Claim No: 432453

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Lyons v. O'Regan M-B Ltd., 2016 NSSM 11

BETWEEN:

STUART LYONS

Claimant

- and -

O'REGAN M-B LIMITED and
BOB BLUMENTHAL AUTO WHOLESALERS INC.

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 23, 2015, August 12, 2015 and at Halifax, Nova Scotia on January 27, 2016

Decision rendered on March 21, 2016

APPEARANCES

For the Claimant	Thomas Thompson, counsel
For the Defendant O'Regan's M-B Limited	Jeff Waugh, counsel
For the Defendant	Tracy Smith, counsel

Bob Blumenthal Auto

BY THE COURT:

Introduction

[1] The Claimant, Stuart Lyons, is a real estate agent who lives in Moncton, New Brunswick. In October 2012, he was shopping for a used luxury car and became aware of a 2006 Mercedes Benz C280 for sale at the Defendant, Bob Blumenthal Auto Wholesalers Inc. (hereafter "Blumenthal"). The price was $13,995.00 plus tax and a few other charges.

[2] As a six-year old vehicle, it had been driven just over 118,000 kilometres, perhaps not that much for a Mercedes Benz, with that vehicle's legendary durability.

[3] The Claimant was interested, but wanted some assurance that it was in good condition. He took it for a test drive, and was favourably impressed. He asked the salesman, Phil Blumenthal (the owner's son) if there were any known problems with the vehicle, to which Mr. Blumenthal said no. The Claimant asked if he could take the vehicle to be independently inspected, and was not only permitted, but actively encouraged to do so.

[4] It should be mentioned that Blumenthal deals in used cars of all makes, and neither has nor claims any particular expertise in Mercedes vehicles.

[5] The Claimant contacted the Defendant, O'Regan M-B Limited ("O'Regan") and asked if they could perform a comprehensive inspection for him. He was told that such an inspection could be done that very day, while he waited, at a cost of just over $200.00 (including HST). What he says he was told was that

O'Regan would perform what is called a "Signature Class Inspection." O'Regan now says that what it was proposing was not quite a Signature Class Inspection, because that type of inspection is designed for vehicles that are being considered to be included in a Mercedes dealership's inventory. As such, it says, there were investigations and tests which it did not do, since it did not have a concern that it might have to issue a warranty on the vehicle. It claims that it made this distinction clear to the Claimant.

[6] Whether or not anything was said, it is very doubtful that the Claimant appreciated the subtlety of this distinction, especially since the invoice rendered by O'Regan simply referred to a Signature Class Inspection.

[7] The Claimant waited approximately an hour and a half while O'Regan's technician did his investigations. Thereafter, the service manager went over the findings with the Claimant. Several problems were flagged, as reflected in a single page of notes handwritten by the technician. These were:

a. Air conditioning was "weak" but functional.
b. Brake fluid was noted to be "black."
c. Both rear coil springs were broken.
d. Tires were quite worn out, and new tires plus a wheel alignment were recommended.
e. Rust was noticed on the underbody, and undercoating was recommended.
f. The rear trunk handle was seized.
g. Windshield wipers were worn and only smearing water.

h. The steering wheel was out of alignment, and needed an adjustment.

[8] What the Claimant did not receive (at that time) were the results of certain electronic diagnostic scans which revealed some “stored” codes. As explained to the court, modern vehicles have a computer-like memory that records abnormal events in the life and performance of many systems in the vehicle, as recorded by the many sensors in the vehicle. A “current” code is indicative of a problem that is manifesting now and which needs to be dealt with by way of a repair or adjustment. A code that is stored records an event - perhaps a malfunction - that has occurred at some point but is not currently manifesting. The mere fact that it is stored does not tell you much. It does not say when it was stored, or when or how it was resolved. At most, it may direct you to undertake further investigations.

[9] The O’Regan technician (and the service manager) knew about, but did not disclose to the Claimant, the stored codes that came up during the inspection. In particular, a stored code 1208 was one of several stored codes that showed up. Another was 0946. Some months later, while under diagnosis at another Mercedes dealership, the 1208 code showed up as a current code, along with another (1200), that (together) pointed to a serious problem with the vehicle - a faulty and worn-out balance shaft. My simplistic understanding of a balance shaft is that its function is to smooth out what would otherwise be unacceptable vibration caused by the engine.

[10] The costly repairs required to keep his vehicle on the road convinced the Claimant that he had been misled by either or both of Blumenthal or O’Regan,

and in this lawsuit he seeks damages to compensate him for his unanticipated costs. I will detail the costs incurred and damages sought later in this decision.

The case against Blumenthal

[11] Going back to October 2012, the Claimant took the results of the O'Regan inspection to be fairly positive, and he decided to buy the vehicle. He admitted that he knew there were repairs that needed to be done which might cost him in the range of $2,000.00. He went back to Blumenthal and shared some of the findings of the inspection and tried to get Blumenthal to perform many of the needed repairs as part of the purchase deal. Blumenthal was willing to repair the broken springs but nothing else, as they explained that they had already spent a considerable amount of money on the vehicle. The Claimant accepted this.

[12] At this time the Claimant was offered the option of purchasing an extended warranty through Blumenthal, but he declined to do so. The Used Vehicle Bill of Sale dated October 25, 2012 was placed in evidence. On that document, Blumenthal attempted to distance itself from any warranty obligations. The document clearly states that the dealer is not providing any warranty, express or implied, and that there is no extended warranty although the purchaser has been offered one.

[13] The document has several places where the purchaser (the Claimant) was intended to sign or initial. In actual fact, he did not do so, although Phil Blumenthal did sign. The lack of a signature from the Claimant appears to have been an oversight on the part of both parties. The Claimant argued that he is

not bound by anything on that document, because he did not sign it. I disagree. It is obvious that the Claimant saw, and likely took away with him a copy of the sales contract. There was no other written contract in existence. He paid his money, drove away with the vehicle and received title papers. The lack of his signature or initials might be significant if the contract was not fully performed by the Defendant Blumenthal, but it was. I find that the Claimant is bound by the contract, as written. He understood that the dealer was making no warranty, and that he had been given, but declined, the option of buying an extended warranty. He does not actually contend otherwise, except to the very limited extent that he holds Blumenthal to its statement that it was not aware of anything wrong with the vehicle.

[14] Blumenthal explained that it encourages buyers to take extended warranties, which are underwritten by third parties, not only because they think it is a good idea but also because they make a profit selling them.

[15] While a seller such as Blumenthal may believe that it can escape all liability by stating on the sales document that there is no express or implied warranty, that is not entirely true, as a matter of law. It can certainly disclaim express warranties. But the question of implied warranties is governed by the Nova Scotia *Consumer Protection Act*, which introduces some minimum level of protection for purchasers of goods from professional sellers - **"notwithstanding any agreement to the contrary"**. The applicable sections of that Act are:

> **Implied conditions or warranties**
>
> 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 ....
>
> (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: .....
>
> (e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the purchaser relies on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, a condition that the goods shall be **reasonably fit for such purpose**; provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose; .....
>
> (h) a condition that the goods are of **merchantable quality**, except for such defects as are described; .....
>
> (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. (Emphasis added)

[16] I have highlighted the subsections that refer to goods being “reasonably fit for the purpose,” of “merchantable quality” and the 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. These are warranties that sellers cannot avoid simply by putting a disclaimer on the invoice. Such disclaimers are deemed void by s.28(1) of the Act.

[17] As such, Blumenthal cannot entirely distance itself from any obligations respecting the vehicle that it sold to the Claimant. But the well-known case law

interpreting these sections makes clear that this is a fairly limited form of protection.

[18] I had occasion to comment upon these sections in *Randolph v. Tibbs*, 2012 NSSM 19, a case where a 6 or 7 year old used car, already having been driven about 100,000 kilometres, developed serious transmission problems after being driven a further approximately 600 km by the Claimant. I found the Defendant responsible:

> 15 The extent, if any, of the obligations of a vendor of used cars has been a thorny issue for courts everywhere. There are cases that appear to apply the principle of *caveat emptor* (buyer beware) with great strictness, while other courts have been more forgiving and allowed relief in favour of consumers. Cases in other provinces are of limited value without looking closely at their statutory framework. In Nova Scotia, there is an implied warranty in relation to consumer goods or services provided for under the *Consumer Protection Act* of Nova Scotia. That Act is specifically addressed to professional sellers of goods, like the Defendant. This distinction is important, as it places legal responsibilities upon dealers that are not placed on private sellers. .....
>
> 17 What this all means is that a professional seller implicitly warrants that consumer goods are “merchantable” and free of any hidden defects, and “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.” .....
>
> 18 There is no question that this Act applies to the sale of motor vehicles, as well as other manufactured goods, which fact may surprise some sellers who believe erroneously that the existence of a manufacturer’s warranty excuses them from any direct responsibility for what they sell. .....
>
> 19 All of this begs what is perhaps the bigger question, namely how far does the warranty extend? What kind of promise is actually being made with respect to a clutch and manual transmission that, as far as we know, had been driven almost 100,000 km? And given the evidence that bad driving can cause a manual transmission to fail in a very short period of time, how much do we really know about the state of the transmission at the time of sale?

> **20 There is good reason to restrict the application of the implied warranty in the case of used vehicles that are older models with considerable mileage. This vehicle was between six and seven years old, and had been driven almost 100,000 km.**
>
> .....
>
> 23 Nevertheless, it is difficult to say that this vehicle proved itself to be reasonably durable. I believe that most objective observers would say that a vehicle should not suffer this serious a transmission problem in such a short time. According to the sales contract, the kilometres on the vehicle at the time of sale totalled 97,517. The repair invoice dated February 10, 2012 shows an odometer reading of 98,129, which means that the vehicle had been driven all of 612 km in the time that the Claimant had owned it. While the Claimant had not driven a manual transmission for some time, she did have prior experience on a manual transmission and most people would say that this is a skill that one can easily recover, like riding a bicycle. Mastering a manual transmission is not rocket science.
>
> 24 Accordingly, I am prepared to make finding that there has been a breach of the implied warranty of reasonable durability, and that some amount is recoverable as damages. **(Emphasis added)**

[19] In a subsequent case, *Theriault v. Mobility Auto Sales Inc*., 2014 NSSM 40, I also applied the Act to a situation where a used vehicle developed a problem the day after it was sold to the Claimant.

[20] Notwithstanding the occasional success under the Act experienced by claimants, I am also mindful that the Nova Scotia Supreme Court in *Robertson v. Seddon*, 1997 CanLII 9845 (NS SC) had earlier cautioned that the protection of the Act was “minimal” in a situation where the dealer extended no warranties and the purchaser had every opportunity to have it inspected. As stated by Associate Chief Justice Palmeter:

> 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 would be minimal at best and not under the circumstances as found by the adjudicator.

[21] What all of this means is that the exercise is contextual, which is also made clear in the language surrounding the implied condition of durability "having regard all the surrounding circumstances of the sale."

[22] The question that it is appropriate to ask, at this point, is whether Blumenthal made any form of misrepresentation, or should be responsible for any implied warranty, in connection with this vehicle.

[23] The question of whether the vehicle proved to be "durable" is part of the analysis. In the case here, the evidence is clear that the significant problems with the balance shaft were not diagnosed and repaired until some five months later, and after the vehicle had been driven approximately 16,000 kilometres. It is true that the Claimant says the check engine light came on shortly after he took the vehicle back to New Brunswick, but no serious problem was experienced or diagnosed until months later.

[24] Looking back to the time of the sale, there is no doubt that Phil Blumenthal said positive things about the vehicle, but I did not hear any evidence suggesting that he did anything more than would be expected of a salesman trying to sell a vehicle. As far as he knew, he said, the vehicle was in good shape, but he did not expect the Claimant to take his word for it. He encouraged the Claimant to get it independently expected. Not every used car dealer encourages their customers to do this. When the Claimant returned with his inspection report, the Claimant seemed generally satisfied with the condition of the vehicle. Blumenthal agreed to do one thing - fix the springs - but that was all it was prepared to do.

[25] Blumenthal made every effort to encourage the Claimant to buy an extended warranty, which in hindsight, had he done so, might have saved him a lot of money and made this lawsuit unnecessary.

[26] The vehicle was driving nicely at the time. Blumenthal did not put itself forward as experts in Mercedes Benz vehicles. There is not a shred of evidence that they knew of any problems that might surface in the future. In actual fact, the vehicle performed adequately for a number of months after purchase.

[27] Given all of this, there is no principled basis to say that, once the vehicle left its lot, Blumenthal continued to bear any significant risk concerning the mechanical condition of the vehicle. Apart from the very limited scope of the *Consumer Protection Act*, those risks were essentially passed on to the Claimant, who had the vehicle inspected by a Mercedes expert, and who made the calculated decision not to protect himself with an extended warranty.

[28] I have not yet mentioned that the Claimant was suspicious that Blumenthal knew something. He testified that the “check engine” light was on when he first drove the vehicle, although it was off when he later drove the vehicle to O’Regan. He also said that he saw Phil Blumenthal crouching near the vehicle with what he suspected may have been a device that clears codes in the vehicle’s system.

[29] I find that these suspicions were unwarranted. Even if the check engine light was on, for a time, the evidence satisfies me that no one at Blumenthal had any knowledge of this. Furthermore, I am satisfied that they did not have the capability of reading, let alone turning off (clearing) codes from the system.

[30] In the end, I find nothing in the conduct of Blumenthal that justifies a claim against it. The Claim against the Defendant Blumenthal is accordingly dismissed.

The case against O'Regan

[31] The more difficult question for the court is whether the Defendant O'Regan was negligent or in breach of contract by failing to alert the Claimant to the problems that he eventually experienced, which have involved some expensive repairs. I believe it is fair to say that, had the Claimant anticipated the scope of the mechanical problems he would experience within the first year of owning this vehicle, he would never have bought it, or perhaps he would have protected himself with an extended warranty.

[32] Of course, hindsight is 20-20 and it is always a possibility that a mechanical device will break down sooner than one may have hoped. That is why it is apt to speak of risk. The Claimant could have paid a warranty company to assume all or part of that risk. What he asserts, in this Claim, is that O'Regan failed to inform him of all of the known risks, and as such it should be held legally responsible for what later occurred.

[33] The question therefore becomes: what information about this vehicle did O'Regan have, but not disclose, that might have caused the Claimant to think differently about the risks he would be assuming with this vehicle? I must also consider whether such non-disclosure, if found, amounted to a breach of contract.

[34] I will return to these questions, after considering an issue that occupied some significant time during the trial, and which I believe only clouds the picture. The Claimant and his counsel made much about the fact that he believed he was getting a full Signature Class Inspection, while O'Regan did not treat this as such. As it explained, that full inspection is reserved for vehicles that are being considered for a Mercedes dealership's inventory (as a certified pre-owned Mercedes), with all of the risks that Mercedes would be assuming, since such vehicles are sold with a Mercedes warranty (of some length).

[35] I have no doubt that the Claimant did not appreciate the distinction, more likely than not because O'Regan did not make that distinction perfectly clear. As already mentioned, the invoice for the inspection stated that it was for a Signature Class Inspection, without qualification.

[36] However, one must not lose sight of the fact that the Claimant came to O'Regan not with a preconceived notion of wanting a Signature Class Inspection, but wanting to have the vehicle gone over with a careful eye to any mechanical issues that might be lurking, and which might dissuade him from buying the vehicle that he was seriously considering. O'Regan could have called what it was doing anything.

[37] Had O'Regan actually done all that a Signature Class Inspection dictates, it would have run up against the fact that the vehicle records were incomplete in the sense that there were gaps in the service records, as far as the Mercedes database was concerned. That could have meant one of two things: either it had not had all of its recommended service (such as oil changes), or such procedures had been done by some other service facility that would not be reflected in the Mercedes database. The inspector might have been satisfied

with paper copies of service records showing that the vehicle was properly serviced at all of the recommended intervals, but in the absence of such records might have had to reject the vehicle as ineligible for certification. The evidence here suggests that there were no paper service records with the vehicle, and it would never have passed a full Signature Class Inspection.

[38] O'Regan should have explained all of this to the Claimant. It should have said, in effect, "we are going to concentrate on the mechanical condition of the vehicle, but will not necessarily perform all of the steps that we are directed to do (such as checking service intervals at authorized Mercedes repair facilities) when we are considering buying the vehicle and reselling it as a certified, warranted pre-owned Mercedes."

[39] Had O'Regan done so, I doubt that the Claimant would have acted any differently. He was interested in knowing the mechanical condition of the vehicle. He did not know anything about Signature Class Inspections, or any other class of inspection. O'Regan would be well advised to use a different name when offering inspections to customers such as the Claimant.

[40] The more substantial question that the court must address, is whether O'Regan discovered (or ought to have discovered) - but did not disclose - information that was significant in terms of informing the risk that the Claimant would be assuming if he bought the vehicle. The Claimant's theory is principally that the discovery of code 1208 was a clue that might have predicted a balance shaft problem. Had this code been raised during the debrief, the Claimant asserts, he might have asked O'Regan to do further examinations (presumably at extra cost) to see whether there was a developing balance shaft problem.

Alternatively, he might simply have been spooked by the implications of the stored code(s) and decided to back out of the purchase.

[41] I now turn to the evidence about what a stored code 1208 actually means.

Stephen Ellis

[42] The Claimant called Mr. Ellis as a witness. He runs an auto repair shop in Truro, specializing in European and Japanese cars. He is very experienced and has access to diagnostic tools particular to Mercedes Benz. He was qualified in court as an expert.

[43] Mr. Ellis has never seen, let alone serviced, the Claimant's vehicle. He based his testimony on the documents and, to an extent, on the Claimant's recounting of his experience with the vehicle.

[44] He explained that the "Quick Test" done by O'Regan, which revealed the stored codes, is an all-system scan that will reveal many things, ranging from the trivial to the critical. In his view, it would have been incumbent on O'Regan to review these codes with the Claimant, pointing out which ones had any real significance. Codes that relate to the engine or transmission would be a concern, which might point to the need for further in-depth investigations.

[45] If he saw either or both of the codes 0946 and 1208, these would raise red flags for him because it suggests possible timing issues and potential damage to the catalytic converter. He stated that there are known problems with balance shafts in this vehicle, as reflected in Mercedes Technical Bulletins (of which O'Regan would have been aware).

[46] The simple version of the problem, as I understand it from this and other witnesses, is that the teeth on the balance shaft can become worn causing the belt to slip, which causes the balance shaft to stop performing properly. This is a serious problem, when it occurs.

[47] The balance shaft is not visible on a routine visual inspection. It requires some disassembly of other parts to be exposed. However, there are clues that there may be such a problem, including the codes stored in the system. Mr. Ellis stated that it would take about an hour to set up to be able to insert a camera down to where the balance shaft sits, and examine whether or not the teeth were worn. Another clue would be to look inside the oil pan, where the presence of metal filings (as were later found here) also points to worn teeth on the balance shaft.

[48] Mr. Ellis testified that it would have been perhaps an $80.00 job for O'Regan to have done these additional tests, to arrive at an informed opinion as to whether or not there was a balance shaft problem.

[49] In his view, the later appearance of codes 1200 and 1208 meant that the problem had progressed to the point of outright failure of the balance shaft.

[50] Mr. Ellis also looked at other stored codes on the Quick Test done by O'Regan, which he says should at least have been explained to the Claimant. Mr. Ellis agreed that stored codes are less of a concern than current codes, but a stored code might potentially point to a serious and expensive problem, down the road.

Tom Stenason

[51] Mr. Stenason was the technician at O'Regan that performed the inspection on October 22, 2012. He was relatively early in his career at the time, but received all of the required training to be able to do his job.

[52] He described the steps that he took, including a road test, visual inspection, and computer scan (Quick Test).

[53] The check engine light was not on at any time during his inspection, he said. Based on the road test and visual inspection, he was able to diagnose certain issues, namely the broken springs, worn tires, rust, worn wipers and black brake fluid.

[54] On the Quick Test he noted that there were quite a few stored codes, but no current codes. As he described them, stored codes mean that there was a malfunction in the past that is not currently manifesting. He stated that he would only bring a stored code to the attention of the customer if that stored code bore a relationship to a currently reported problem.

[55] The code 1208 is a stored fault code for a camshaft position sensor. He did not raise it with the Claimant, nor consider any further testing, because there was no currently reported problem that might have pointed to the camshaft.

[56] He was aware of the Mercedes Technical Bulletin which mentions that where current codes 1200 and 1208 are both present, there may be a problem with worn balance shaft gears. Here only 1208 was present, and only in a stored code, so he did not pursue it. He recalled that he did call up the

Technical Service Bulletin on his system when he saw the 1208 code show up, so he was aware of it at the time.

[57] Mr. Stenason said that without a currently manifesting problem, it is not possible to determine why the code was stored in the first place. Fault codes can be triggered by very temporary, minor glitches.

[58] The approach he uses with stored codes is to use the Xentry system to erase all of the codes in the history, then do a short drive to see if the codes reappear, in which case there is a current problem that is manifesting and bears further investigation. Usually the check engine light will go on, indicating that a malfunction has been sensed.

[59] Mr. Stenason described the subject vehicle as one that had been slightly neglected, and needed some work. It had never been undercoated. There were broken springs. It needed an alignment. These were things that he noted in his handwritten report.

[60] When asked the hypothetical question of what he would have done if 1208 showed up as a current code, he said he would have done further checks to see if it was a mechanical problem, or possibly a problem with the sensor itself. One possibility would have been to do a visual inspection of the camshafts. It would have been something to bring to the attention of the customer.

[61] The fact that 1208 was showing, but not 1200, was significant to him. These codes represent the left and the right side. Any actual problem with the timing chain would cause fault codes on both sides, not just one.

[62] He also saw no significance in code 0946 also showing up, as it concerned the catalytic converter and had nothing to do with code 1208.

[63] Mr. Stenason never met with the Claimant. That was not his function. He gave the test results and his notes to the service manager, Bruce Gilmour.

[64] On cross-examination, he said he was not aware that the Claimant might be basing a buying decision on the inspection. He assumed the Claimant simply wanted to know as much about the state of this vehicle as he could. He had no idea of the vehicle's history, and would not have been able to access the vehicle history through the Mercedes database. He had no idea whether the vehicle's maintenance records were complete. He did know that this vehicle was not being considered as a Certified Mercedes vehicle, and that the inspection was for the benefit of a private individual. As such, some of the additional steps that are part of a Signature Class Inspection did not need to be done.

[65] Mr. Stenason admitted that there were some inconsistencies between his notes and the boxes that he checked on the form, but these are not significant in the context of this case, other than that they point to some carelessness or lack of attention to detail on his part.

[66] He admitted that any stored code could potentially foreshadow a future problem. He admitted that 1208 could indicate a mechanical problem at sometime in the future, but he explained (again) that 1208 would not point to a balance shaft problem unless it showed up together with 1200. Also, unless they were current they really did not mean much to him.

Bruce Gilmour

[67] Mr. Gilmour was the service manager on duty at the time the Claimant brought in his vehicle. He has considerable experience in the industry generally and 15 years with O'Regan.

[68] Mr. Gilmour understood from the Claimant that he was considering buying this vehicle and wanted it inspected. He wanted to know the current condition of the car. He says that he explained to the Claimant that they could do something similar to a Signature Class Inspection. He says that he explained that a full Signature Class Inspection was only done when Mercedes was considering taking a vehicle into inventory.

[69] He testified that he likely gave the Claimant a printout of the vehicle history, though he did not specifically recall doing so.

[70] After the inspection was done and he had Mr. Stenason's notes, he went over the findings with the Claimant. He gave the Claimant a copy of the notes and the Signature Class Inspection form which had been partially filled out.

[71] Mr. Gilmour stated that he would rarely review stored codes with a customer, and only if they related to a current problem. The reason he gave is that it could be more confusing than helpful to the customer.

[72] He stated that he expressed no opinion to the Claimant as to whether or not he should buy the vehicle. He did tell the Claimant that there was work to be done, and that it could be costly. He says that he told the Claimant that this was not the best example of the product that he had seen.

[73] On cross-examination, Mr. Gilmour stated that he never said that the vehicle “passed” or “failed” inspection. He says that he expressed no opinion as to whether or not it would be a wise purchase.

[74] Mr. Gilmour testified that he did not discuss the vehicle’s history, to whatever extent it was known, because he understood that the Claimant was interested in the current state of the vehicle. He admitted that - had they had the time - they could have gone over some of the notations in the history, including the fact that at some point it had had a major repair.

[75] He gave no significance to the stored codes 0946 and 1208, since they were unrelated and did not correspond to any currently manifesting problem. He admitted that he did not give the Claimant a copy of the Quick Test results, and did not bring to his attention any of the stored codes. He denied that he had any duty to do so. Nor did he give the Claimant any Technical Service Bulletins since they are meant for technical staff, and are not for general circulation.

[76] He was steadfast in his view that the presence of a stored code 1208 did not mandate further investigations. He disagreed with Mr. Ellis, in the sense that he does not believe it is feasible to investigate every stored code that shows up on a scan. He admitted that he never gave the Claimant the option of having O’Regan undertake further testing.

[77] He draws a significant distinction between the situation that existed in October 2012 - namely a stored code 1208 - and that encountered by the Claimant approximately 5 months later when another Mercedes service centre found both stored and current codes 1200 and 1208.

ARGUMENT

[78] I will not say anything more about the arguments against Blumenthal as I have already determined that there is no liability on Blumenthal.

[79] Counsel for the Claimant, Mr. Thompson, argues that Steve Ellis is the only qualified expert to have testified, and that I should prefer his evidence over that of the O'Regan witnesses. Mr. Ellis testified that the stored codes were relevant and should have been discussed with the Claimant.

[80] Mr. Thompson argues that O'Regan had pertinent information about the state of the vehicle, and unilaterally decided to withhold that information. The presence of code 1208, in particular, signalled the possibility of a problem that could have been investigated further, albeit at a cost.

[81] O'Regan also had the service records which suggested that the vehicle might not have been serviced in a timely manner. This too should have been discussed with the Claimant, given that it reflected a possible risk.

[82] The Claimant, he argued, did everything right. He went to "the best" expecting the best. He expressed the wish to know everything he could about the vehicle, to help him make an informed decision.

[83] Mr. Waugh on behalf of O'Regan argued that the inspection was done in a workmanlike manner and all relevant information was provided to the Claimant.

[84] He argued that Mr. Ellis was not a Mercedes Benz expert, and his evidence counsels an unduly high standard of care.

[85] He argued that it would have been unscrupulous to advise the Claimant to have further work done, based on the presence of a stored code, which may be in the system for any number of reasons, including a “false positive” or a faulty sensor.

[86] He argued that the fact that code 1208 later manifested, along with 1200, was just a coincidence and could not have been predictive of the problems that later manifested.

[87] He argued that the inspection should not be treated as if it were a warranty or guarantee. Furthermore, the vehicle was driven approximately 16,000 kilometres after the inspection, before 1200 and 1208 codes were detected, and the balance shaft repairs were done.

Discussion of liability

[88] A threshold question which I must answer is this: did the Defendant O’Regan have a duty to disclose further information to the Claimant, that would have been material to his decision to buy the vehicle and not protect himself with an extended warranty?

[89] In my opinion, O’Regan did have such a duty. It was, or ought to have been clear to O’Regan that the Claimant was considering buying the vehicle and wanted as much information as he could obtain from the recognized experts in Mercedes Benz vehicles. He did not qualify his request.

[90] On all of the evidence, I am satisfied that the presence of stored codes was material information. There was no basis to allow the Claimant to leave O'Regan without showing him the Quick Test and discussing the implications with him. It is patronizing to have assumed that the information might be more confusing than enlightening. That was not O'Regan's decision to make. It ought to have recognized that someone considering purchasing this vehicle and demonstrating caution, might want to know something of its history (from a mechanical point of view) and not just a present snapshot. Although it may not have been doing everything that a Signature Class Inspection would have required for its own purposes, it should have recognized that a third party purchaser would be interested in many of the same things. After all, if Mercedes itself would not have been prepared to place a warranty on this vehicle because of issues in its history, O'Regan ought to have considered that the Claimant might have had some qualms about assuming all of the risks himself. He ought to have been given the information and been allowed to make a better informed decision about what to do.

[91] The failure to disclose all of the information in the Quick Test and in the vehicle history was, I find, a breach of contract entitling the Claimant to damages.

[92] Having said that, it is important to determine what damages actually flow from this breach. The Claimant's position rests upon a certain amount of speculation about what he would have done, if he had been given further information by O'Regan. Had he been shown the stored codes, and given information about what they meant, what might he have done? Would he have asked for deeper investigation, such as sending a camera down to get a close

up look at the balance shaft? Would he have been willing to spend the further $100.00 (or so) that it would have cost? Would that investigation, if done, have disclosed a serious enough amount of wear to cause him to rethink the purchase? Would the mere fact of the stored codes have caused him to back out of the deal? Would the additional information have caused him to take a different view of the risks that he was assuming, and perhaps convinced him that it would be wise to purchase an extended warranty?

[93] I am satisfied that he might have acted differently, and had he either backed out of the deal, or purchased an extended warranty, he might have avoided some of the additional cost that he has incurred.

[94] I do not think the Claimant has to prove that he definitely would have made different decisions, or that he definitely would have avoided additional expenses. That is not a provable fact. The law has never insisted that Claimants prove on a balance of probability what they might have done in such a scenario. Rather, assuming that the Defendant has breached a legal duty that deprived the Claimant of an opportunity to act differently, as I have found, the law has treated the question as a "loss of chance."

[95] A good discussion of the loss of chance doctrine can be found in the judgment of Griffiths, J.A. in *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, 1993 CanLII 3431 (ON CA) (which case was referred to with approval by Moir J., in *Grant v. Gold Star Realty*, 2011 NSSC 2):

> The general rule is that the burden is on the plaintiff to establish on the balance of probabilities that as a reasonable and probable consequence of the breach of contract, the plaintiff suffered the damages claimed. If the plaintiff is not able to establish a loss, or where the loss proven is trivial, the plaintiff may recover only nominal damages.

> A second fundamental principle is that where it is clear that the breach of contract caused loss to the plaintiff, but it is very difficult to quantify that loss, the difficulty in assessing damages is not a basis for refusal to make an award in the plaintiff's favour. One of the frequent difficulties in assessing damages is that the plaintiff is unable to prove loss of a definite benefit but only the "chance" of receiving a benefit had the contract been performed. In those circumstances, rather than refusing to award damages the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis.
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> .....
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> In short, in assessing damages the court must discount the value of the chance by the improbability of its occurrence.
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> .....
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> On my analysis these two Supreme Court of Canada decisions *[Webb & Knapp (Canada) Ltd. v. Edmonton (City),* 1970 CanLII 173 (SCC), [1970] S.C.R. 588, 11 D.L.R. (3d) 544 and *Kinkel v. Hyman*, 1939 CanLII 7 (SCC), [1939] S.C.R. 364, [1934] 4 D.L.R. 1] stand for the following propositions. The burden rests on the plaintiff alleging breach of contract to prove on the balance of probabilities that the breach and not some intervening factor or factors has caused loss to the plaintiff. In this respect the courts have not relaxed the basic standard of proof. Where it is clear that the defendant's breach has caused loss to the plaintiff it is no answer to the claim that the loss is difficult to assess or calculate. The concept of the loss of a chance then begins to operate and the court will estimate the plaintiff's chance of obtaining a benefit had the contract been performed. But even in this situation, the Supreme Court of Canada has said in *Kinkel v. Hyman*, supra, that proof of the loss of a mere chance is not enough; the plaintiff must prove that the chance constitutes "some reasonable probability" of realizing "an advantage of some real substantial monetary value".

[96] As put in a nutshell by Bauman J., of the B.C. Supreme Court in *Manley v. Chilliwack General Hospital Society*, 2000 BCSC 649 (CanLII) (albeit in a medical context):

> [15] ..... In contract it is not, as it is in tort, an all or nothing proposition. Whereas in tort, a plaintiff must prove on a balance of probabilities that the defendant's negligence caused his or her injuries and is then entitled to 100% of his or her loss, in contract, a plaintiff can argue that the

> defendant's breach cost the plaintiff the chance ..... of avoiding some of the injury he or she suffered. In contract, the plaintiff need not show causation on a balance of probabilities - every breach of contract entitles the innocent party to damages although they may be only nominal. .....

Damages

[97] I will now turn my attention to the damages that the Claimant has incurred.

[98] In his Amended Claim, the Claimant sought a number of items including the initial cost of the vehicle, which was $15,348.10. I cannot accept that this is a legitimate ground of damage, at least not against O'Regan. The Claimant has retained the vehicle and continues to drive it (at least he did as of the last hearing day). He has accordingly had three years of use, albeit with extra expenses that he did not anticipate. I acknowledge that he says he lacks faith in this vehicle, but I do not find that lack of faith to be a compensable head of damage. Had he sold the vehicle at a loss, that might have been a different story.

[99] There are several other items that are also not appropriate as damages, such as the cost of undercoating ($126.44), new tires ($698.29), installation of tires ($67.80), car registration ($185.00), wipers/licence plate holder ($170.18). These were expenditures that the Claimant made either because he had to, or because he had been advised that they were needed. In none of these instances can it be said that the Claimant might have avoided these expenses, had he been better informed.

[100] The Claimant also argued that rust repairs in the amount of $1,287.41 should be included as damages. I do not see any connection between rust

claims and the O'Regan inspection. In fact, O'Regan warned the Claimant about rust and suggested he immediately get the vehicle rust proofed.

[101] The same is true of suspension and steering repairs in the amount of $1,844.21. There is nothing in the evidence to suggest that O'Regan know something about, but failed to disclose, the possibility that such repairs would be needed. He did know that an alignment was needed, preferably after purchasing new tires.

[102] The real substance of the claim involves the unanticipated expenses which have a factual connection to the non-disclosure of relevant information:

Towing charge	$226.00
Car rental (while repairs being done	$417.47
2nd car rental	$605.63
Balance shaft check	$103.89
Balance shaft repair	$2,544.80
Bus Saint John to Moncton	$35.17
Catalytic converter repairs	$514.10
TOTAL	$4,447.06

[103] These are the damages that might have been avoided, had the Claimant been in possession of all of the relevant information about his vehicle.

[104] I have given some thought to the question of what he might have saved had he backed out of the purchase altogether, to see whether the result would be any different. The best he might have hoped for would have been the

purchase of a different vehicle, and one that was trouble free. He still would have spent the initial purchase price, plus all of the incidental expenses and recommended repairs. In the end, it remains the above list of unanticipated expenses that he might have avoided.

[105] I do not consider that the Claimant has achieved any "betterment," as argued. This might be the case if it were established that a balance shaft will inevitably fail in any vehicle, and the Claimant simply incurred an expense that was inevitable and ends up with something better that will now last longer. There was no evidence to that effect. I very much doubt that a balance shaft failure is something that every Mercedes owner can expect even after driving several hundred thousand kilometres.

[106] The Defendants were also critical of the expenses for car rental, suggesting that the Claimant was indecisive about whether to do the repairs, and thus prolonged his need for alternate transportation. I think the Claimant's hesitation was understandable. These are essentially mitigation expenses, and I find that the Claimant was reasonable in thinking through what he was going to do, and taking the time before he committed himself to significant expenses.

Loss of chance

[107] In assessing the degree of the loss of chance, I must make an assessment based upon all of the factors disclosed by the evidence. The Claimant impressed me as someone who is inherently cautious. He is a real estate agent, and made much of the analogy that he expects purchasers that he represents to obtain inspections of properties and make fully informed decisions.

He is not someone who, in my estimation, would have brushed off the information that O'Regan had but did not disclose.

[108] On the other hand, he was someone who was looking for a good deal and probably considered this car to be a bit of a bargain.

[109] In my mind, I consider it at least as likely as not that the Claimant, more fully informed, would have done something differently, most likely by obtaining an extended warranty as offered by Blumenthal. As such, I find his loss of chance to be 50% , and would award him 50% of the damages that he has suffered; i.e. half of $4,447.06, or $2,223.53.

[110] The Claimant claims costs of $1,000.00 for the expert witness, $199.35 to issue the claim, plus $118.00 to serve it.

[111] I am prepared to allow the expert witness cost, as the evidence was helpful to the court.

[112] The cost to issue the claim was predicated on recovery of more than $5,000.00, which the Claimant has not achieved. I would allow only $99.70 for the cost of issuance. Also, the Defendant O'Regan should not have to pay for the cost to serve Blumenthal. I therefore allow $59.00 for service.

[113] The Claimant shall accordingly recover $2,223.53 in damages, plus costs in the amount of $1,158.70, for a total of $3,382.23.

Eric K. Slone, Adjudicator