

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Rushdi v. Buy Rite Auto Ltd, 2006 NSSM 53

Between:

JUSTIN AHMED RUSHDI

CLAIMANT

-and -

BUY RITE AUTO LIMITED

DEFENDANT

DECISION

Adjudicator

David T.R. Parker

Heard: March 2, 2006

Decision: April 18, 2006

Counsel:

Kent Noseworthy for the Claimant

Brian Church, Q.C., for the Defendant

Summary of Claim

This case involved the purchase of a previously owned vehicle from a car dealership. After driving the vehicle for a few days, the "turbo" for the vehicle's

engine failed and the Claimant is seeking repair costs for the turbo in the amount of \$2,015.41.

Facts

- The Claimant purchased a used 2001 Volkswagen Jetta motor vehicle from the Defendant used car dealership.
- The vehicle had in excess of 163,000 kilometres on its odometer.
- The sticker price for the vehicle was \$13,900.00 and it was sold to the Claimant for \$12,000.00 plus taxes and various fees for a total of \$13,970.85.
- When the Claimant test drove the vehicle, a car light came on which said "engine check" and upon being informed the Defendant said they would check it out.
- The Defendant agreed to have a Volkswagen dealer replace the "timing belt" and when this was done the Claimant also asked the Volkswagen dealer to do a 56 point inspection on the vehicle.
- The Claimant was offered an extended warranty by the Defendant; however, the Claimant did not purchase the extended warranty.
- After purchasing the vehicle the Claimant drove the car for approximately 1400 km to check out the gas mileage and enjoy the vehicle.
- The Claimant then experienced power problems with the vehicle and could not get the vehicle to accelerate past 70 km per hour. The "check engine" light came on and it was determined that the turbo failed. This engine light was the same light that came on when the Claimant test drove the vehicle.

Applicable Statute

The Claimant pleads the *Consumer Protection Act* R.S.N.S. 1989 c. 92.

The applicable provisions of this Act are:

21 This Act applies notwithstanding any agreement or waiver to the contrary.

26 (1) In this Section and Section 27, "consumer sale" means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale

(a) to a purchaser for resale;

(b) to a purchaser whose purchase is in the course of carrying on business;

(c) to an association of individuals, a partnership or a corporation; or

(d) by a trustee in bankruptcy, a receiver, a liquidator or a person acting under the order of a court.

(2) In this Section and Section 27, "purchaser" means a person who buys or agrees to buy goods or services.

(3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

(b) a warranty that the purchaser shall have and enjoy quiet possession of the goods;

(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 the surrounding circumstances of the sale.

28 (1) Any written term or acknowledgment, whether part of a contract of sale or not, that purports to negative or vary any of the conditions or warranties set out in this Act or states that the provisions of this Act or the regulations do not apply or that a benefit or remedy under this Act or the regulations is not available, or that in any way limits or abrogates, or in effect limits, modifies, or abrogates, a benefit or remedy under this Act or the regulations, or that in any way limits, modifies or abrogates any liability of the seller including any limitation, modification or abrogation of damages for breach of any of the conditions or warranties set out in

this Act or the regulations, is void.

(2) If a written term or agreement contrary to this Act or the regulations is a term of the contract, it shall be severable therefrom.

(3) A written term or acknowledgement contrary to this Act or the regulations shall not be evidence of circumstances showing an intent that any of the implied conditions and warranties are not to apply.

(4) Money paid under or by reason of a written term or acknowledgement contrary to this Act or the regulations is recoverable in a court of law.

(5) This Section applies to contracts entered into on or after the fifteenth day of August, 1975

Jurisprudence

In the case Roberts v Sheldon [1997] N.S.J., the Purchaser was told that the engine required "constant feeding of oil". The Purchaser inspected the vehicle prior to its purchase and drove it 1800 km after which he had to have the engine repaired. The Purchaser was awarded the costs of repair at trial by the Small Claims Court adjudicator.

The Supreme Court on Appeal held that the adjudicator's determination on the vehicle not being reasonably durable was not supported by the adjudicator's finding of fact. The Appeal Court held that the Purchaser purchased the vehicle with clearly expressed conditions and disclaimers, had ample opportunity to inspect the vehicle and assumed the risk of damage.

In the case before this Court the Claimant also had ample opportunity to inspect the vehicle and in fact had the vehicle inspected by an independent dealership which happened to be a Volkswagen dealership.

The Claimant's father who participated in the entire purchasing process said, "My understanding once we drove it off the lot then it is my responsibility that is what I thought no warranty - expressed or implied meant".

And on cross-examination he said, "I understood there was no warranty, yes I guess it would be as is. It was explained to me there would be no warranty."

Notwithstanding the Claimant was well aware that the vehicle had been given "no warranties expressed or implied" as noted on the Bill of Sale, in spite of the fact that in the Claimant's father's mind, who was an integral part of the deal, that meant "as is", the warranties contained in the *Consumer Protection Act* still apply. A car dealer cannot contract out of the warranties provided to a consumer in the Act

In applying 26(1)(3)(j) it is necessary for the Claimant to provide sufficient evidence, to show the court, pursuant to the civil standard, that the vehicle was not reasonably durable. What evidence is there to show the goods were not durable for a reasonable period of time?

The mechanic, Mr. MacKenzie, who worked as manager of Hillcrest Volkswagen for six years and for twenty-one years at the Hillcrest dealership, gave no opinion on how long a turbo should last under normal operation of the automobile. This question was never asked. He did say when Hillcrest inspected the vehicle the turbo was working and a diagnostic test that they did on the vehicle would have indicated if a problem existed. He also said he couldn't tell why it failed without taking it apart.

Mr. Noseworthy, Counsel for the Claimant, said that the following factors should be considered on determining what a reasonable period of time should be in respect of the vehicle's durability.

- No evidence that turbo should have failed
- Price of the vehicle is a factor
- Has the customer put vehicle to unreasonable use
- the time span between when the vehicle was purchased and when it failed.

Excepting for the first point which I shall refer to later in the decision, I agree with Mr. Noseworthy that the above noted factors are to be considered in making a determination. There are other factors as well.

The time in this case was a two-week period and 1400 kilometres were put on the car over that time. The vehicle cost \$12,000.00 to purchase. Should I exercise judicial common sense and say that \$12,000.00 is a fair amount of money to pay for a vehicle and have it last for only two weeks or 1400 kilometres. The Sheldon case would dictate that I should have a factual basis for reaching such a conclusion.

The case Neal v Suzuki in Dartmouth [2004] N.S.J. No. 43 suggests that factors determining the extents of the warranty of durability are the surrounding circumstances and, in particular, the knowledge of the purchase as to the state of

the car as well as any representations made....prior to or at the point of sale

To say it depends on the surrounding circumstances refers to the use the vehicle was put and what was done to the vehicle that might impact upon its durability,

The *Consumer Protection Act* refers to three components in its warranty as to the durability of goods sold:

- (1) it has to be durable for a reasonable period of time
- (2) based on how it normally would be used; and
- (3) based on all surrounding circumstances of the sale

Dealing with the last point first, the car was not sold on an "as is" basis. The sale agreement under the "conditions of sale" state:

"(1) Vehicle sold as is: I agree that if the appropriate space is initialed by me, the vehicle is sold "as is" and is not represented as being in a road worthy condition, mechanically sound or maintained on any guaranteed level of quality. The vehicle may not be fit for use as a means of transportation and may require repairs at my expense."

Then there is a space for the Purchaser's initials. In this case the Purchaser did not initial the space provided which stated "if not initialed by me, this clause does not form part of the agreement".

It can be safely said that the vehicle was not sold "as is" as that term is defined in the contract; that is, being in a roadworthy condition and so on. However, the vehicle was a previously owned 2001 model with over 163,000 kilometres on its odometer and it was sold with no warranty. This, along with the fact that the purchaser and his father believed once it was purchased that was it, they would have to be responsible for any future problems and sets the stage for determining what the surrounding circumstances of the sale would be. The Claimant did not or could not expect a very long period for which they could expect the vehicle to function without encountering a problem and if there was a problem shortly after purchase it was to be their problem, not the seller's.

With respect to point number two, there is no indication that the vehicle was not put to the use it would normally be put according to the testimony of the Claimant.

His testimony on how he drove the vehicle was not challenged.

In terms of the first test, whether the vehicle was durable for a reasonable period of time, it is possible to say in some circumstances where one could conclude that the vehicle or part of the vehicle should have lasted for a longer period than it did. However, I have to have some evidence that this was the case here. The mechanic could not or did not tell how long the "turbo" should last in this vehicle. There is no evidence that the turbo was not working when it was checked over by the Volkswagen dealership. I cannot conclude on balance that the turbo in this type of vehicle with the amount of kilometres on it should have been durable for a longer period of time than it was. The Claimant has suggested there is no evidence that the Turbo should have failed.

The onus however is still on the Claimant to show the warranty was breached. In this case on balance I cannot say it has been breached.

The Claimant shall not succeed in his claim in this case.

DATED at Halifax, Nova Scotia, this 18th day of April, A.D., 2006.

David T.R. Parker
Adjudicator of the Small Claims
Court of Nova Scotia