2001 Sc. No.: 115213
Date:20020117

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: MacKinnon v. Gillis, 2002 NSSM 5

BETWEEN:

Carolyn A. MacKinnon

Claimant

- and -

A.P. Gillis

Defendant

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers for the parties on August 17, 2006. This decision replaces the previously distributed decision

DECISION

Counsel/ Representatives:

The Claimant represented herself at trial;
The Defendant represented himself at trial.

This matter came before Douglas J. Lloy, Small Claims Court Adjudicator sitting in Sydney on December 17, 2001 who reserved rendering a complete order until a written decision could be prepared.

[1] The Claimant, Mrs. Carolyn A. MacKinnon brought this claim against the Defendant, Mr. A.P. Gillis, claiming the sum of $3,206.73 in car expenditures and repairs plus $272.00 in costs for a total of $3,479.73 per the Claimant's calculation of her claim in *Exhibit 2C*. The foundation of her claim revolves around her purchase on August 11, 2001 of a 1986 Jetta from the Defendant which she subsequently discovered possessed several mechanical defects.

[2] Some components of the Claimant's claim were dismissed in an oral order of this court on December 17, 2001. I held that the Claimant could not recover the cost of a new battery, tires, brake pads and rotors and assorted auto equipment as these items were not subject to any warranty, expressed or implied, by the Defendant as to their functionality or durability. The old principle of *caveat emptor* applies to deny the Claimant's claim for these expenditures or repair costs. Thus, the Claimant's claim remaining to be adjudicated is reduced to $2,500 for the car purchase, $250 for sale or trade-in, $23.00 for the inspection by Carl Dawson and the $272.00

costs component for a total of $3,045.

[3] The more vexing question is whether the Claimant's claim for recission of the purchase contract, including the purchase price, trade-in or sale and costs incidental to the preparation of her case for trial.

[4] The Claimant relies upon the provisions of the Consumer Protection Act, R.S.N.S. 1989, c. 92 as amended to argue that there existed an implied provision that the Jetta should be durable for a reasonable period of time. Section 26(3)(j) provides that there shall be an implied warranty in sales covered by the Act that the goods sold shall be reasonably durable for the normal usages of the buyer and to all the surrounding circumstances of the sale. The entirety of this subsection reads as follows:

> s. 26(3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:
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> ***
>
> (j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all of the surrounding circumstances of the sale. (emphasis mine)

[5] The key word insofar as Mrs. MacKinnon's argument goes is "seller". A seller is defined in s. 2(n) of the Act as follows:

> s. 2(n) "seller" means a person who is in the business of selling goods or services to buyers and includes his agent, but does not include a person or a class of persons to whom this Act is by the regulations declared not to apply.

[6] I heard no evidence that Mr. Gillis was engaged in the business of selling cars to buyers- in fact, Mr. Gillis is in the copper recycling business. Therefore, as Mr. Gillis is not a "seller" as defined in the Act, this implied warranty of durability, plus all of the other warranties under the Act, do not apply to this sale. If the Claimant is to have redress, then it must be through a written or oral warranty given to her by the Defendant. As there was no written warranty given, her relief must be found in any oral statements that Mr. Gillis made to her about the car's condition, taking into account that the car was fifteen years old when it was sold to Mrs. MacKinnon and all other circumstances of the sale.

[7] I listened closely as the Claimant related that about one month after her purchase of the vehicle, the Jetta finally stopped working as a result of a cracked cylinder. Before that time, a whole host of problems plagued the Jetta, from unconnected signal lights and horn to tires infected with dry rot. On almost all occasions except the cracked cylinder episode, Mr. Gillis responded to Mrs. MacKinnon's Jetta breakdowns and repaired the same free of charge, for which Mrs. MacKinnon was grateful. Mrs. MacKinnon also accepted the breakdowns and more

minor defects with good grace and was cordial to Mr. Gillis.

[8] The cracked cylinder did not come as a sudden surprise in retrospect. For some time before the final breakdown, the Jetta was losing fluid. This fluid loss occurred to such an extent that Mrs. MacKinnon began bringing two litres of water with her in the car to cope with the situation. The fluid loss was a mystery to Mrs. MacKinnon- she placed cardboard under the vehicle for a number of nights to see if the Jetta was leaking when it was stationary with no luck. Finally, when Mrs. MacKinnon was driving the Jetta from her home in Loch Lomond to Rita's Tea Room outside of Big Bras d'Or, the car critically overheated and died.

[9] It was then that Mrs. MacKinnon took the car to Mr. Roland Doncaster's garage for inspection. Mr. Doncaster, a diesel mechanic, diagnosed that the car had a cracked cylinder which accounted for the fluid loss. He also diagnosed several other defects with the car in that the Jetta needed another battery and terminals, the tires were infected with dry rot and the front brake pads were half worn through. The piston rings were also damaged because of the overheating problem. However, Mr. Doncaster was careful to point out that he only inspected the Jetta's cylinders after it had overheated, and therefore could offer little evidence as to why it overheated or whether the Jetta was sold with a cracked cylinder. Mr. Doncaster did state that the car could not have been driven in the state that it was in when it was brought to his garage; ergo, the leakage problem must not have been as severe before the final overheating and breakdown.

[10] Mr. Gillis, via cross-examination of Mrs. MacKinnon, stated that he believes that Mrs. MacKinnon caused the cylinder to crack by continually driving the diesel-powered Jetta in the wrong gear. Mrs. MacKinnon denied this allegation. Mr. Gillis claimed in cross-examination that he once saw Mrs. MacKinnon drive by with the Jetta blowing black smoke, a sure sign that she was driving in a higher and incorrect gear and was hence burning fuel. This evidence was not denied by Mrs. MacKinnon.

[11] In his direct evidence, Mr. Gillis stated that the car ran well when it was in his possession- it did not lose fluid nor overheat. Before the sale, he gave it to Mr. Doncaster to ensure that it was running properly, per the work sheet he attached to his defence. A fairly considerable amount of work was done by Mr. Doncaster for Mr. Gillis in this regard.

[12] Mr. Gillis speculated that the cause of the problem was that Mrs. MacKinnon was running the car "hot" too often, as perhaps she was unfamiliar with the seriousness of car overheating problems and was particularly unfamiliar with diesel engines. Mrs. MacKinnon denied that she was inattentive to the heat gauge. Mr. Gillis stated that a cylinder head crack was a defect that could not be detected without stripping the engine apart. Hence, if the cylinder head was cracked during his ownership of the vehicle, there would be no way that he could have known about it unless it started exhibiting outward symptoms of cracking (fluid loss and overheating), which he maintains it did not. Mr. Gillis also pointed out that Mrs. MacKinnon had time to inspect the vehicle prior to purchase, and indeed had a neighbour of hers, Mr. Elmer Rand, check out the Jetta before she bought it. She could have conducted a pressure test and discovered the defect, if

in fact it was present when she bought the vehicle from Mr. Gillis.

[13] Mrs. MacKinnon's response was that Mr. Gillis told her that at a $2,500 purchase price with 408,000 kms. on the Jetta's odometer, she was "getting a bargain". She also stated that when she first brought the fluid loss and consequent overheating problem to Mr. Gillis's attention, his response was "just continue to put water into it". She pointed out that Mr. Doncaster could not pinpoint when the cylinder crack occurred- whether it was during Mr. Gillis's period of ownership or when Mrs. MacKinnon bought the Jetta. Thus, she submitted that it was possible for the crack to have occurred when Mr. Gillis owned the Jetta, and if so he should be held liable.

[14] Unfortunately for Mrs. MacKinnon's case, I did not hear any evidence that Mr. Gillis gave any warranty as to the car's condition. The "bargain" statement cannot be taken as such a sweeping warranty as to cover this situation so as to induce the Claimant to enter the contract of sale. It may be that Mr. Gillis did not know that the cylinder head was cracked, or that the cylinder head was not cracked until Mrs. MacKinnon bought it- the evidence does not say when the defect occurred. However, the law is clear that in the absence of a warranty or representation from the vendor as to the quality of the product that induced the purchaser to buy the product, the rule of *caveat emptor* applies.

[15] Therefore, despite Mrs. MacKinnon's otherwise very detailed testimony, there was no evidence that I heard that would fill this evidentiary gap to permit her case to succeed.

[16] I consequently must dismiss the case against the Defendant, and I so order. I thank the parties for their concise presentation of their respective cases.

Dated at Sydney, this 17th day of January, 2002.

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Douglas J. Lloy
Small Claims Court Adjudicator.