or is of a substantial character within the meaning of section 21 of this Act, the consumer may –
>
> (a) Subject to section 20 of this Act, reject the goods in accordance with section 22 of this Act; or
>
> (b) Obtain from the supplier damages in compensation for any reduction in value of the goods below the price paid or payable by the consumer for the goods.
>
> (4) In addition to the remedies set out in subsection (2) and subsection (3) of this section, the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure.
>
> **20. Loss of right to reject goods** – (1) The right to reject goods conferred by this Act shall not apply if –
>
> (a) The right is not exercised within a reasonable time within the meaning of subsection (2) of this section; or
>
> (b) The goods have been disposed of by the consumer, or have been lost or destroyed while in the possession of a person other than the supplier or an agent of the supplier; or
>
> (c) The goods were damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply; or
>
> (d) The goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them.
>
> (2) In subsection (1)(a) of this section, the term "reasonable time" means a period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to –
>
> (a) The type of goods:
>
> (b) The use to which a consumer is likely to put them:
>
> (c) The length of time for which it is reasonable for them to be used:
>
> (d) The amount of use to which it is reasonable for them to be put before the defect becomes apparent.

[18] Anderson J said that on the assumption that the vehicle could be said to be one normally acquired for personal or domestic use, it was of a type "meant to be driven hard and used off-road". Thus the type of goods and the use to

which the consumer was likely to put them would be "energetic." In such circumstances the amount of use to which it was reasonable for such vehicles to be put before the defect became apparent would be considerably less than in the case of a more sedate vehicle.

[19] The High Court Judge referred to the age of the vehicle (though overstating it as 14 years) and the fact that Porter Motors had made it plain that it would not give any warranty as to odometer readings. He accepted a submission by Mr Keall for the respondents that in the circumstances six months would be the maximum time which would be reasonable having regard to the matters set out in s 20(2). The right of rejection had not been exercised within six months.

[20] A further matter raised on the appeal to the High Court was whether the rejection complied with s 22(1):

> **22. Manner of rejecting goods –** (1) The consumer shall exercise the right to reject goods under this Act by notifying the supplier of the decision to reject the goods and of the ground or grounds for rejection.

[21] The Judge doubted whether these requirements were met by the solicitors' letter and its enclosure. No grounds for rejection had been specified.

[22] The appeal on the questions arising under the Consumer Guarantees Act was therefore dismissed, as was an appeal in relation to the Fair Trading Act. In dismissing also the Sale of Goods Act claim Anderson J said at p 501 that he would "find it cogent evidence of fitness for purpose and merchantable standard that a 14 year old [sic] vehicle of unknown odometer history, of a type generally designed for hard use, should be driveable for 16,000 kilometres." The 16,000 km was a reference to the usage of the vehicle by the Nesbits prior to its failing the warrant of fitness test in January 1996.

Issues on second appeal

[23] In a further judgment of 14 June 1999 (High Court, Rotorua, AP 47/98) Anderson J gave leave for an appeal to this Court pursuant to s 67 of the Judicature Act 1908 "on the confined issues relating to the Consumer Guarantees Act 1993."

[24] Those issues are:

(a) Whether the Nesbits purchased as a "consumer" so as to attract the protection of the guarantee of acceptable quality in s 6;
(b) Whether the right of rejection was lost, in terms of s 20, because it was not exercised within a "reasonable time";
(c) Whether the manner of rejecting the goods complied with the requirements of s 22; and
(d) Whether, in view of the finding that the vehicle was of merchantable quality, it could still be said not to have been of "acceptable quality" in terms of s 7.

Meaning of "ordinarily"

[25] Counsel for the appellant submitted that the Courts below appeared to have considered that because a Navara is ordinarily acquired for commercial use, therefore it is not a vehicle ordinarily acquired for personal, domestic or household use; that the former purpose excludes the latter (which we will call "private use"). Certainly this seems to have been the approach of Judge Thomas. It was argued that Anderson J, whilst appearing to accept that in theory there could be a situation in which goods were ordinarily acquired either for commercial use or private use or both, was wrong to conclude that this was not such a case. He had decided that the appellants had not discharged the burden of showing that Judge Thomas was wrong "in the sense that there was no proper evidential basis or legal justification for his conclusions." Yet Judge Thomas had himself approached the matter in the wrong way.

[26] It is clear from the definition of "consumer" that Parliament contemplated that goods can have several uses; that some buyers might acquire them exclusively for a business use, some exclusively for a private use and some might intend to use them for both. The definition covers under para (a) a person who acquires goods of a kind ordinarily acquired for private use, but in para (b) goes on to exclude such a person if the goods are actually acquired, or the purchaser holds himself or herself out as acquiring them, for any of the commercial purposes listed in subparas (i), (ii) or (iii). Paragraph (b) would be unnecessary if goods could fall within para (a) only if they were of a kind not ordinarily acquired for a commercial purpose. A further complication is that para (b) does not cover all commercial purposes, so that it is possible to have goods which are of a kind ordinarily acquired for a private use which are actually being bought by a particular buyer for a commercial purpose and where para (b) does not operate to exclude that buyer from being a "consumer" in relation to those goods. Take, for example, a sofa purchased for the reception area of a business. A sofa is ordinarily acquired for household use but this commercial purpose is outside para (b). Therefore the buyer would be a "consumer".

[27] Mr Keall accepted that whether a person is a consumer is not simply a matter of determining a majority or dominant ordinary purpose of acquisition of the particular kind of goods. If more purchases are for a commercial use it does not follow that the goods in question cannot also be said to be ordinarily acquired for private use by the minority of buyers. Take the example of ballpoint pens. They are frequently acquired for private use but it seems probable that much greater numbers are bought by businesses. It is a matter of fact and degree whether goods can be said to be ordinarily acquired for private use when only a proportionately small number of sales is for that purpose.

[28] The *Oxford English Dictionary* definition of "ordinarily" is as follows:

> "In an ordinary manner or degree.
>
> 1. In conformity with rule or established custom or practice; according to settled method; as a matter of regular practice or occurrence.
>
> . . .
>
> 2. In the ordinary or usual course of events or state of things; in most cases; usually, commonly.
>
> . . .
>
> 3. In an ordinary degree; to the usual extent. Esp in phr *more than ordinarily* = unusually, exceptionally:
>
> . . .
>
> 4. In the ordinary way; as is normal or usual."

[29] We consider that "ordinarily" is used in the Act's definition of "consumer" in the sense of "as a matter of regular practice or occurrence" or "In the ordinary or usual course of events or state of things". According to Mr Farmer's evidence, about 20 per cent of buyers of Navaras acquire them exclusively for private use. There were 189 instances in the buyer profile. There

is therefore a regular practice or occurrence of such vehicles being purchased for private use. It is in the ordinary or usual course of things. It is not to be overlooked that Mr Porter said that in many years of trading he personally had never sold a vehicle of this type for private use only, but that may possibly have been because his dealership held itself out as specialising in commercial vehicles and so perhaps did not attract many private customers. Mr Farmer's Nissan dealership and his prior experience as a divisional general manager for Nissan seems to provide a better guide. On the basis of that experience, Mr and Mrs Nesbit's purchase was not an unusual or uncommon event. The evidence of Mr Farmer shows that they did not make an idiosyncratic choice, buying for private use a vehicle like a Mack truck, which it would presumably be unusual to devote to that purpose.

[30] As Ms Nield pointed out, this approach to the question of who is a "consumer" for the purposes of the Act will not seriously disadvantage motor vehicle dealers and other suppliers of goods which have a commercial use. The definition will itself exclude many buyers who are in fact buying for a commercial purpose, because it is one which falls within para (b). And where it does not, s 43(2) permits the supplier to contract out of the obligations otherwise imposed by the Act where the consumer acquires, or holds himself or herself out as acquiring, goods for the purpose of a business. (There was such a clause in Porter Motors' standard agreement form.) A further protection for the supplier is to be found in s 7(2), modifying the statutory guarantee where a defect has been specifically drawn to the consumer's attention before the supply agreement is entered into. Section 7(4) protects the supplier against a claim where the goods have been used in a manner or to an extent which would not have been expected.

[31] We conclude that the Courts below were wrong to hold that the Nesbits were not a "consumer" and were not entitled to the benefit of the guarantee of acceptable quality in s 6.

Loss of right of rejection

[32] The next question is whether, upon the same assumptions made by the High Court about the existence of a breach of guarantee giving rise to a right of rejection, the Nesbits lost their right to reject the Navara because, in terms of s 20, they did not exercise it within a "reasonable time", namely "a period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent" having regard to the matters listed in (a) to (d) of subs (2).

[33] A "defect" is not defined generally for the purposes of the Act but s 7(5) uses the term as meaning, for the purposes of that section "any failure of the goods to comply with the guarantee of acceptable quality" and that definition is appropriate to the use of the word in s 20(2).

[34] The period runs from the date of supply (here 14 July 1995), not from the date on which any defect was, or ought to have been, detected. The Nesbits did not reject the vehicle until nine months had elapsed.

[35] Section 20(2) speaks of *the* defect, meaning the defect actually encountered by the consumer whose right of rejection is under consideration. The period must be reasonable in relation to the particular defect or combination of defects causing the buyer to reject the goods. Within what time would it be reasonable to expect such defect(s) to become apparent? The actual experience of the particular consumer is obviously relevant but the section requires that reasonableness is to be tested against certain objective criteria.

Paragraph (a) refers not to the particular article which was supplied but to the type of goods. Paragraph (b) requires consideration of the use to which *a* consumer (not the actual buyer) is likely to put them, that is, that type of goods, and paras (c) and (d) require regard respectively to the length of time for which it is reasonable for that type of goods to be used and the amount of use to which it is reasonable for that type of goods to be put before the defect becomes apparent. So the Nesbits' actual use of the Navara has for this purpose to be considered against the use to be expected from a notional consumer of that type of vehicle.

[36] In many, if not most, cases the period will be longer for new goods, which a buyer is entitled to expect to be defect-free when first used, than it will be for second-hand goods of the same type. As a general rule, the older the goods, the shorter is likely to be the reasonable time. The period may also be longer if the goods are likely to be used infrequently or only at a particular time of year. For example, one would not expect any defect in skis purchased during summer to become apparent until the next winter.

[37] Another factor which will influence the period to be allowed for exercise of the right of rejection is whether regular inspections of the goods for defects are customary or, as in the case of motor vehicles, required by law. But for defects which cannot be expected to be revealed by such inspections the reasonable time may be longer.

[38] Mr Collis submitted that s 18 is relevant to the fixing of a reasonable time. It confers a right of rejection where a supplier refuses or neglects to remedy a defect, or where it cannot be remedied or is of a substantial character. Counsel submitted that his clients were entitled to credit for the time involved in their negotiations with Porter Motors. Mr Collis said that there was a basis for rejection under s 18(2)(b)(ii) and consequently the reasonable time under s 20(2) should be extended to allow for the Nesbits' attempts to get Porter Motors to honour their obligations. The Court is obliged to reject this argument which, although it has some attraction in fairness to a buyer, is impossible on the wording of the sections. Section 18(2)(b)(ii) has been made expressly subject to s 20. If, in terms of s 20, the right has otherwise been lost, there is no power for the Court to extend the period in the circumstances contemplated by s 18(2). For the same reason the time is not extended to allow a consumer to pursue a complaint to a trade organisation.

[39] It is nonetheless to be noted that s 21(a), in prescribing the test of whether a failure to comply with a guarantee is of a substantial character for the purposes of s 18(3), says that the test is whether the goods "would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure". A reasonable time under s 20 must accordingly be one which suffices to enable the consumer to become fully acquainted with the nature of the defect, which, where the cause of a breakage or malfunction is not apparent, the consumer can be expected to do by taking the goods to someone, usually and preferably the supplier, for inspection. In this context, therefore, a defect is not "apparent" until its cause has been identified and the buyer knows what has to be done to fix it, and what that will cost; in other words, until the buyer is in a position to determine whether the defect is substantial.

[40] In some instances the defect will be of a kind where it may be obvious that something is wrong with the goods but the supplier or someone else to whom the consumer turns for help may be in doubt about the exact nature of the problem and thus about how serious it is. For example, the operation of a motor

vehicle may be affected by the failure of a small and comparatively obscure part, say, a waver spring in an automatic transmission; until the transmission is dismantled a mechanic cannot be sure what the defect is. Or the cause of malfunction, particularly one which occurs intermittently, may be hard to detect even upon inspection. It may be necessary to carry out a series of tests or even to wait and see what, if anything, develops. Or the repairer may think the fault has been identified and that the correct repair or adjustment has been made but this view may prove to be wrong and the problem may manifest itself again. An example is to be found in the judgment of the District Court at Auckland in *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170. In all such cases, a reasonable period will not elapse before the consumer has had the opportunity to become properly informed about the nature of the defect and has also had a little time then to consider an appropriate decision, whether or not to reject the goods. It almost goes without saying that the period will be correspondingly longer where the supplier has taken steps which effectively conceal a defect or has withheld relevant information.

[41] In considering what is a reasonable period in a particular case it is necessary also to bear in mind the practical utility to a consumer of the right of rejection given by s 18 of the Act. Ms Nield submitted persuasively that, although a right to damages survives the loss of the right to reject, in pursuing it the consumer may face substantial litigation costs where the claim is for a sum exceeding the jurisdiction of the Disputes Tribunal (now $7500, or $12,000 by agreement of both parties). Replacement (under s 19(1)(b)) or repair by or at the cost of the supplier or rejection of the goods, where that is available in terms of s 18, are more "user-friendly" solutions to a consumer's problem with goods, although of course it may still prove to be necessary to litigate in order to recover all or part of the price.

[42] Against this, however, the Court should not lose sight of the burden which may be imposed upon a supplier by a lengthy delay in rejecting the goods during a time when their value is likely to depreciate, particularly where depreciation is increased by further usage, as it is for motor vehicles.

[43] In this case the defects relied upon by the Nesbits to justify the rejection were the extensive rust and the problems with the steering box and the shock absorbers, all of which must be taken for present purposes to have been latent at the date of supply and which actually became apparent by the time of the warrant of fitness check which occurred on 19 January 1996, a little more than six months later. The rust was noticed by the panel beater in November or December and drawn to the attention of the Nesbits. It is unclear whether they would have detected it themselves if the vehicle had not required panel beating, but it was again observed by the person who carried out the inspection on 19 January. The shock absorbers gave trouble well within six months. The Nesbits had noticed the heaviness of the steering but did not appreciate that there was a defect in the steering box until 16 January. Again, the warrant of fitness inspection could be expected to bring this to light and it did so.

[44] The first of the matters to which the Court must have regard is the type of goods. Here the vehicle was an 11-year-old second-hand twin cab sold as an imported vehicle, in respect of which no warranty was given concerning the amount of prior usage as shown on the odometer reading. This was an ageing vehicle of uncertain overseas history. It was a four-wheel drive and therefore one which was likely to have been driven in off-road conditions. (The rusting may well have resulted from its being driven on roads which had been salted

but the evidence does not suggest an objective observer would have contemplated that possibility and it must be disregarded.)

[45] The next matter to which regard must be had in assessing a reasonable time for rejection is the notional consumer's likely use. A purchaser of a Navara for private use is likely to use it in the way just described, namely in rough conditions in which a four-wheel drive is necessary or advantageous.

[46] Paragraph (c) in s 20(2) requires consideration by the Court of the length of time for which it is reasonable for the goods to be used. This is particularly referable to goods with a limited life, which the Navara was not. It could be expected to be used for many years, although, as it was an 11-year-old vehicle, the notional consumer could also expect some parts to wear out or break as a result of use as they notoriously do in older vehicles.

[47] Lastly, regard must be had to the amount of use which would be reasonable before the particular defect(s) became apparent. A vehicle of this kind could be expected to be in immediate daily use, sometimes travelling long distances in the course of the owner's recreational pursuits. But it would not be anticipated that it would be used to the same extent as a vehicle purchased for commercial purposes.

[48] We consider that in a vehicle of the age and type of this Navara it is reasonable to expect defects of the kind actually encountered by the Nesbits, latent at the time of the supply, to become apparent relatively soon after the supply. (We do not understand there to have been an allegation that there was any concealment on the part of Porter Motors.) In our view the motor vehicle dealer should generally be freed from the burden of having to accept rejection of a vehicle of this age and pedigree after the time for the next mandatory six-monthly warrant of fitness check has passed. If, at the latest, a defect of the kind found in the Navara has not manifested itself on such an inspection, it would be an unfair burden upon the supplier if a buyer of such a vehicle, which must be assumed to have been in daily use, sometimes in rough conditions, should thereafter be able to reject it. Bearing in mind, however, that most people do not have their vehicles tested until the six-month period is expiring, there is a need for some latitude to give time to decide whether to exercise that right.

[49] Additional time may be allowed if the particular defect is one unlikely to be revealed by the kind of checking which occurs when a warrant of fitness is applied for. There was no such complicating factor in the present case, nor did the defects escape the attention of the Nesbits' panel beater or repairer. They were not of a kind which it was difficult to diagnose, as in *Cooper v Ashley & Johnson Motors Ltd.*

[50] Looking at all the relevant factors and allowing some tolerance for the time needed to react to the discovery of the combination of the defects in the Navara, we have reached the conclusion that the reasonable time for the exercise of the right of rejection in this case expired by the middle of February 1996. The period is longer than the one set by the High Court but still ran out before the date of the actual rejection by the Nesbits. Accordingly, their right of rejection had been lost and the purported rejection was legally ineffective.

The rejection notice

[51] The statute does not require a written notice. Mr Porter was well aware, as a result of his participation in the Disputes Tribunal hearing, of the grounds for the purported rejection. He would have understood the letters written to him

by the Nesbits and their solicitors to be referring to the matters canvassed at the hearing. The notice sufficiently complied with s 22.

Merchantable quality/acceptable quality

[52] There is a significant difference between the tests of merchantable quality in s 16(b) of the Sale of Goods Act 1908 and acceptable quality in s 7 of the Consumer Guarantees Act. Goods are of merchantable quality if of use for *any* purpose for which goods which complied with the description under which they were sold would normally be used; if fit for any such purpose they are regarded as saleable under that description (*Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 at p 77). In contrast, as Mr Collis pointed out, goods are of acceptable quality only if fit for *all* purposes for which goods of the type in question are commonly used and they meet the other standards referred to in s 7(1), including being free of minor defects, with all of these matters being tested against the opinion of a reasonable and fully-acquainted consumer having regard to the matters in paras (f) to (j) of that subsection. This test is quite dissimilar to the test in s 16(b) of the Sale of Goods Act, and it therefore does not follow from the Judge's finding of merchantable quality that there was no breach of the warranty of acceptable quality.

Result

[53] The appeal is unsuccessful because the right of rejection was not exercised timeously and it is dismissed. Because the District Court found that the appellants were not a consumer it did not rule upon their separate claim for damages, being the cost of repairing the shock absorbers. The case is remitted to that Court for that to be done, which will require determination of whether there was a breach of the guarantee of acceptable quality, on which the District Court has expressed no conclusion. In the circumstances the parties are to bear their own costs in this Court.

Appeal dismissed.

Solicitors for the appellants: *Potts & Hodgson* (Opotiki).
Solicitors for the respondents: *Andrew Stokes* (Milford).

Reported by: Carol Powell, *Barrister*

Williams v Aucutt

Court of Appeal Wellington
4, 20 April 2000
Richardson P, Gault, Keith, Blanchard and Tipping JJ

Family protection – Claims – Whether adequate provision made in will for "proper maintenance and support" – Family Protection Act 1955, s 4.

Christine Williams and Susan Aucutt were the daughters of Lilian Beatrice Henderson. At Mrs Henderson's death the total value of her estate was about $920,000 including a house valued at $380,000, contents of $120,000 and $420,000 for deposits and shares.

The testator believed that her most valuable asset was her house and thought that the shares were of no great value. The chattels, which had been insured for $20,000 at the time of her death, were subsequently reinsured for $231,000 once the executors became aware of their true value.

By her last will dated in 1992 Mrs Henderson had devised her residence to Christine. Christine also received a painting, a list of specified chattels and the contents of the residence other than those specifically disposed of, plus all shares owned at the death other than the shares in CSR. To Susan she bequeathed the CSR shares, another painting and a number of specific articles, including a period tea set. Each of the five grandsons received a specified chattel or chattels of family significance and a legacy of $1000 subject to abatement if the residue was not sufficient. Clause 9 of the will provided:

> "9. I DECLARE that this my Will makes greater provision for my daughter Christine than for my daughter Susan not because of any lack of affection for my daughter Susan but because I consider that my daughter Christine's financial position is much worse than that of my daughter Susan who is well provided for from other sources and it was the wish and intention of my late husband that Christine's greater need be recognised."

Christine's assets were modest. The assets of Susan and her husband were worth close to $1m.

The High Court accepted that both of the sisters were dutiful daughters laying emphasis on different matters.

Susan had applied to the Court for greater provision from the estate. The High Court concluded that there had been a serious breach of moral duty in that there had been a failure to recognise her position in the overall life of the deceased and the contribution that she had made in that respect. The High Court ordered that Susan was entitled to further provision from the estate by way of a share of the residue of the estate, which was to include the house property, the shares and the chattels, to the extent of 25 per cent and that Christine was entitled to the balance of 75 per cent. Christine appealed against that order.