



Atkinson ("Atkinson") requesting an Order requiring Atkinson to pay the sum of \$806.00 and costs of this proceeding for the repair of a vehicle purchased by Robinson from Atkinson or, in the alternative, the sum of \$1,430.00 and costs upon the return by Robinson to Atkinson of the vehicle Robinson purchased that being a 1988 Ford 4x4 vehicle no. 28TEF14Y4JCB21182, ("the truck")

2. Robinson and Atkinson were self-represented during the hearing held on April 22, 2004.

### **ROBINSON'S TESTIMONY**

3. On or about December 24, 2003 Robinson purchased the truck from Atkinson for the sum of \$1,200.00. In support of his purchase he produced the receipt he received at the time of purchase. This receipt is filed as Exhibit "2" in this proceeding. The receipt was given by Atkinson to Robinson for the sum of \$1,200.00 dated December 24, 2003. On the receipt the following appears:

"1988 Ford 150 sold as is where is".

4. Robinson told Atkinson, prior to purchasing the truck, that he needed a serviceable vehicle to plow snow. Robinson asked Atkinson a number of questions about the condition of the truck. He was informed by Atkinson that the clutch and alternator had been replaced, and a battery and starter installed. He was informed the exhaust was new. Robinson understood from Atkinson that this work had been performed by Atkinson's father. Atkinson stated that the truck was in good operating condition.

5. Atkinson gave Robinson a motor vehicle inspection certificate dated November 22, 2003, filed in this proceeding as Exhibit 1. That certificate indicated that the truck had passed all the elements required for the issuing of the certificate.

6. While Robinson was discussing the purchase of the truck with Atkinson the truck had been started and was running. Robinson was provided an opportunity to test drive the truck but he chose not to do so.

7. Robinson stated that he relied on the information provided by Atkinson in respect to the condition of the truck when he decided to purchase it. He also was interested in

purchasing the truck because he had one like it at his residence. He could use the parts from his truck to repair the truck he purchased from Atkinson. He suggested he had knowledge of motor vehicle mechanics.

8. Robinson accepted the receipt provided by Atkinson, at the time it was given, and he made no comment to Atkinson about the statement on the receipt that the truck was sold "as is where is".

9. At the time Robinson purchased the truck he was unable to drive it to 23 Beacon Street, Amherst, Nova Scotia, the residence where it eventually was taken. He had driven his own car to Atkinson's residence and he had no other person with him at the time.

10. Robinson asked Atkinson to deliver the truck to 23 Beacon Street and Atkinson agreed.

11. Atkinson drove the truck to 23 Beacon Street and, according to Robinson, Atkinson had to put it in four wheel drive just to get it out of his driveway "spinning the wheels all of the way".

12. Atkinson left the vehicle at the end of the driveway at 23 Beacon Street and Robinson later drove it further onto the property. The truck stayed at the 23 Beacon Street location and was not driven again until early January, 2004 when Robinson attempted to drive the truck from Beacon Street to his home in Oxford. Before arriving in Oxford the truck completely broke down and it had to be eventually towed to his home.

13. Robinson's neighbour, Stuart Chapman, "who knows about mechanics", examined the truck and indicated that the clutch had failed.

14. Robinson produced an estimate from Canadian Tire, filed as Exhibit "3" in this proceeding, indicating the sum of \$776.55 would be required to purchase a new clutch assembly and have it installed in this truck. Robinson has not had this repair work performed.

15. At the present time, the only thing wrong with the truck, as far as Robinson knows, is the problem with the clutch.

#### **CRISS SARSON'S TESTIMONY**

16. Criss Sarson lives at 23 Beacon Street, Amherst, Nova Scotia. On or about December 24, 2003 the truck was driven into her yard and it remained there until approximately

January 5<sup>th</sup> or 6<sup>th</sup> when Robinson decided to drive the truck to his home in Oxford. Ms. Sarson did not see anyone drive the truck the entire time it was in her driveway but she did acknowledge she was not at home all day everyday.

#### **STEWART CHAPMAN'S TESTIMONY**

17. Mr. Chapman testified that on January 6<sup>th</sup> he towed the truck to Robinson's home. The truck couldn't be driven. He noticed that the vehicle "wouldn't pull itself". He did not provide any specific information about any further examination nor did he mention anything specifically about the clutch or its condition. Mr. Robinson had no further witnesses after Stewart Chapman.

#### **TESTIMONY OF ATKINSON**

18. Atkinson stated that the truck was in good operating condition when he sold it to Robinson. He had it checked over before he sold it and his father had done some replacement to the exhaust and the brake cables. The clutch had been replaced about a year ago. The truck was capable of being driven and he drove it on the day of the sale. He didn't know anything was wrong with the truck.

19. After he sold the truck to Robinson, Atkinson drove it to a gas station to buy enough gas to get it to Beacon Street. He then drove it to 23 Beacon Street and left the truck at the end of the driveway.

#### **TESTIMONY OF JACK ATKINSON**

20. Jack Atkinson is the Defendant's father. He is employed by Toyota as an automotive repair person. He stated that his son drove this truck every day until he sold it. He lives across the street from his son and he could see his son using this vehicle. Also, he and his son are in frequent contact and he would have known if there were difficulties with the vehicle because Mr. Atkinson does repair work on the vehicles owned by his family.

21. Jack Atkinson recently put a new muffler on this vehicle; he replaced the brake cable and some of the lights. He stated that "a clutch can go without warning and if they are

going to go they don't provide any advance notice".

**TESTIMONY OF DARREN MCKAY**

22. Darren McKay saw Robinson driving the truck "around Christmas". He knew Atkinson, although they are not close friends, and he recognized Atkinson's truck. He identified Robinson as the person he saw driving the truck "around Christmas". He could not give an exact date.

23. Mr. McKay watched Robinson back the truck out of the driveway on Beacon Street. When the truck was part way across the road it stalled. As Robinson attempted to move the truck he kept stalling it and Mr. McKay could smell a "burning clutch". Mr. McKay thought that perhaps Mr. Robinson had never driven a standard before because of the way he was driving the truck.

24. On cross examination by Robinson, Mr. McKay was asked how many vehicles he had been around that had a "burnt clutch". Initially Mr. McKay mentioned the figure of 300 to 400 but he later revised this figure having misunderstood the question. Mr. McKay's involved in selling vehicles and explained that this is why he knows what a "burning clutch smells like".

**TESTIMONY OF DAVID HARRISON**

25. David Harrison is a licensed technician employed by Carline Muffler shop at Amherst, Nova Scotia.

26. Mr. Harrison, as a favor to Atkinson, examined the truck before it was sold. He visually checked it over and drove it.

27. Mr. Harrison confirmed that the muffler and the brake cable appeared new. The tires were "halfway decent" and the front end "looked tight". He checked the wipers and the lights and they worked. Mr. Harrison did this inspection to determine whether there were visual defects that might prevent the truck from passing a motor vehicle inspection. Atkinson wanted to repair any of these defects before he had the truck inspected. Mr. Harrison did not speak to the person who eventually did inspect this truck who issued the vehicle inspection safety certificate that was filed in this proceeding as Exhibit "1".

28. Mr. Harrison testified that if "a clutch is old and it's in an old truck it's bound to

go".

### **SUBMISSIONS**

29. Robinson sought the protection of the provisions of the Consumer Protection Act, R.S.N.S., 1989 c. 92, and in particular those described in paragraphs 26 and 28.

30. He also requested a finding based on misrepresentation and on the basis of warranty. Atkinson knew Robinson needed an operating vehicle for the purpose of snow removal. Atkinson told him the vehicle was in good operating condition. The truck broke down very soon after he purchased it and he requests that Atkinson either return his money, in which case Robinson will return the truck or pay Robinson the cost to repair the truck.

31. Atkinson states that this is an "as is where is" sale. Robinson purchased an old vehicle and Atkinson did not take any responsibility for how long it would operate without repair.

32. The truck was working at the time Atkinson sold it to Robinson and he had no knowledge that there was anything wrong with the clutch.

### **DECISION**

33. The provisions of the Consumer Protection Act relied upon by Robinson apply to sales by persons or companies who are in the business of buying and selling. Atkinson is not in the business of buying and selling cars and therefore this legislation does not apply to this sale.

34. I have reviewed the provisions of the Sale of Goods Act, R.S.N.S. 1989 c. 408 requiring that goods be durable and fit for the purpose. However these provisions also only apply to sales by those who are in the business of buying and selling.

35. A seller can give an express warranty to a buyer that the item sold will, for example, continue to operate for a specific period of time. There was no express warranty given by Atkinson to Robinson when Robinson purchased this truck.

36. The motor vehicle inspection certificate issued in respect to the truck is not a document that in any way guarantees, or purports to guarantee, that the truck, examined at the time of the inspection, will continue to work for any period of time after the date of the inspection.

37. The truck purchased by Robinson from Atkinson was purchased second hand and was a 1988 model. Therefore it was approximately 16 years old and this would be obvious to

Robinson. Atkinson did tell Robinson that the truck was in good condition but I do not accept that this was given in the nature of a warranty of fitness or to imply that the truck would continue to work for any particular period of time before repairs would be needed. I accept that Atkinson, by placing the words "as is where is " on the receipt given to Robinson did so to clearly indicate he was giving no warranties nor making any representations as to the continued operation of the vehicle. The truck was working on the day of sale and there were no defects known to Atkinson that he attempted to hide from Robinson. I accept the evidence that the clutch in the truck had been installed approximately a year ago and that a clutch may fail without warning.

38. There are few reported cases involving sales of used vehicles between individuals. However, in Keefe v. Ford, 27 N.S.R.(2d) at page 361, Justice Pace quoted from Peters v. Parkway Mercury Sales Limited (1975), 58 D.L.R. (3d) 128 at pp.134-135:

"In my opinion, there is a substantial distinction between the implied condition of fitness in the case of the sale of a second hand car and that which is implied in the sale of a new car. Persons who purchase used cars, especially older models with substantial mileage, must expect defects in such cars will come to light at any time. In the present case the insistence of the plaintiff on the benefit of a used car guarantee and the reluctance of the vendor to give such a guarantee, clearly indicate that the parties realized the possibility that the car was not likely to be free of defects and that some defects might come to light even within the first 30 days following the sale. In my view, they entered into the contract of sale and purchase on that basis. In Godsoe v. Beatty (1959, 19 D.L.R.(2d) 265 ....., Ritchie, J.A., quoted with approval (at p. 267) a passage from 77 Corp. Jr. Sec., at p. 1199 containing the following statement:

‘A used car dealer is not an insurer of the cars he sells and is not required to inspect them for latent defects. Where a secondhand motor vehicle will run, the fact that frequent repairs are necessary does

not establish a failure of consideration...’”

39. Justice Pace continued in his decision to quote from the decision of Lord Denning in Bartlett v. Sidney Marcus, Ltd., [1965] to ALL E.R. 753, at p. 755:

"It means that, on a sale of a second hand car, it is merchantable if it is in usable condition, even though not perfect. This is very similar to the position under s. 14(1). A second hand car is 'reasonably fit for the purpose' if it is in a roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car.

Applying those tests here, the car was far from perfect. It required a good deal of work to be done on it; but so do many second hand cars. A buyer should realize that, when he buys a second hand car, defects may appear sooner or later; and, in the absence of express warranty, he has no redress. Even when he buys from a dealer the most that he can require is that it should be reasonably fit for the purpose of being driven along the road. This car came up to that requirement. The plaintiff drove the car away himself. It seemed to be running smoothly."

40. In the case of the situation relating to the truck sold by Atkinson to Robinson, I note that this truck was capable of being driven along the road and that on the day of sale, it appeared to be running smoothly and was driven to 23 Beacon Street as requested by Robinson. Robinson himself was later able to drive that truck further into the driveway located at 23 Beacon Street.

41. In Sheldon v. Robinson (1997), 158 N.S.R. (2d) 359., the plaintiffs purchased, from the defendants, an eight year old used vehicle on an "as is where is" basis. This was a sale involving a seller of used cars. However, it does provide some guidance in respect to the issue relating to the sale of used cars. Shortly after purchase the plaintiffs in this case encountered engine trouble requiring the expenditure of \$829.00 for repair. The small claims court adjudicator allowed the plaintiff's claim against the defendant dealer on the basis of provisions of the Consumer Protection Act. The Supreme Court Justice on review reversed this decision. Justice Palmetter stated at Paragraph 13, quoting from a previous decision he had made in Penney



v. Brent Pontiac Buick GMC (1989) 95 N.S.R. (2d) 321:

"The vehicle was sold 'as is', which could mean that the vehicle could only be durable for a short period of time or perhaps not at all. The purchaser accepted the vehicle as is and in my opinion the definition of durability in this case must depend on that circumstance."

42. Justice Palmetter stated at paragraph 18:

"In this case the respondents purchased the motor vehicle in the face of clearly expressed conditions and disclaimers. They had every opportunity to inspect the vehicle and they did assume a substantial risk. In my opinion any warranty, if at all, implied under the Act (Consumer Protection Act) would be minimal at best and not under the circumstances as found by the adjudicator."

43. Justice Palmetter reversed the decision of the Adjudicator and relieved the Defendant from the payment of any cost of repair to the Plaintiff having determined that the vehicle had operated for a sufficient period of time based on the circumstances of the facts before him.

44. At the time Atkinson purchased the truck it was running. He had an opportunity to take it for a test drive had he wished to do so. He did not ask to have it examined by a mechanic. He did little examination of the truck himself. The vehicle was capable of being driven and was driven to 23 Beacon Street, Amherst, Nova Scotia. Robinson knew he was purchasing an old used vehicle. He knew he was purchasing the truck from a seller who was selling on the basis of an "as is where is" sale. Therefore, he knew or should have known that the seller was not providing an warranty in respect to the continued operation of the truck, irrespective of the comment by the buyer that the truck was in "good condition". As a result, I find that there was no misrepresentation by Atkinson.

45. Having found that there were no misrepresentations by Atkinson and that there were no warranties in respect to fitness and durability given by Atkinson to Robinson, nor any implied by law, I dismiss Robinson's claim against Atkinson.

Dated this 12<sup>th</sup> day of May, 2004.

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Beryl A. MacDonald, Q.C.  
Adjudicator