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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HOWARD LEIGH SAREMBOCK ..... APPELLANT

and

MEDICAL LEASING SERVICES (PTY LTD) .... 1ST RESPONDENT

BLOOMSBURY CARRIAGE COMPANY ..... 2ND RESPONDENT

CORAM : CORBETT CJ, NESTADT, VIVIER, KUMLEBEN et F H GROSSKOPF JJA

HEARD : 28 AUGUST 1989

DELIVERED : 29 SEPTEMBER 1989

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA

The appellant sued the first respondent in the Cape of Good Hope Provincial Division of the Supreme Court for abatement of the purchase price paid by him for a motor car bought from the first respondent. The second respondent was joined as a Third Party. For his cause of action, based on the actio quanti minoris, the appellant relied on the fact that, unbeknown to him, the car, a 1981 Porsche 911 SC, was latently defective at the time of sale in that its front portion had been replaced. By reason of this defect its value at the time of sale, so the appellant alleged, was R20 000 less than the price of R39 500 which he paid for it: hence the claim for a reduction of the purchase price to R19 500. Both the respondents admitted that the front end of the car had been replaced but denied all other material averments in the particulars of claim. The second respondent, in

amplification of its general denial, alleged that before the sale was concluded the appellant was told that the car had been involved in an accident and that the manner of its repair was explained to him. Despite the denials on the pleadings, at the trial it was not disputed that the car was latently defective and that the defect had reduced its value. Thus the two issues of fact to be decided were whether the appellant knew of the defect and whether the value of the car when sold was less than the price paid for it to the extent claimed.

The second respondent is a motor car dealer. The firstrespondent is a leasing service enabling clients to deal with it rather than make a direct purchase. The appellant negotiated with the employees of the second respondent and in effect bought the car from the second respondent: once the appellant had decided to buy, it was

formally sold to the first respondent who in turn sold it to the appellant in terms of an instalment sale agreement. At the pre-trial conference the appellant undertook, were he to fail in his action, to pay the first respondent's costs. And the second respondent indemnified the first respondent in respect of any order made against it in favour of the appellant. Thus the need for the first respondent to feature as a party to the action fell away. By further agreement these arrangements held for this appeal.

The first of the two issues accounted for most of the evidence. The appellant, supported by his brother, Dr Brian Sarembock, said that he was unaware that the car had been involved in a major accident or of the repairs effected and was thus unaware of the resultant defect. Three witnesses for the second respondent sought to contradict this evidence. They were

Mr Levin, the sole director and shareholder of the second respondent; Mr Booysen, a salesman employed there; and Mr Caroline, the administrative manager of the firm. The court (Conradie J) considered, with respect quite correctly, this issue to be one of straight credibility and for convincing reasons found that these three witnesses were dishonest. On this issue their evidence was consequently rejected as false. This conclusion was not challenged on appeal. As to the second issue, the court held that the appellant had failed to prove the value of the car at the time of sale and on this ground dismissed the claim. It is this finding which is contested in this appeal.

Before turning to it, the history of this car and some details of its sale to the appellant ought to be briefly recounted.

The 911 SC is one of a series of Porsche motor cars and is in about the middle of the range of models of this make. They are imported from Germany and are much sought after by motor car enthusiasts primarily as an investment or for their high performance capabilities or for both these reasons. The origin of this particular car is rather obscure. Hearsay, which was received without objection at the trial, indicates that it was imported with extensive front-end damage by a panel-beating firm in Durban. "Parts of another vehicle" were then grafted on to the front of the damaged one. This was variously described as "cutting it in half" to create a "mechanical hybrid" or as the substitution of the "nose cone" by means of a "front-end graft". Fortunately a more precise description of what was done emerges from the evidence. The chassis of the Porsche consists of a moulded metal frame or plate to which the sills of the superstructure

(the bodywork) and other components of the car are attached. In this case the chassis was cut right through, laterally, approximately where the passenger compartment in front begins, that is, just in front of the foot pedals, as one witness put it. The corresponding front portion of the chassis of another Porsche 911 SC was then matched and welded to the remaining part of the chassis of this car. The dissection did not take the form of a straight cut at right angles to the length of the chassis. The fusion was an irregular one - in carpentry terms "a tongue and groove joint" - to make it more secure. Thereafter the front end of the car was rebuilt on the grafted or joined chassis. This involved inter alia the re-welding of the sills of the body to the chassis and some reconstruction and welding of the windscreen pillars.

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Thus repaired, the car was sold to Mr Anthony Martin, a used car dealer in Durban, who was called as a witness for the second respondent. Martin said he was aware of the defect at the time of purchase but could no longer remember precisely what he paid for it. As he recollected, the price was "approximately R32 000." On 20 October 1983 he in turn sold it to Levin, acting on behalf of the second respondent, for R35 000. According to Levin, Martin told him that the car had been damaged and repaired. Without grasping the technicalities of this explanation, he was satisfied on what was said to him that the strength and safety of the car was unimpaired. He accepted this assurance from Martin, whom he knew to be a Porsche racing driver. Before going to Durban Levin already had a prospective buyer, a Mr van Embden, who was a personal friend of his. On his return to Cape Town, Levin sold it to Van Embden for R40 000 at a time when

the odometer registered 9 000 kilometres. Van Embden retained it for about a year before trading it in for R35 000 in part payment for another car bought by him from the second respondent.

Thus the car came to be in the showroom of the second respondent when the appellant became interested in buying a Porsche. He was twenty-five years old and was running a successful practice as a dental surgeon. Though a tiro in the field of sports cars, he decided to buy, as he put it, a "prestigious" car for investment purposes. Assisted by his brother, Dr Brian Sarembock, he selected this particular one. After their first trial run in it, the appellant asked Booysen whether it had been involved in any major accident. He replied that, as a result of a minor one, the bonnet had been damaged and replaced. The appellant decided to buy the car.

On Wednesday 16 January 1985 Caroline came to the appellant's surgery with a written offer to purchase in order to close the deal. Coincidentally, whilst Caroline was there, another second-hand car dealer telephoned the appellant and told him that the car he was on the point of buying had been "sawn in half." He was suitably shocked and confronted Caroline with this information. Caroline put him in touch with Levin by telephone. The latter emphatically denied this. He there and then dictated a letter over the telephone to Caroline in which an undertaking to buy back the car subject to certain conditions was given. In addition the letter confirmed that the car was a 1981 model and that "every major component thereof is of the year 1981 or later." (It did not, one notes, confirm that the car had not been "sawn in half".) On the strength of Levin's oral assurance and the contents of the letter, which was

signed by Caroline and the appellant, the latter signed the offer to purchase. At the foot of this document, with some instructions to the seller, the following words appear: "Client aware of front end damage." (This, one also notes, does not state the nature of the repair work and is conveniently consistent with what was told to the appellant, namely, that the bonnet had been damaged.) According to this document the purchase price was R39 500 and the general sales tax was apparently to be paid by the appellant. There is a reference to the fact that the appellant was to trade in his BMW motor car in part payment of the purchase price but no credit for the trade-in price features on the document. This is no doubt because this sum is taken into account in some way in the instalment sale agreement between the appellant and the first respondent. Be that as it may, it was common cause on the pleadings and at the trial that the purchase price

was R39 500.

The appellant took delivery of the car. After about a year he and his brother drove it to Durban and left it with Mr McGee of Durban Porsche to have the engine modified and other work done to it. After about a week McGee telephoned the appellant to tell him that the car had in fact been "sawn in half". At that stage he was committed to the extent that he had paid Durban Porsche a deposit of R10 000 for parts ordered from overseas. His attorney advised him to go ahead and have the modification and other work done as planned notwithstanding this disturbing disclosure. The total cost of such work eventually amounted to R30 000. He retained the car and continued to use it.

Mr Botha was called as a witness for the

appellant to describe in detail the condition of the car. He was a qualified motor mechanic employed by the Automobile Association of South Africa in Durban as a technical officer to check repairs done to vehicles. He inspected the car in Durban and drew up a detailed report. He was critical of the standard of the repair work involved in the front-end graft. It is unnecessary to refer to his evidence in this regard since, as I have said, it was common cause that the graft amounted to a latent defect. At the conclusion of his evidence-in-chief he expressed the view that as a result of the graft the car was possibly less safe to drive. As he put it,

> "If the vehicle was in any form of collision after this repair work had been carried out there is a possibility, notably the side-swipe type of accident, the vehicle could be torn in two."

His grounds for this conclusion proved deficient. Under cross-examination he was obliged to concede that what he

regarded as below standard welding would not necessarily have weakened the chassis and, what is more important, it appeared that his view was based on a misconception of how the graft had actually been carried out. Although his evidence in this regard is not all that explicit, it appears that he assumed from the welding mark that the cut across the chassis floor was in a straight line or more or less in a straight line. This, in his view, would constitute an inherent weakness. He later, however, conceded that in the case of a "tongue and groove" graft such an inference could not necessarily be drawn. Notice was given in terms of Uniform Rule of Court 36(9)(b) that Botha would be called as an expert and his "Confidential Report" was attached to the notice. In the report all the defects are listed but in the concluding paragraph, which states that the car was involved in a major collision involving a front-end graft and that the repair

work is below standard, there is no mention of the car being less safe. Had he held that view at the time of inspection, it is most unlikely that he would have omitted to say so in his report. Moreover, when the car was modified to increase its engine power there is no suggestion that the chassis was strengthened. Yet the appellant was not told by anyone that it was hazardous for him to continue driving the car.

On the evidence I am satisfied that the court a quo was correct in concluding that the appellant had failed to prove that the car, though defective as a result of the graft, was on that account less safe.

It was common ground that for the appellant to succeed in his claim it was necessary for him to prove, on a balance of probabilities, the value of the car at

the time of sale and, one need hardly add, that such was less than the purchase price paid. To do so the appellant relied primarily on the evidence of his witness, Mr Hoffmann. He was the branch manager of LSM Distributors (Pty) Ltd of Durban. This firm was the agent for, and the sole distributor of, Porsche and Jaguar motor cars in South Africa. He had at the time of the trial eight years experience in the "exclusive car market" and during the previous three years had dealt almost exclusively with Porsche motor cars. Before he came to Durban in April 1986 he had been with the Johannesburg branch of his firm. There he had sold about 150 Porches per year, and of every 100 about 20 were 911 SC models. He and one other employee of his firm are accredited by it to value Porsche motor cars.

He examined this particular car when it

arrived in Durban and later at the panel-beaters when it was "totally stripped." The value he would have placed on that car at the time of sale in January 1985, had it not been grafted, would have been between R40 000 and R45 000. His valuation with the defect, and the basis for his estimate, appear from the following two passages in his evidence-in-chief:

> "Now what would you say the value of such a car would've been in January of 1985? --- Well if you ask me that question I must say nothing because the value of a car like that only can be based - it's - look, a Porsche, especially a 911, is really - it's a classic motor-car and the people who buy this type of cars they obviously not only enjoy their cars, they buy these cars for investment purposes. So they want to have an immaculate car, definitely a car - not a car what was involved in an accident. So if you say - let's say a value R20 000,00 to R25 000,00, that's already on the high side and has only one reason because if you take the engine components and the gearbox and take all that things in account, that has somewhere on the line of value but not really the car as such so much.
>
> Now you mentioned - you've had, obviously, dealings with the type of person who buys a Porsche motor

vehicle? --- Ja.

And just tell the Court what motivates people to spend this type of money on a motor car? --- Look you see especially in South Africa very clear over the last about say 10, 15 years that a motor vehicle only appreciate in value, especially a Porsche, really only appreciate in value and that's the reason they buy the motor-car. They enjoy it to drive no doubt. On the other hand they now also - they get at least their money back plus so they - they can't do really a mistake because it's - from the investment point it's one of the really, really good investments which they can do in these days."

and

"Now knowing the average Porsche buyer as you do ...--- Ja?

Is he likely to buy a car which has been, for want of a better term, sawn in half? --- No, he wouldn't. Definitely not. Because if he buys a car - this type of car, he wants to buy it not only to enjoy it, he wants to buy as an investment and also this type of car, it's a very, very fast sports car, so if he wants to go for it and wants to drive that car fast, obviously it's dangerous. So two purposes why he won't buy it. He buys the car mostly for investment reasons. So the car without a value he can't buy.

> And what is the position of Dr Sarembock? What is his position going to be when he wants to sell this car? --- Well, I only can say good luck, I wouldn't buy it from him."

As appears from these passages, the basic premise for the value Hoffmann placed on the car is that, with the defect disclosed, it would only be bought for the sale or use of certain of its component parts - for what one might call its "break-up" value.

The reason for this conclusion is in the first-quoted passage restricted to the attitude of a buyer purchasing for investment purposes. However, in the second extract from his evidence he states that a Porsche thus grafted is "obviously dangerous" and for this reason as well would not be bought to be driven. It clearly emerged during cross-examination that he lacked the expert knowledge to state as a fact that it was

dangerous; that this assertion was no more than an assumption on his part based on what Mr Botha had said in court and on certain information from other sources - "my technical guys"; and that this supposition weighed with him in deciding that it had no prospect of being sold as a motor car. This is borne out by the following answers he gave under cross-examination:

> "You assumed that that car is dangerous. Am I correct? --- Well, we got the statements about it and we've got the statements from, I believe, that Mr Botha, for example, was here yesterday and from my technical guys." .....
>
> "And for purposes of the evidence that you've given, you have assumed that that car is dangerous? --- Ja. With that facts what I got, I gave a valuation. That's right." .....
>
> "You've assumed that fact but you don't know that fact by reason of your own expertise because you're not an expert in that field? --- That's right."

Thus, for the premise on which Hoffmann's valuation was based to have validity, it was necessary for the

appellant to prove that the car was in fact dangerous to drive. This, as I have said, was not established. In point of fact it seems to me more likely that a prospective buyer of such a car, when told of a front-end graft, would want to know whether the salesman could give an assurance that it was safe to drive rather than whether it could be proved to be unsafe. Be that as it may, this was not the basis on which Hoffmann approached the matter and founded his valuation.

Mr Hoberman, who appeared on behalf of the second respondent, submitted that the Martin-Levin and Levin-Van Embden sales of this particular car, with the buyer in each case knowing of the defect, also serve to refute the premise of Hoffmann. I consider it unnecessary to rely on the evidence of these three witnesses in this regard and am disinclined to do so.

The first sale from Martin to Levin was between second-hand car dealers and, for reasons still to be stated, Martin's credibility on matters of fact is, like that of Levin, suspect. Van Embden's evidence, which by contrast can be accepted as credible, does not make it clear that the nature of the front-end graft was fully or adequately explained to him or that he properly understood what was told to him. He said that Levin did give him details of the damage and repair work, the technicalities of which, according to Van Embden, were rather lost on him. To refer to his evidence, he said that Levin had told him

> "that it had been in a motor vehicle accident of some sort and that they were in Durban fixing up the car and that they were replacing the front of the car. I also recall him discussing with me the fact that there's a metal underneath to the motor vehicle and as a result of the structure of the car in question the logical way to fix a car where the front had been in an accident was not to panelbeat the parts but to in fact replace the front of the car. Jack also told me certain technical details which - I'm personally not a technical man so I

would not recall in detail what he spoke about when he referred to things in technical detail."

(In passing, the statement that they were busy fixing the car in Durban is incorrect. The car had been repaired before it was delivered to Martin.) This evidence does not clearly show that Van Embden was told, or fully appreciated, what a front-end graft entailed. Moreover, if Levin had made a full disclosure of the defect to Van Embden and was nevertheless able to sell it to him for R40 000, why - one may ask - did he decide to be devious and deceitful in selling the car to the appellant for R39 500 a little more than a year later. Without relying on the evidence of these three witnesses, I nevertheless consider that the court a quo was correct in concluding that the basis for Hoffmann's valuation of R25 000 - R20 000 for the "car" cannot be accepted.

As a general rule the value of an article is to be determined with reference to the price it would fetch in the open market: see Pietermaritzburg Corporation v South African Breweries, Ltd 1911 A.D. 501 at 515. However, as Innes JA at page 516 of that judgment observed:

> "There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. .....
>
> There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give."

If the evidence proves or indicates that sales of such cars with grafted chassis take place with sufficient regularity for them, or certain of them, to serve as a guide to market value, it may well have been incumbent

upon the appellant to produce such evidence. If not, the court must do the best it can and, with reliance on some other legitimate method of valuation, make a fair and reasonable estimate on the evidence of the value of the car. (Cf. Maennel v Garage Continental, Ltd 1910 AD 137 at 145 and Labuschagne Broers v Spring Farm (Pty.) Ltd 1976(2) S.A. 824 (TPD) 827 F - G.)

What is the evidence on the frequency of sales of such a car? Hoffmann, with his considerable experience of the sale of Porches, was on only one occasion offered one for sale. He turned it down because he considered that it would be difficult, if not impossible, for him to dispose of it. Levin does not suggest that he ever bought or sold such a car, apart from this particular one. Had he done so, he would certainly have given evidence to this effect in support

of that of Martin. The latter's evidence, purporting to rebut that of Hoffmann, was that there was in fact a market for such cars. He agreed that a particular type of buyer - the investor on whom Hoffmann focussed attention - would not contemplate buying such a Porsche. But, he said, there is another category of less affluent Porsche enthusiasts who would be prepared to buy one though at a considerably lower price. His evidence does not bear out this assertion. On the contrary, in reply to the suggestion that it is "very uncommon" to come across such a car, Martin agreed that it was "unusual". Earlier in his evidence-in-chief he had said that such a car could be easily sold. In fact he said that they were "very, very saleable at the moment", that is, in September 1987 when the trial took place. In support of this statement, he volunteered the information that in June 1987 he had sold a 1980 Porsche 911 S Targa with a

front-end graft for R45 000 to a Mr Leslie Amas of Durban. After the second respondent had closed its case, Amas was called by the appellant in rebuttal. He happened to be a motor mechanic. He had inspected the car, which he still owned, and stated unequivocally that its chassis was intact and had never been cut or welded: there was no question of its having had a front-end graft. He added that had such been the case and had this been disclosed to him, he would not have bought the car. His evidence was not challenged and must therefore be taken to have been accepted by the second respondent. Thus Martin was caught out in what the trial court called "an extraordinary lie" but one which it considered had no more than "anecdotal" significance and was hardly worth lying about. I view the matter in a rather more serious light. It was a deliberate lie told to bolster his evidence on a vital

aspect of the case on which he had been called to testify. It at the very least discredits that part of his evidence which was intended to prove that such cars are frequently or readily sold in the market place. In fact on all the evidence the contrary was established.

I turn now to consider whether there is satisfactory evidence on what the value of this car would have been at the time of sale had it not been subject to this front-end graft.

Hoffmann valued it without the defect at R40 000 - R45 000. His competence and experience to make such a valuation was not disputed. The learned judge, however, considered that there were two countervailing considerations which made this valuation suspect and led him to conclude that even its upper

limit was too low. The reasons for this conclusion appear from the following two passages in the judgment:

> "The evidence of sales which Mr Hoffmann did present does not, to my mind, lend support to his opinion that a 1981 911 SC Porsche in mint condition would in January 1985 have sold for between R40 000 and R45 000. The prices upon which he relied for his view do not seem to bear him out. There is no evidence of any sale at R40 000 or less. In fact, the lowest figure recorded was for a car one year older than the Plaintiff's; that was R8 000 above the price paid by the Plaintiff for his vehicle. I have borne in mind that two of the vehicles used as examples were 1982 models, one of which was a right hand drive with additional features. The one example of a 1981 model sold during May 1985 shows that it fetched R52 000; it was a right hand drive. Vehicles with left hand drives cost about R3 000 less.
>
> Viewed as a whole, it certainly seems to me that the relevant price range is considerably higher than Mr Hoffmann made out. This lends support to the Third Party's case that the price of R39 500 discounted the imperfection."

The other passage reads as follows:

> "It does not seem to me that I can, on the evidence before me, say that the Plaintiff did not

at the time buy his Porsche for the true value of a grafted 1981 Porsche. I have found that the Plaintiff was not told of the welded chassis. These two findings do not conflict. It is my view that Booysen, who strikes me as a seasoned and clever and certainly very experienced operator in the used car market, might have feared that he might lose the sale if he told the Plaintiff about the graft. Of course, in concealing this from him he cheated him. But it does not follow that he also robbed him by making him pay more for the car than it was worth." (My emphasis.)

In this way, in the last-quoted passage, the court sought - albeit somewhat tentatively - to reconcile the deliberate concealment of the defect with the sale of the car at its true value. I cannot agree with this. It is to my mind against all the probabilities - and would have been wholly out of character - for the three dishonest car dealers (according to Levin, Caroline as well as Booysen knew of the defect) to have decided to act as they did but at the same time to have resolved not to take full

advantage of their deception. There was an inherent risk that they would be found out, in which event they would be hard pressed to persuade anyone that they had concealed this material defect for the limited purpose of securing a sale but nevertheless gave the appellant a square deal. In the witness box they made no attempt to do so.

Turning to the first-quoted passage from the judgment, the reliance upon certain sales for doubting Hoffmann's valuation is based on a portion of his evidence during cross-examination. After furnishing details of the number of Porsches he was involved in selling annually, his evidence continues thus:

> "Have you got any documentation reflecting the sales of those 911's that may help us in arriving at the correct market value? --- Well, I could tell you some figures what are in fact just - put together yesterday in Johannesburg, just

reflecting the start time of '85. You see in that short period I couldn't find all the records also but let's start ...." (and the witness then proceeds to give certain details of five sales).

From this evidence one cannot say with any degree of certainty that the "figures" of these five sales, which he had obtained in or from Johannesburg the day before he testified in court, are based on his personal knowledge and, if so, that they were taken into account by him in reaching his valuation of R45 000 - R40 000. I shall, however, assume in favour of the second respondent that this is the inference to be drawn from what he said. But there is no suggestion that his valuation was based solely on these five sales. His evidence in regard to them can be thus summarised (the odometer reading at the time of sale is stated in parenthesis):

Sale 1

In March 1985 he sold a left-hand drive 1982 Porsche 911 SC (41 000 kilometres) for R49 000.

Sale 2

In March 1985 he sold a left-hand drive 1978 Porsche 911 SC Targa (60 000 kilometres) for R31 000. (The Targa has a detachable roof section. For this reason it is a more expensive version of the 911 SC.)

Sale 3

In March 1985 he sold a right-hand drive 1982 Porsche 911 SC (45 000 kilometres), which he described as a "full house", for R51 000. (A "full house", in the argot of the trade, refers to a car with certain extra features. The witness said "with electric windows, everything" but was not asked to explain what was included in the term "everything".)

Sale 4

In May 1985 he sold a right-hand drive 1980 Porsche 911 SC (86 000 kilometres), also a "full house", for R47 500.

Sale 5

In May 1985 he sold a right-hand drive 1981 Porsche 911 SC for R52 000. (Odometer reading not given.)

There are a number of reasons why the facts relating to these sales, such as they are, cannot be regarded as a ground for refuting or casting doubt on Hoffmann's valuation based on his general experience. It was common cause that there were changes in the exchange rate, as well as in import restrictions and duties, which affected the price of second-hand cars already imported. In two cases "full house" cars were sold and, as has been pointed out, one does not know

precisely what this term means or to what extent the extra features influence the selling price. There is evidence that there was an increase in the price of such cars from January 1985 (when the car was sold to the appellant) to May 1985 but the extent of such increase is not adequately disclosed. In the light of the known - and unknown - facts relating to these five sales they cannot, jointly or severally, serve to disprove Hoffmann's valuation. The statement in the extract from the judgment that there is no evidence of any sale at R40 000 or less is not strictly accurate. The price in the second sale was R31 000. It is true that the sale price in the case of the other four sales was more than R40 000 but, taking into account the considerations to which I have referred, the prices to my mind cannot be considered in isolation and do not serve as a ground for concluding that Hoffmann's

valuation is wrong.

Of the five sales the last one (Sale 5) is the most comparable. Apart from the fact that it relates to a right-hand drive car whereas the car bought by the appellant was a left-hand drive and that they no doubt had different odometer readings, the two cars are in other respects similar. Hoffmann's unchallenged evidence is that a left-hand drive on a Porsche 911 SC would reduce its market value by about 10%. If this is taken into account, together with the fact that there was an increase in price from January to May, this sale would appear to be in line with Hoffmann's valuation.

There is no suggestion that the car bought by the appellant suffered from any other defects or for

any other reason would not have been sold at the current market price for such a car. Having concluded that it was not sold as a grafted car or at a discount owing to that imperfection, the selling price of R39 500 can be taken into account - see Van Zyl v Stadsraad van Ermelo 1979(3) S.A. 549 (AD) 572 G - H - and is an additional factor tending to confirm Hoffmann's valuation.

In argument Mr Hoberman submitted that Hoffmann's estimate was unacceptable in that it postulated a car in "mint condition". His evidence in this regard reads as follows:

> "Now based on your experience as a salesman of Porsche motor vehicles, do you sell both new and second-hand Porsche motor cars? ----Yes.
>
> What would the value of that motor vehicle have been in let's call it "mint condition" ... --- Ja.

Fair wear and tear excluded ... --- Yes.

In January of 1985? --- Round about between R40 000,00 and R45 000,000.

Between R40 000,00 and R45 000,00? --- Yes.

Now let me just get this clear at this stage. When you say that and it was already presupposed in my question ... --- Ja.

But that is a car in mint condition? --- Yes, definitely.

And when you give that price it's based on your experience as ... --- Obviously. And that's also based upon that - what we do for example with a car. Look, if we get a car in, that car get total checked over, that car get a - not only full workshop report, it get a service done, major service or minor service, whatever has happened, and leaves our showroom with full factory guarantee. That's meaning guarantee on everything so that's the reason why we base the price round about that frame."

The inspection of a second-hand car to ensure that it is in proper working order and the servicing of it are, one would expect, routine tasks to be undertaken before it is offered for sale and there is nothing to show

that this car was not in that sense in "mint condition". The importance or import of a "full factory guarantee" was not explored in evidence, but it is unlikely that this factor significantly influenced the valuation made by Hoffmann, bearing in mind the comparatively wide limits of his estimate.

In the result, on an assessment of all the relevant evidence, the appellant, in my view, has proved that the car without the defect at the time of sale had a market value of at least R40 000.

It is self-evident, and common cause, that this car with a front-end graft has a substantially lower market price than its counterpart without any such imperfection. Hoffmann was not asked to estimate the diminution in value since, as we have seen, his

figures were based on "break-up" value. Martin agreed that the price would be reduced - though not "drastically reduced" as was suggested to him - and said that it would or could be sold at 20% less than the price of what he called an "undamaged" car. Levin agreed that he would expect a percentage reduction of that order. I must say that these estimates seem to be on the low side if one takes into account the far-reaching nature of the damage and repair work. An abatement of 20% would, for instance, amount to no more than twice the percentage reduction which is made for a left-hand drive. However, in the absence of any other evidence in this regard, this estimate of the required reduction - furnished by the second respondent's own witnesses - ought to be accepted. It amounts to a subtraction of R8 000 from the estimated value of R40 000.

In the result I am satisfied that it has been shown on a balance of probabilities that the car was worth R32 000 at the time of sale.

This conclusion is reached along lines which differ from those on which the appellant set out to prove the value of the defective car. In the particulars of claim he simply alleged that its value was R20 000 less than was paid for it. In the request for further particulars further information was sought, inter alia: (i) "Full and precise details ..... as to how the sum of R20 000,00, being the diminution in the value of the said vehicle, is calculated and arrived at; (ii) its market value at the time of purchase "assuming the defect to have existed"; and (ii) its market value "assuming there to have been no latent defect." The appellant furnished

the figure of R19 500 in reply to (ii) but did not respond further. No particulars for the purpose of trial were sought. The appellant was therefore not bound by the pleadings to prove this aspect of his case in any particular manner. This Mr Hoberman did not dispute. In fact he, very fairly, conceded that, if the evidence warranted the calculation of the value of the car in the manner set out above, he could not point to any prejudice or raise any valid objection.

The remaining matter, one of law, is whether the aedilitian remedy is available to a claimant in a case such as the present when the latent defect affects the resale price, and hence its value as an investment, but not the utility of the car to be used as such. The possibility that this issue would have to be settled prompted the trial judge to grant leave to

appeal to this court. The question is comprehensively dealt with in the appellant's heads of argument. However, Mr Hoberman did not submit that, in the event of the value of the car at the time of sale being proved, the appellant's claim was not well-founded. In the circumstances I need but briefly deal with this question.

In his particulars of claim the appellant did not allege fraud or breach of contract on the part of the first respondent. His claim for relief was based solely on, and was restricted to, the aedilitian remedy.

The nature and effect of the defect required to be proved in such a case is thus described in Holmdene Brickworks (Pty) Ltd v Roberts Construction

Co. Ltd 1977(3) S.A. 670 (AD) 683 H - 684A:

> "Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it has been sold or for which it is commonly used (see Dibley v. Furter, 1951 (4) S.A. 73 (C) at pp. 80-2, and the authorities there cited; also Knight v. Trollip, 1948(3) S.A. 1009 (D) at pp. 1012-13; Curtaincrafts (Pty.) Ltd. v. Wilson, 1969 (4) S.A. 221 (E) at p. 222; De Wet and Yeats, Kontraktereg, 3rd ed., p. 236; Mackeurtan, Sale of Goods, 4th ed., p.246; Wessels, Contract, 2nd ed., para. 4677)."

The passage in Knight v Trollip cited reads as follows:

> "As I understand it, a contract of sale under the common law normally imports, in the absence of variation by express agreement or necessary intendment, that the seller undertakes to the purchaser that the "res vendita" is, at the time of contracting, free from any undisclosed defect which renders the "res" unfitted in whole or to a substantial extent for the purposes for which such a thing is normally used, and/or for any special, even though unusual, purpose which the purchaser has, prior to the making of the contract, made known to the seller."

The evidence proved that such cars are generally bought for investment purposes. The presence of this defect therefore materially impaired its effectiveness as an investment. If, however, it can possibly be said that the "utility or effectiveness" of a car of this kind does not usually or ordinarily relate to it being bought as an investment, in this case its purchase for that purpose was known to all concerned. Thus it cannot be said that the nature of the defect is a bar to the appellant's claim.

The appeal is allowed with costs, including the costs of two counsel. The order of the court a quo is set aside and the following substituted:

"An order is granted reducing the purchase

consideration as it appears in Annexure "A" to the particulars of claim to an amount of R32 000 and the first respondent is ordered to pay the costs of suit."

M E KUMLEBEN
JUDGE OF APPEAL

CORBETT CJ)
NESTADT JA)
VIVIER JA) - Concur
GROSSKOPF FH JA)