

**IN THE COUNTY COURT AT CARDIFF**  
**On appeal from the County Court at Merthyr Tydfil**  
**Deputy District Judge Wilson**  
**Claim No. 076MC686**

Cardiff Civil Justice Centre  
2 Park Street, Cardiff, CF10 1ET

Date: 22 March 2021

**Before:**

**HIS HONOUR JUDGE KEYSER QC**

**Between:**

**ANETTE PENDRAGON**

**Appellant/  
Defendant**

**- and -**

**JUDY COOM**

**Respondent/  
Claimant**

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**Rachel Anthony** (instructed on **Direct Access**) for the **Appellant**  
**Kate Longson** (instructed by **Taylor & Emmett LLP**) for the **Respondent**

Hearing dates: 18 March 2021  
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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**HIS HONOUR JUDGE KEYSER QC**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2.45 p.m. on Monday 22 March 2021.

## **JUDGE KEYSER QC:**

### **Introduction**

1. This is my judgment on an appeal by the defendant, Anette Pendragon, from the order made by Deputy District Judge Wilson (“the Judge”) at the County Court at Merthyr Tydfil on 14 August 2020, by which he gave judgment for the claimant, Judith Coom, against Ms Pendragon for £4006.11, together with costs. The appeal is brought with permission granted by HHJ Jarman QC.
2. The claim was limited to £5,000 and proceeded in the small claims track. Nevertheless, it generated a trial bundle in two lever-arch files and significant written and oral argument on points of law of the kind that are liable to crop up in busy lists of small claims.
3. I am grateful for the assistance of counsel: Rachel Anthony, who appeared for Ms Pendragon on this appeal, and Kate Longson, who appeared for Ms Coom here and below.

### **The Facts**

4. The case concerns the sale of an Old English Sheepdog puppy that was said to have been of unsatisfactory quality at the point of sale on account of two latent conditions. The evidence in the case as to those conditions is as follows.
  - 1) Hip dysplasia in dogs is a common, hereditary, skeletal condition, in which the hip joints develop abnormally. Although when the puppy is born its ball and socket joints are structurally normal, within weeks the ligaments supporting the hip joints become lax, resulting in the joints becoming unstable. The instability causes the ball and socket to become ill-fitting; this leads to abnormal wear of the joint and to slight dislocation and can cause pain and suffering in the dog. In milder cases, the condition may be managed with medication. In severe cases, total hip replacement is required. The best way of preventing hereditary hip dysplasia is to screen breeding dogs for the disease. A tool for use in screening is provided by recognised hip scores, which are awarded on the basis of specialist interpretation of radiographs. Each hip has a possible maximum score of 54; the maximum total score is therefore 108. The lower the score, the greater the chance of progeny having serviceable hips; a higher score increases the likelihood of the inheritance of genes that may result in hip dysplasia. The Kennel Club recommends that breeders choose breeding stock with hip scores around, and ideally below, the 5-year breed median score. For the Old English Sheepdog, the 5-year median score is 8.
  - 2) Diabetes insipidus in dogs is a disorder of the pituitary gland. It causes urine to be very dilute, and symptoms may include excessive urination and drinking. The condition may be due to a birth defect, trauma or a tumour of the pituitary gland, or it may have no identifiable cause. The condition can begin at any time between 7 weeks and 14 years of age. Treatment is typically by

medication. Symptoms usually disappear quickly after the start of treatment, but the condition is life-long.

5. Ms Pendragon had been breeding Old English Sheepdogs for about 25 years when, on 21 June 2018, she sold an 8-week-old Old English Sheepdog puppy, called Lady, to Ms Coom for a price of £1,000.
6. Lady was not registered at the Kennel Club. She had been born as a result of accidental mating between her dam and her sire. An endorsement had been placed against the registration of the dam, which prevented registration of her progeny. Ms Coom knew that Lady was not registered at the Kennel Club. This did not concern her, as she did not want to show Lady; she wanted her as a pet. The price for Lady reflected the lack of registration. Ms Coom knew the reason why Lady was not registered.
7. Before the sale, Lady's dam had been tested for her hip score. It is now known that the tests produced a hip score of 42, which was very high. That does not mean that the dam had hip dysplasia or that she would have shown any sign of lameness. It does mean, however, that all her puppies would be at increased risk of developing hip dysplasia.
8. Ms Pendragon told Ms Coom that the dam had been tested for her hip score and that she was waiting for the results. Ms Pendragon's evidence was that this was because she did not know the results of the hip score tests. Ms Coom disputed that evidence: initially, she merely said that the veterinary surgeon or approved assessor who had taken the dam's X-ray would inevitably have warned Ms Pendragon at the time that the X-ray indicated the likelihood of a high hip score; subsequently, after veterinary records had been disclosed, she said that they showed that the dam's hip scores had been recorded by the veterinary surgery on 11 June 2018 and that they had been communicated (by inference, to Ms Pendragon) on 15 June 2018. This remained an issue of fact at the hearing before the Judge.
9. Ms Coom's evidence was that, if she had been told that the test results were high, or that it appeared likely that the test results would be high, she would not have bought Lady. The Judge did not make any finding in this regard in his judgment. In fact, Ms Coom learned of the dam's hip scores within a few weeks of the sale but did not then take any further action.
10. In December 2018 Lady was diagnosed with diabetes insipidus, for which she continues to be treated by medication.
11. In late January 2019 Lady was observed to have symptoms of lameness. On 13 February 2019 she was diagnosed with hip dysplasia. The first record of a veterinary expense referable to this condition is on 18 February 2019.
12. It appears that Ms Coom wrote to Ms Pendragon, intimating a claim, on 18 February 2019, and that there were exchanges of communications on Facebook. Ms Coom wrote again on 20 March 2019, complaining that "the goods" were not of satisfactory quality and requesting £1,000 as "a percentage of expected and already paid vet bills which is 20% of insurance monies I have to pay." Ms Pendragon replied on 25 March

2019, saying, “any passing of money to you would involve your bitch being returned back to me.” Ms Coom declined that offer.

13. In May 2019 Lady underwent a total hip replacement. Five weeks later, in the last week of June, X-rays revealed that the new hip had dislocated. Further surgery was required.
14. Ms Coom commenced proceedings on 24 June 2019. The claim form stated the “reason for claim” as follows (punctuation altered for clarity):

“I bought a puppy in good faith, thinking it would be healthy, but the breeder didn’t tell me that the mating was with a mother that had a much higher than average hip score. These sort of hip scores should never have litters as they produce litters with the chance of hip dysplasia, which is what happened to me. Because she had no pedigree papers she was sold cheaper; I wasn’t too bothered as I wanted a pet not a show dog. But now I know why she has no papers, as I found the hip score through the kennel club, when checking to see why she wasn’t registered.

So I am claiming for the repair of said item. She has already had a hip operation and will need the other one done next year; she has also had a dislocated hip on the same one; she is at the vet all the time [and has] had no puppy life, all because this breeder wants to make money. I am insured but have to pay 20% of bills. Just the hip operation was £6,500: hence this claim. She also has diabetes insipidus, which is congenital, with kidney problems, and will be on medications for life.”

15. The claim form claimed £5,000, being the sum of (1) £1,000 (for “% of insurance claim for diabetes insipidus, which is congenital from parents, and wasn’t informed of possible illness, resulting in medications for life”) and (2) £4,000 (for “% of insurance claim on operation total hip replace on dog congenital should have been disclosed as a fault when selling puppy”).
16. In her first witness statement, dated 4 November 2019, Ms Coom confirmed that Ms Pendragon had offered to refund the price and accept a return of Lady. She stated: “I can confirm that I have rejected that offer on the basis that my claim is for damages for consequential loss and future loss and not a claim for a refund. These losses have been suffered as a result of Lady not being free from minor defects and not being of sufficient durability with those damages continuing to grow given her further treatment needs.”
17. In her defence, Ms Pendragon said that she had told Ms Coom that Lady was not registered because she was the result of an unplanned mating and that the results of the hip testing of the dam were still awaited. The price reflected the fact that Lady was unregistered. She (Ms Pendragon) had expected that the results of the tests would be good. When Ms Coom complained, she had offered to take Lady back and refund the purchase price. Ms Pendragon said that it was impossible to give a

guarantee against genetic conditions in animals. She said that, anyway, diabetes insipidus was not necessarily genetic; she had never had any dogs with that condition.

18. The case was allocated to the small claims track. Ms Coom applied for permission to rely on expert evidence from a veterinary surgeon, and on 26 November 2019 permission was given for expert evidence limited to the report of a single joint expert. As Ms Pendragon was unable or unwilling to contribute to the cost of the expert, that direction was subsequently varied to permit Ms Coom to obtain and rely on an expert report.
19. Other than as set out above, the main points to be taken from the expert's report included the following:
  - Although Lady's dam had a high hip score, she "may not yet show any clinical symptoms" (para 7.01). "Hence Ms Pendragon would not have been alerted to any possible issues with her dog's hips" (para 7.03). The expert interpreted the records of the veterinary surgeon as showing that the hip scores were communicated to the surgery on 15 June 2018: "There is no indication of the date that [the surgery] communicated the results to Ms Pendragon" (para 7.03).
  - "Interpreting radiographs taken to identify hip dysplasia is a specialist job and the vast majority of veterinary surgeons do not possess the detailed knowledge of the Kennel Club / British Veterinary Association panel of experts. Thus they would choose to wait for the results to come back before discussing them with the client." (para 6.08)
  - The report did not express any conclusion as to the cause of Lady's diabetes insipidus. It also expressed no opinion as to the date of the onset of the condition, although it recorded that Lady first showed signs of inappropriate urination on 5 July 2018.
  - The treatment given for both the hip dysplasia and the diabetes insipidus was reasonable.
20. The claim was heard by the Judge on 14 August 2020. Ms Coom was represented by Miss Longson. Ms Pendragon was unrepresented, though she had the benefit of a skeleton argument written by counsel, Mr McCracken, acting *pro bono*.
21. After receiving evidence and submissions the Judge gave judgment for Ms Coom for:
  - "£4,006.11 for damages";
  - £1,672 for costs, comprising (i) £1,030 for court fees and (ii) £672 for the expert report. (There appears to be an arithmetical error in the costs award.)

22. The Judge’s decision was largely, though not entirely, based on the provisions of Chapter 2 of Part 1 of the Consumer Rights Act 2015 (“CRA”), which deals with the sale of goods to consumers. In this judgment I need only consider the provisions of CRA so far as they have a bearing on the present case.
23. Chapter 2 of CRA applies where, *inter alia*, there is an agreement between a “trader” and a “consumer” for the trader to supply “goods” under a sales contract: sections 1 and 3. “‘Trader’ means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf”: section 2(2). “‘Consumer’ means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”: section 2(3). “‘Goods’ means any tangible moveable items ...”: section 2(8).
24. Section 9 of the CRA contains provisions regarding the quality of the goods to be supplied under a contract to which Chapter 2 applies:

*“9. Goods to be of satisfactory quality*

(1) Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory.

(2) The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of—

- (a) any description of the goods,
- (b) the price or other consideration for the goods (if relevant), and
- (c) all the other relevant circumstances (see subsection (5)).

(3) The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of that kind are usually supplied;
- (b) appearance and finish;
- (c) freedom from minor defects;
- (d) safety;
- (e) durability.

(4) The term mentioned in subsection (1) does not cover anything which makes the quality of the goods unsatisfactory—

- (a) which is specifically drawn to the consumer's attention before the contract is made,
- (b) where the consumer examines the goods before the contract is made, which that examination ought to reveal, or
- (c) in the case of a contract to supply goods by sample, which would have been apparent on a reasonable examination of the sample.

...

(9) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract."

25. Sections 19 to 24 contain the principal provisions concerning the remedies available where a consumer's statutory rights under a contract to supply goods have not been met. Section 19(3) provides:

"(3) If the goods do not conform to the contract because of a breach of any of the terms described in sections 9, 10, 11, 13 and 14, or if they do not conform to the contract under section 16, the consumer's rights (and the provisions about them and when they are available) are—

- (a) the short-term right to reject (sections 20 and 22);
- (b) the right to repair or replacement (section 23); and
- (c) the right to a price reduction or the final right to reject (sections 20 and 24)."

However, these statutory rights are not exhaustive of the remedies potentially available to a consumer. Section 19 provides further:

"(9) This Chapter does not prevent the consumer seeking other remedies—

- (a) for a breach of a term that this Chapter requires to be treated as included in the contract,
- (b) on the grounds that, under section 15 or 16, goods do not conform to the contract, or
- (c) for a breach of a requirement stated in the contract.

(10) Those other remedies may be ones—

- (a) in addition to a remedy referred to in subsections (3) to (6) (but not so as to recover twice for the same loss), or

- (b) instead of such a remedy, or
- (c) where no such remedy is provided for.

(11) Those other remedies include any of the following that is open to the consumer in the circumstances—

- (a) claiming damages;
- (b) seeking specific performance;
- (c) seeking an order for specific implement;
- (d) relying on the breach against a claim by the trader for the price;
- (e) for breach of an express term, exercising a right to treat the contract as at an end.”

26. Both the short-term right to reject and the final right to reject entitle the consumer to reject the goods and receive a refund of the price. (It may be open to a consumer to claim damages instead of a refund or “because of the limits of the entitlement [to a refund]”; cf. section 20(19).) In the case of a sale contract, the short-term right to reject is, save in specified cases, lost unless it is exercised within 30 days of the delivery of the goods and the passing of title. No question concerning the short-term right to reject arises in the present case.

27. The right to repair or replacement is dealt with in section 23:

*“23. Right to repair or replacement*

(1) This section applies if the consumer has the right to repair or replacement (see section 19(3) and (4)).

(2) If the consumer requires the trader to repair or replace the goods, the trader must—

- (a) do so within a reasonable time and without significant inconvenience to the consumer, and
- (b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

(3) The consumer cannot require the trader to repair or replace the goods if that remedy (the repair or the replacement)—

- (a) is impossible, or
- (b) is disproportionate compared to the other of those remedies.



(4) Either of those remedies is disproportionate compared to the other if it imposes costs on the trader which, compared to those imposed by the other, are unreasonable, taking into account—

- (a) the value which the goods would have if they conformed to the contract,
- (b) the significance of the lack of conformity, and
- (c) whether the other remedy could be effected without significant inconvenience to the consumer.

(5) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

- (a) the nature of the goods, and
- (b) the purpose for which the goods were acquired.

(6) A consumer who requires or agrees to the repair of goods cannot require the trader to replace them, or exercise the short-term right to reject, without giving the trader a reasonable time to repair them (unless giving the trader that time would cause significant inconvenience to the consumer).

(7) A consumer who requires or agrees to the replacement of goods cannot require the trader to repair them, or exercise the short-term right to reject, without giving the trader a reasonable time to replace them (unless giving the trader that time would cause significant inconvenience to the consumer).

(8) In this Chapter, ‘repair’ in relation to goods that do not conform to a contract, means making them conform.”

28. Section 24 deals with the right to a price reduction and the final right to reject.

*“24. Right to price reduction or final right to reject*

(1) The right to a price reduction is the right—

- (a) to require the trader to reduce by an appropriate amount the price the consumer is required to pay under the contract, or anything else the consumer is required to transfer under the contract, and
- (b) to receive a refund from the trader for anything already paid or otherwise transferred by the consumer above the reduced amount.

(2) The amount of the reduction may, where appropriate, be the full amount of the price or whatever the consumer is required to transfer.

...

(5) A consumer who has the right to a price reduction and the final right to reject may only exercise one (not both), and may only do so in one of these situations—

- (a) after one repair or one replacement, the goods do not conform to the contract;
- (b) because of section 23(3) the consumer can require neither repair nor replacement of the goods; or
- (c) the consumer has required the trader to repair or replace the goods, but the trader is in breach of the requirement of section 23(2)(a) to do so within a reasonable time and without significant inconvenience to the consumer.

(6) There has been a repair or replacement for the purposes of subsection (5)(a) if—

- (a) the consumer has requested or agreed to repair or replacement of the goods (whether in relation to one fault or more than one), and
- (b) the trader has delivered goods to the consumer, or made goods available to the consumer, in response to the request or agreement.

...

(8) If the consumer exercises the final right to reject, any refund to the consumer may be reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered ...

...”

29. I note, but need not set out, the wide powers given to the court in respect of the choice of remedy by section 58 of CRA.

### **The Judgment**

30. The hearing before the Judge was recorded and there is a transcript of it. Unfortunately, something went awry with the recording when the Judge gave his judgment; the transcribers were unable to produce a transcript. Miss Longson took her own note of what the Judge said, and when that note was typed up it was submitted to the Judge for his approval.

31. The result is not entirely happy. Counsel's note was admirable, but it very properly contained a few notes to the effect that words had been missed or corrected, or that words needed to be supplied (with suggestions as to what might be supplied), and an invitation to the Judge to address the question of misrepresentation, which was missing from the note. The Judge did not use the note to produce a definitive text. Instead he confirmed that he believed the note to be accurate and approved it (presumably, with approval of the suggestions in counsel's note concerning lacunae or corrections; he did not comment on the suggestions) and added a summary of his recollection of his reasoning in respect of misrepresentation, which he later had to correct when an obvious error was pointed out to him. In the circumstances, and for further reasons that I shall mention below, it is not entirely clear what the Judge's reasoning on all points was.
32. Almost at the very beginning of his judgment, the Judge said: "This is not a case of dishonesty and the parties were doing their best to help me reach a decision." This appears to be an express finding of two important matters: first, the grounds of the decision did not include any finding of dishonesty; second, the parties, who were the only persons to give evidence of fact, were honest witnesses.
33. However, the Judge did not accept Ms Pendragon's evidence as to the state of her knowledge at the time of the sale of Lady to Ms Coom. He found that she already knew the results of the dam's hip tests. This finding appears to have been based at least in part on the Judge's acceptance that the hip score was communicated to Ms Pendragon on 15 June 2018. However, the Judge has not provided as much assistance as might have been hoped for in understanding his reasoning on this point. Counsel's note reads in part:

"I come back to the point that the defendant is a breeder. I find on a balance of probabilities that the defendant did know of the results of the tests. I find it inconceivable that a breeder of 27 years, who had a dam who shouldn't have been bred, ..."

Counsel has then inserted a footnote: "Gap in drafting—assume something along the lines of 'wouldn't have called the vet to find out the results before selling the puppies.'" In approving the note, the Judge did not comment on this annotation or confirm what his reasoning had been at this point in the judgment.
34. On the basis of his finding as to knowledge, the Judge held that Ms Pendragon had made a misrepresentation in that she failed to disclose the dam's high hip score to Ms Coom and thereby represented Lady as being a healthy puppy. This appears to have been a subsidiary point in the judgment, because the Judge only expressed his view on misrepresentation at the end of the judgment and in answer to an enquiry from counsel as to whether he made any finding on the matter.
35. I shall consider the difficulties to which the parts of the judgment concerning knowledge and misrepresentation give rise when I discuss the grounds of appeal.
36. The major part of the reasoning in the judgment concerned CRA.

37. First, the Judge held that Ms Pendragon was a trader for the purposes of CRA. He does not appear to have found in terms that Ms Coom was a consumer, but that is implicit in the judgment and would be a justified finding.
38. Second, the Judge held that Lady was not of satisfactory quality for the purposes of section 9 of CRA, by reason of her hip dysplasia, though not of her diabetes insipidus.
39. Third, the Judge considered remedies with reference to the statutory provisions. He held: (1) by implication, that Ms Coom was entitled to refuse Ms Pendragon's offer to take Lady back; (2) that she had a "right to repair the dog", provided the cost of repair were "proportionate in value"; and (3) that she was entitled under section 24(2) of CRA to "a reduction in price up to a full refund". Accordingly, he awarded to Ms Coom:
- the full amount of the price she had paid for Lady, namely £1000, reflecting the difference between the price paid and the actual value of the dog. This appears to have been a price reduction pursuant to section 24(1) and (2) of CRA;
  - an amount of £3006.11 in respect of veterinary fees referable to the treatment of Lady's hip dysplasia. In the light of the way the case was advanced on behalf of Ms Coom and the Judge's express reference to "repair", it appears that the Judge purported to make this award on the basis of the statutory "right to repair" in section 23 of CRA. However, it would better be considered as an award of common law damages for consequential loss in accordance with section 19 (9) to (11);
  - costs, limited to the court fees and the cost of the expert report.

### **The Appeal**

40. The appellant's notice identifies seven grounds of appeal.
- 1) The Judge erred in law in that he set the standard of suitability under section 9 of CRA impossibly high;
  - 2) The Judge erred in law in that he made an order for repair when repair was not possible and was therefore not available under section 23 of CRA;
  - 3) The Judge made a substantial procedural error in permitting Ms Coom to advance a case in misrepresentation that had not been pleaded;
  - 4) The finding that Ms Pendragon had made a misrepresentation was not open to the Judge on the evidence;
  - 5) The Judge erred in law by awarding damages for losses that were insufficiently pleaded or proved;
  - 6) The Judge erred in law by awarding damages for losses which Ms Coom had unreasonably failed to mitigate;

- 7) The Judge was wrong to order costs in the amount he awarded.

## **Discussion**

41. For reasons that will, I hope, become apparent, it is convenient to consider the grounds of appeal in a slightly different order from that in which they appear in the appellant's notice.

### *Grounds 3 and 4: misrepresentation*

42. These grounds are identified in paragraphs 2(c) and 8 of the Grounds of Appeal drafted by Miss Anthony. The grounds were formulated before a note of judgment was available and have not been amended subsequently. However, it was not until 8 March 2021 that the approved terms of judgment were finally confirmed. Anyway, the nature of the complaints is clear enough: first, the Judge ought not to have entertained a case advanced on the basis of misrepresentation as no such case had been set out in the statements of case; second, a finding of misrepresentation was not open to him on the evidence.
43. In my judgment, the Judge's treatment of the question of misrepresentation is problematic in several respects.
44. First, there was no plea of misrepresentation. The claim form did say that Ms Pendragon had not told Ms Coom that the dam had a high hip score, but it did not say that Ms Pendragon had made a false statement of fact. A claimant who wishes to rely on any allegation of misrepresentation is required to set out details in the particulars of claim: CPR PD16, para 8.2.
45. I accept that, by itself, this omission need not perhaps have been determinative of the question whether misrepresentation should be considered at trial. Although the requirement to plead an allegation of misrepresentation applies in the small claims track as it does elsewhere, a degree of leeway may reasonably be (and commonly is) given regarding the formulation of statements of case in such a claim. The claim form was prepared by Ms Coom as a litigant in person. It is also true that Ms Coom's first witness statement, dated 4 November 2019, stated that Ms Pendragon had said before the sale that she was awaiting the dam's hip score (cf. paras 8, 13, 14 and 30) and expressed Ms Coom's belief that Ms Pendragon would have known that the hip score was likely to be high (paras 9, 12, 14 and 15); though again no positive misrepresentation is alleged. Ms Coom's second witness statement, dated 24 March 2020, impliedly alleged misrepresentation, because it stated by reference to veterinary records that Ms Pendragon knew the dam's hip score by the date of the sale. However, from at least November 2019 Ms Coom was represented by solicitors, who prepared her witness statements and represented her at pre-trial hearings. There was never an application to amend the claim form to allege misrepresentation.
46. Second, the case on misrepresentation that was advanced at trial involved an allegation of fraud, because it rested on the allegation that Ms Pendragon represented

that she was awaiting the dam's hip score whereas in fact she already knew what the hip score was and that it was unfavourable. (Negligence was alleged in the alternative, but I cannot see that it was a realistic way of putting the case.) It is a basic requirement both of fairness and of the rules that an allegation of fraud be set out in the particulars of claim, and it is also a requirement that an allegation that a party knew or had notice of a fact must be similarly pleaded: PD16, para 8.2. Neither fraud nor knowledge was alleged in the claim form.

47. Third, it is not altogether clear what representation the Judge found to have been made. In his gloss on counsel's note, the Judge commented that "the defendant, in knowing of and failing to disclose prior to sale the existence of the puppy's underlying health condition and defect, misrepresented the puppy as a healthy puppy." As it stands, that is a finding of non-disclosure rather than of misrepresentation. It may be, of course, that the Judge considered that Ms Pendragon's knowledge of a particular fact made something that she said false (for example, if she said, "I am waiting for the hip scores", when she already had them), or that there was a misrepresentation by the statement of a partial truth or by conduct. But the Judge did not identify the words or conduct on which his finding of misrepresentation was based and has not explained his reasoning.
48. The problem is exacerbated by the fact that, when it was pointed out to the Judge that it had never been suggested that Ms Pendragon knew of any defect or condition in the puppy at the date of sale, he agreed with the suggestion that his reference to "the puppy's underlying health condition and defect" was incorrect and ought to have been to the dam's underlying health condition and defect. I do not think that this facile correction is satisfactory. The puppy does indeed have an underlying health condition and defect, though Ms Pendragon did not know of it at the time of sale. The dam, however, is not known even now to have either an underlying health condition or a defect. What she has is a high hip score, which makes her unsuitable for use in breeding because it increases the risk of hip dysplasia in her litters; but she herself is perfectly well, so far as the evidence shows. Therefore the Judge's reasoning was, apparently, that Ms Pendragon's failure to disclose matters known to her that indicated an increased risk that Lady would suffer from hip dysplasia constituted a representation that Lady was in satisfactory condition. This could, I think, be a cogent line of reasoning, but it would require further development to show how things actually said or done by Ms Pendragon could, by reason of the non-disclosure, constitute a misrepresentation. The Judge did not develop the point in his judgment, and the confusion in his gloss makes it unclear (to me, at least) what his thinking was.
49. Fourth, there is in my judgment a basic incoherence in the judgment. The Judge began by stating in terms that the case was not one of dishonesty and that the parties had done their best to assist the court. I do not think that can be reconciled with a finding that Ms Pendragon knew the dam's hip score at the time of sale and misrepresented the condition of the puppy. It was the evidence of both parties that Ms Pendragon told Ms Coom before the sale that she was awaiting the hip score. If Ms Pendragon did in fact know the hip score, she acted dishonestly in telling Ms Coom that she did not know the hip score, and it is very hard to see on the facts of the case how her persistent denial that she did know the hip score could have been an honest one. Yet the Judge specifically found that Ms Pendragon had not acted dishonestly and had done her best to assist the court.

50. The fact that the Judge's findings of knowledge and misrepresentation on the part of Ms Pendragon necessarily entail the conclusion that Ms Pendragon was fraudulent and dishonest (in the absence of some process of reasoning that the Judge did not express and that I cannot identify), taken together with the absence of a plea of fraud and an express finding that there was no dishonesty, means that the findings in that regard cannot support the Judge's order.
51. In those circumstances, it is unnecessary to consider in any detail the further points that the Judge did not address the question whether any misrepresentation induced Ms Coom to enter into the contract and did not purport to give any remedy for misrepresentation.
52. It is also unnecessary to consider in detail the reasoning that led the Judge to make the findings that he did make. However, out of fairness to Ms Pendragon, I ought to say that I am not persuaded by that reasoning as I understand it.
53. The finding of misrepresentation was expressly based on a finding of knowledge of the dam's hip scores. If and insofar as the latter finding rests on a conclusion as to what the veterinary surgeon must have told Ms Pendragon when the X-ray was taken, or as to what the entry in the surgery's records for 15 June 2018 meant, it is contradicted not only by Ms Pendragon's own evidence but by the expert report (see above); though this does not mean that the conclusion is not one that could properly be reached. However, it appears that the Judge's finding that Ms Pendragon had knowledge of the hip score rested at least in part on his reasoning that an experienced breeder would have ascertained the results before selling the puppy. The use of that reasoning to support that conclusion seems to make little sense. If the breeder would have waited to know the results before selling the puppy, there must be a reason why she would have waited. The most obvious reason is that she would not sell the puppy if the results were unfavourable; but that does not apply, because Ms Pendragon did sell the puppy. The Judge did not explain what other reason Ms Pendragon would have had for ascertaining the results before selling the puppy. If what he had in mind was that Ms Pendragon would have wanted to know whether the hip score was favourable, because in that event there was a prospect of selling the puppy at a higher price, there exist the two problems that (a) such a thought process is unexplained and unarticulated by the Judge and (b) the explanation is very doubtfully consistent with a finding that Ms Pendragon was honest.
54. I turn to consider the grounds of appeal relating to the claim in contract, which concern the actual basis on which the Judge granted relief.

*Ground 1: satisfactory quality*

55. The first ground of appeal is that the Judge was wrong to hold that, by reason of hip dysplasia, Lady was not of satisfactory quality and there was a breach of the term implied by section 9(1) of CRA.
56. Miss Anthony submitted that the Judge set the standard too high: in the case of a living thing, such as a puppy, there could be no guarantee that the goods were free of all and any undetected constitutional defects and health problems.

57. It may readily be accepted that the implied term of satisfactory quality is not equivalent to a guarantee of freedom from defect. However, that does not really assist the appellant. The duty to supply goods of a satisfactory quality is a strict duty. It is obvious that the quality of goods may be rendered unsatisfactory by a defect that is not and even could not be known at the point of sale. To talk of the impossibility of guarantees is to deflect attention from the statutory provisions in section 9 of CRA, which are to be considered on their own terms.
58. Miss Longson submitted that the Judge's finding that Lady was not of satisfactory quality was a finding of fact that was open to him and that I should not interfere with the finding unless I concluded that it was not one that any reasonable judge could have made. I do not agree. The findings of primary fact were a matter for the Judge; an appellate court should be slow to interfere with them and should do so only if they were not reasonably available on the evidence. However, the question whether, on the facts as found, the goods satisfied the term in section 9(1) of CRA is one of law. If it were otherwise, identical facts could give rise to different conclusions as to compliance with the same legal obligations. The fact that the test of satisfactory quality is ultimately the (rather circular) test of conformity to "the standard that a reasonable person would consider satisfactory" (section 9(2)) does not turn the question into one of fact, any more than the question whether given facts are constitutive of negligence, or the question of the correct construction of a contractual provision, is a question of fact. The question is certainly not, as was suggested at one point in argument, one of judicial discretion.
59. In the present case, the evidence shows that at the point of sale Lady had hip dysplasia, although the condition was latent. The condition was liable to and did become painful and disabling for Lady and, if it were to be treated, expensive for her owner. Ms Pendragon accepted in evidence that a puppy known to have hip dysplasia would be unsellable and would have had to be given away. These matters strongly support the Judge's conclusion that there was a breach of the term in section 9(1) of CRA.
60. The question that has concerned me is whether the particular circumstances of the case are such that the defect in this puppy was not such as to render her condition unsatisfactory. Ms Coom did not know that Lady had hip dysplasia but she knew that she was unregistered and paid a reduced price on that account, and she also knew that Lady's dam had undergone a hip test and knew (or believed) that the results were not yet available. In those circumstances, Ms Coom could have waited until the results were known before buying Lady. Although Ms Coom's knowledge does not bring the case within section 9(4) of CRA, the question arises whether in all the circumstances of the case, including Ms Coom's knowledge of the uncertainty regarding Lady's dam, the condition of hip dysplasia was not such as to render Lady's condition unsatisfactory. However, I have concluded that the Judge was indeed correct to hold that Ms Pendragon was in breach of contract. Ms Coom accepted and could not have complained of the fact that Lady was not suitable for breeding purposes. She did not know that Lady had hip dysplasia. There is also no evidence that she knew that Lady was at special risk of hip dysplasia. Any animal may have a latent constitutional condition that will adversely affect its health—that indeed was a point made by Miss Anthony—but that does not mean that such conditions are incapable of rendering the animal's condition unsatisfactory for the purposes of section 9(1). The price paid for



Lady reflected the fact that she was suitable as a pet but not for breeding purposes, but the evidence does not show that it reflected any discount for the risk of a particular defect or condition.

61. In the light of this conclusion, it is unnecessary to consider what might have been the relevance of the question of Ms Pendragon's knowledge at the date of sale (for reasons already stated, left unresolved by the Judge's judgment) or how any issues in that regard might have been resolved.

*Ground 2: the right to repair*

62. The second ground of appeal is that the Judge wrongly granted a remedy pursuant to the right to repair in section 23 of CRA.
63. It seems, indeed, that this is what the Judge thought he was doing. The judgment states that Ms Coom had the right to a repair under section 23, and the case was advanced on the basis that section 23 applied. However, that reflected a misapprehension. The consumer's "right to repair" under section 23 is not a right to carry out a repair but a right to have a repair carried out by the trader. In the expression "right to repair or replacement", the words "repair" and "replacement" are alternatives and both are nouns, not verbs. If that were not otherwise obvious, it would be made so by the further provisions of section 23: for example, "If the consumer requires the trader to repair or replace the goods ..." (section 23(2)). (The word "repair" is also used as a verb elsewhere in section 23, with reference to what the trader must do if the consumer exercises the "right to repair".)
64. In my judgment, the award made by the Judge in respect of veterinary bills could be justified, if at all, only as an award of common law damages for breach of contract; see section 19 (9)–(11) of CRA.

*Grounds 4 and 5: damages*

65. The grounds of appeal in respect of damages are that the Judge was wrong to award damages as he did because Ms Coom (i) had not sufficiently pleaded and proved her losses and (ii) had unreasonably failed to mitigate her losses by accepting the offer of a refund upon the return of Lady.
66. There is no appeal against the Judge's decision to award a price reduction in the full amount of the price. The justification for a price reduction in that amount was that Ms Pendragon accepted that a puppy known to have hip dysplasia would be of no saleable value. It might be open to question whether a total refund of the price is truly appropriate where the buyer has acquired and retained a pet on which she thinks it worthwhile to bestow expensive veterinary treatment. But the question does not arise for consideration on the appeal.
67. The question that does arise is whether the Judge was right to award damages of £3,006.11 in respect of the cost of veterinary treatment of a puppy that he found to have no monetary value. Miss Anthony submitted that such an award showed that something had gone badly and obviously wrong.

68. The note of judgment does not explain how the figure for damages for veterinary treatment was arrived at; it appears that, understandably, the point was dealt with by way of a discussion, so counsel could not take a note. However, I think that it is possible to infer how the Judge approached the matter.
- 1) Ms Coom had the benefit of insurance for the cost of veterinary treatment, but she was required to pay 20% of that cost. She claimed only for the uninsured expenditure.
  - 2) The claim advanced by Ms Coom was that she was entitled to recover all the money that she had expended on treatment for Lady's hip dysplasia and diabetes incipidus. The Judge awarded damages only in respect of the treatment for hip dysplasia.
  - 3) The precise figure of £3,006.11 is explicable by reference to the documents exhibited to Ms Coom's third witness statement, dated 27 July 2020. An email from the veterinary surgery dated 24 March 2020 said that Ms Coom had "paid in total an amount of £2712.11" as her contribution "for Lady's ongoing issues since birth to the current day". An email from a hydrotherapy centre, also dated 24 March 2020, attached three "insurance invoices" for hydrotherapy sessions in the sum of £1,176 (at a rate of £42 per session) and said, "In addition to these she has had 7 further sessions at £42 each = £294." The sum of £2,712.11 and £294 is £3,006.11. No other explanation of that total figure appears from the documents.
69. The figures and the way they were used by the Judge present some problems.
- 1) It is apparent that the Judge awarded 20% of the entirety of the veterinary fees, instead of 20% of the veterinary fees attributable to hip dysplasia.
  - 2) In her third witness statement itself (cf. para 5 and exhibit JC2) Ms Coom said that the total of the veterinary fees paid to date (that is, 27 July 2020) was £12,075.81 and that her personal contribution was "£2,415.162". (That figure was clearly arrived at by the use of a calculator; it cannot represent a precise figure paid.) The statement said that this included the hydrotherapy costs, and that is confirmed by at least one entry in the print-out of Lady's insurance claims history, which expressly refers to hydrotherapy. Indeed, the fact that the Judge awarded only £294 for hydrotherapy on top of the total amount paid for veterinary treatment shows that he proceeded on the basis that the veterinary fees included the costs of hydrotherapy shown on the hydrotherapy invoices.
  - 3) This shows that, on his own methodology, the Judge ought not to have awarded £294 for additional hydrotherapy fees but rather £58.80. Ms Coom was claiming only for the uninsured part of the fees.
  - 4) The print-out of the claims history exhibited as JC2 to Ms Coom's third witness statement was up-to-date when the statement was made; it therefore was more up-to-date than the emails from the veterinary surgery and the hydrotherapist. By my reckoning, the total sum of the entries was £12,226.27;

this would give a total personal contribution by Ms Coom, at 20%, of £2,445.25. This is close to the figure stated in the witness statement.

5) However, of the different claims shown on the print-out, those clearly relating to hip dysplasia account for a total of only £9,547.52. Further claims totalling £2,678.75 either relate clearly to diabetes insipidus or other conditions or concern unspecified disorders. (Some of the unspecified disorders may have included hip dysplasia, but it is not shown that they did, and some of them certainly did not.) Similarly, the email of 24 March 2020 from the veterinary surgery gave the figures for all treatment, not for treatment concerned only with hip dysplasia.

70. Accordingly, even if the general approach adopted by the Judge was the correct one, his calculation was in error and would stand to be corrected. The correct award for damages in respect of treatment would have been 20% of £9,547.52: that is, £1,909.50.

71. There remains the question whether the Judge's approach was correct in principle.

72. Neither before the Judge (when Ms Pendragon had the benefit of a skeleton argument prepared by Mr Stuart McCracken of counsel, acting *pro bono*) nor on this appeal has it been contended on behalf of Ms Pendragon that the award in respect of veterinary fees ought not to be analysed as an award of damages (as it was described in the order sealed by the court) or that it was in principle an inappropriate measure of damages. The only submissions advanced were that Ms Coom had not proved the amount of her loss and that she had failed to mitigate her loss by accepting the offer of the return of Lady and the refund of the price. The question of the correct measure of damages was not argued before me and does not properly fall for determination on this appeal. Some observations are in order nonetheless.

1) The purpose of damages for breach of contract is to put the innocent party into the position she would have been in if the other party had performed the contract correctly.

2) In the case of a contract for the sale of goods, the normal measure of damages for defective quality is the difference between the value of the goods at the time of delivery and the value they would have had if they had conformed to the contract. This measure is confirmed as the usual measure of loss by section 53(3) of the Sale of Goods Act 1979. Section 53 does not apply to consumer contracts; see section 53(4A). Nonetheless, difference in value accurately reflects the position at common law, and the preservation of common law remedies by the CRA does not purport to alter the basis on which such remedies are awarded.

3) The cost of cure or remediation is not a usual measure of damages for defective goods, because such a measure would be directed to the defect itself (that is, the removal or remediation of the defect); and in the case of goods that is addressed by difference in value. The typical cases where cost of repair is adopted as the appropriate measure of damage are those involving defective building, where the presumptive measure of damages is the cost of cure. As Lord Cohen said in *East Ham Borough Council v Bernard Sunley & Sons Ltd*

[1966] AC 406, at 434: “There is no doubt that whenever it is reasonable for the employer to insist upon reinstatement the courts will treat the cost of reinstatement as the measure of damage.” (See generally Andrews, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, chapter 21.)

- 4) It may be noted that, in the kind of case where the cost of cure has been accepted as an appropriate measure of damages, it does not represent consequential loss but is an alternative to the difference in value as regards the assessment of the direct financial effect of the non-conformity of the contractual performance. By itself this would raise the question whether it is appropriate to grant both price reduction under section 24 of CRA (which reflects the normal common law measure of damage for delivery of defective goods in breach of contract) and common law damages for the cost of remediation of the defect. (Cf. section 19(10)(a) of CRA.)
  - 5) It may also be noted that, where cost of cure or remediation has been accepted as being an available measure in principle, it will only be awarded if it is reasonable to insist on cure. In this regard, it is of interest to observe that Ms Coom’s claim to recover her expenditure on veterinary fees was advanced on the alternative bases of the “right to repair” in section 23 and common law damages. As I have already remarked, the award of compensation could only have been made at common law. As for the remedies that might actually have been available under section 23 (the “right to [require the trader to effect] repair” and the “right to replacement”), Ms Coom did not purport to exercise either of them. On the facts of this case, it is clear that she could not have done so, because Ms Pendragon could neither provide replacement goods nor effect a repair of Lady within the terms of section 23(8) of CRA. However, if the cost of veterinary fees had been, as it was advanced as being, within the scope of the statutory right to repair, it would have been permissible only if it were not disproportionate to replacement: section 23(3)(b). The notional value of a conforming dog would have been £1,000. The cost of the supposed “repair” (veterinary treatment) would have been about £9,500; it would, of course, be the total cost of the treatment, not an uninsured element of that cost. That would clearly have been disproportionate to replacement. In fact, the comparison does not fall to be made. The point is nevertheless of interest when considering whether the veterinary fees could properly be the appropriate measure, or quantum, of damages.
73. As Ms Coom did not purport to exercise a right of repair or replacement under section 23 and, by reason of section 23(3), could not have done so, her statutory remedy was either price reduction or final rejection: section 24(5). Ms Coom did not seek to reject Lady. Instead she sought, and obtained, a price reduction together with compensation for veterinary fees.
74. Ms Coom limited her claim to a total of £5,000 and to the uninsured part of the veterinary fees. However, Ms Coom’s insurance did not prevent her claiming the full amount; insurance was irrelevant vis-à-vis Ms Pendragon. In analysing the Judge’s award, it is important not to be misled by Ms Coom’s self-imposed cap. The award of damages equal to 20% of the fees could only be justified if it would have been proper to award damages equal to the full amount of the fees. That would require that,

because the puppy that cost £1,000 was defective, Ms Coom could keep the puppy, recover the full price she paid for the puppy, and receive damages of £15,000 (the full amount of the veterinary fees presupposed by the Judge's award). Indeed, Ms Coom's contention is that expenses will continue to be incurred in the future, though she chooses not to claim compensation in respect of those future expenses.

75. In my view, Ms Anthony was correct to say that something went wrong with the award. As it seems to me, the basic problem was that the cost of remedial works (the veterinary bills) was an inappropriate measure of damages for the sale of a defective chattel, especially when the difference between the value of the goods sold and the value they would have had if in conformity with the contract was reflected in the award of a price reduction. It is unnecessary to consider whether the measure could ever be appropriate. Perhaps in the case of a truly unique chattel such an award could be justified, but only if it were reasonable. In the present case, the award made by the Judge was out of all proportion to the value of the goods sold; and, if the award were justified, it would follow that an award of the full amount of the costs would also be justified, as mentioned above.
76. Nevertheless, the grounds of appeal and the contents of the submissions advanced before the Judge and before me do not justify deciding this appeal on the basis that the award was wrong in principle. Therefore I turn to consider mitigation of damage.
77. The victim of a breach of contract is free to act as she pleases in response to it. There is no duty to take steps to minimise the resultant loss. However, the damages available to a claimant who has failed to take such steps as were reasonable for her to take to limit the loss will be awarded on the counterfactual basis that she has taken such steps. The burden of showing that the claimant failed to take reasonable steps lies on the defendant. (If the case were to be analysed in terms of causation of loss, however, the burden would be on the claimant to show that the breach was the cause of the loss.)
78. In my judgment, the reasonable course for Ms Coom was to exercise her statutory right to reject Lady. She would then have been entitled to recover the price paid for the dog. She might also have been entitled to recover some damages. She would, anyway, have avoided substantial expense that was quite out of proportion to the value of the dog.
79. Ms Coom complains that Ms Pendragon did not offer her anything amounting to compensation for the expenses she had already incurred. To the extent that is correct, it does no more than show that Ms Coom was entitled to refuse to compromise any claims on terms offered by Ms Pendragon. It does not mean that she was right to insist on retaining Lady and to fail to exercise her statutory rights. She seems, incidentally, to have apprised herself carefully of the rights under CRA.
80. Ms Coom advances two further reasons why it was reasonable not to reject Lady. First, she says that she was attached to her pet. That may be so, but I do not accept that it made it reasonable to retain the animal at an expense that was disproportionate to its value and that she is most unlikely to have considered incurring without recourse to insurance and to a third party to pick up the bill. Second, she says that she was concerned that Ms Pendragon would have tried to breed from Lady. I do not

accept that this is a valid reason for acting in a manner that resulted in such significant financial outlay, especially on the tenuous evidence supporting such an alleged belief.

81. On behalf of Ms Coom, Ms Longson observed that veterinary bills had been incurred before the exchange of correspondence in March 2019. By my calculations, a total of £2,318.08 had been spent on veterinary fees by the end of March 2019, when Ms Coom ought reasonably to have exercised her right to reject Lady. The uninsured part of that total is £463.62. If Ms Coom had rejected Lady, she would in my opinion have been entitled to recover damages equivalent to that latter amount on the basis that it was wasted expenditure consequential upon Ms Pendragon's breach of contract. That is why it was reasonable not to compromise her potential claims by accepting only the repayment of the price upon re-delivery of Lady. It is not, however, a reason for not exercising the right of rejection. The question is whether, having decided not to exercise the right of rejection but instead to retain Lady, Ms Coom can recover damages in respect of the expenses for which she would have been entitled to compensation if she had exercised the right of rejection.
82. In my judgment, she cannot. I consider that Ms Coom should be entitled in these proceedings to recover in respect of the fees that had been incurred by the end of March 2019 in respect of the hip dysplasia but not otherwise. The Judge's decision was that damages could in principle be awarded for the cost of treating the condition that rendered the dog in an unsatisfactory condition, and there is no appeal against that part of his decision. Insofar as the expenditure on veterinary fees before April 2019 related to conditions other than hip dysplasia, its recovery could be justified only on the basis that it was wasted expenditure. As Ms Coom has retained Lady, the expenditure has not been wasted.
83. The total veterinary expenses that can be identified as being referable to hip dysplasia prior to April 2019 are £417.44. The uninsured part of that is £83.49.

## **Conclusion**

84. In the circumstances, I allow the appeal against the finding of misrepresentation but I refuse the appeal against the finding of breach of contract. There is no appeal against the Judge's award of a price reduction to the full extent of £1,000. I allow the appeal against the Judge's award of damages and I substitute an award of £83.49 for damages.
85. Accordingly, there will be judgment for the claimant for £1,000 and for damages of £83.49.
86. The costs order made by the Judge was in accordance with the limits applicable to cases in the small claims track. I shall receive any representations from counsel if it is suggested that the outcome of this appeal has any bearing on the Judge's costs order or if any issue arises as to the costs of this appeal. \_\_\_\_\_