

Claim No: 308628

Date: 20091023

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Boudreau v. Dooley, 2009 NSSM 64

BETWEEN:

Name Devon Boudreau Claimant

Name Tim Dooley Defendant

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

DECISION

BACKGROUND

- (1) The Claimant, Devon Boudreau (Boudreau), claims the sum of \$4,642.85 from the Defendant, Tim Dooley (Dooley).
- (2) The basis of the claim is stated as follows in the Notice of Claim:

“I was sold a car by the defendant, threw (sic) his dealership. I was under the impression that it was mechanically sound and road worthy.”
- (3) Dooley did not file a Defence to the claim, however, at the outset of the hearing, he stated that his defence was twofold, firstly, he was not previously aware of any mechanical problems with the vehicle and, secondly, when the vehicle was purchased, it was purchased on an “as is” basis and the purchaser had the vehicle checked out by a mechanic prior to the purchase and knew what he was purchasing.
- (4) Although the Defendant had not filed a Defence, the Claimant did not seek an adjournment of the hearing.
- (5) Dooley is a car salesman. Boudreau contacted Dooley after viewing a 2000 Volkswagen Jetta motor vehicle online.

- (6) The initial contact was made on February 26, 2009. On that date, Boudreau went to Dooley's office to see the vehicle. He arranged to take the vehicle with him for a period of time. During that time, Boudreau had the vehicle checked out by a licensed mechanic. He brought the vehicle back to Dooley later that afternoon. Later, he spoke to a salesman, Dale Bourassa, in Dooley's office. A price of \$5,600.00 was negotiated for the vehicle with total balance due, including the taxes and administration fee of \$6,554.00. Boudreau paid a \$300.00 down payment towards purchase of the vehicle.
- (7) A Bill of Sale was drawn up and signed. Boudreau was provided with the pink copy of the Bill of Sale.
- (8) Several days later, Boudreau went back to Dooley's office to pick up the vehicle. There is some confusion about what happened. According to Boudreau, Dooley agreed to accept the total sum of \$6,000.00. According to Dooley, Boudreau paid the total sum of \$6,200.00. I find that the parties both agreed to renegotiate the purchase price at that time to their mutual satisfaction.
- (9) Dooley produced the top copy of the Bill of Sale at the hearing. It had written upon it the following: "Pd in full. Customer had car checked by mechanic."
- (10) Further below that, "As is. No Warranty stated or implied."
- (11) The first statement was purportedly initialed by Boudreau, however, the second statement was not.
- (12) According to Dooley, Boudreau was provided with a copy of the final form of the Bill of Sale with the above items written on it, however, Boudreau's pink copy of the Bill of Sale did not include the above-noted statements.
- (13) Boudreau denies having initialed the final form of the Bill of Sale by the words "Pd in full. Customer had car checked by mechanic."
- (14) In any event, it is an accurate statement that Boudreau did have the car checked by a mechanic before purchasing the vehicle.
- (15) Several days after Boudreau purchased the vehicle, he was driving it along the highway when it overheated. A warning light came on, and he pulled the vehicle over to the side of the highway. He waited for some period of time and then drove the vehicle back to his home. The next morning, he drove the vehicle from his home in Forest Hills to Steele Volkswagen on Windmill Road in Dartmouth.

- (16) The vehicle was put on the hoist, and Boudreau was advised that the cooling system was leaking. The thermostat housing had melted. A new thermostat housing was ordered and it was replaced.
- (17) After this, it was discovered that the circulating water pump was leaking, and a new one was ordered and it was also replaced.
- (18) Several days after that, Boudreau attended at Dooley's office to inform him of the problems with the vehicle and asked for some compensation. Dooley refused to provide compensation.
- (19) Boudreau subsequently returned to Steele Volkswagen, at which time, he found out that the control module and circulating water pump were not working. Those were replaced.
- (20) At this point, Boudreau contacted Motor Vehicle Compliance and was put in touch with David Bezanson (Bezanson), a motor vehicle inspector for Service Nova Scotia.
- (21) Bezanson examined the vehicle and discovered multiple issues. He performed a full motor vehicle inspection and the vehicle failed on several different categories. He removed the inspection sticker and put a rejection sticker on the vehicle on March 11, 2009.
- (22) Subsequently, Boudreau was advised by Steele Volkswagen that the control module for the radiator fans and the main radiator fans needed to be replaced so those were replaced, as well.
- (23) It was discovered that there was corroded wiring in the vehicle, and that was replaced.
- (24) The vehicle was returned to Boudreau on March 16, 2009. He had been without a vehicle for approximately ten days.
- (25) The total cost of the repairs was \$2,713.49.
- (26) Boudreau was provided an estimate by Steele Volkswagen of \$1,555.89 to do the necessary work for the motor vehicle inspection. Boudreau did not have the funds to do this so he shopped around for parts and purchased the necessary parts for a cost of \$219.22. He paid a friend \$300.00 cash to rent his garage and did the repairs himself. He brought the vehicle in to be inspected and was advised that there was a hole in the muffler and a broken exhaust hanger. He went to Speedy Auto Services, ordered an after market muffler, and it was installed for a total of \$408.34.
- (27) The vehicle was then returned to him in good working order and safety inspected.
- (28) The cost of a rental vehicle for ten days was \$348.48.

- (29) According to Dooley, the vehicle was sold on an “as is” basis. He acknowledged, however, that Boudreau did not initial the following portion of the Bill of Sale which appears under the words “CONDITIONS OF SALE”:

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 at any guaranteed level of quality. The vehicle may not be fit for use as a means of transportation and may require substantial repairs at my expense.

..... Purchaser’s Initials (If this space is not initialed by me, this clause does not form part of this Agreement.)”

- (30) Bezanson confirmed that when a vehicle is sold on an “as is” basis, the dealer is to remove any existing inspection sticker from the vehicle. Dooley failed to do this. His explanation was that he was busy that day and simply forgot to do it, and it was a mistake on his part.
- (31) Bezanson also testified that when a vehicle is sold on an “as is” basis, a “Form 20” must be completed. Form 20 is a form entitled “Sale of Vehicle Not Safety Approved”. It is to be signed by both the buyer and the seller. It is an acknowledgment on behalf of the buyer that he has been advised by the seller “that this vehicle is being sold ‘not safety approved’ and requires a safety inspection approval sticker prior to applying for registration and operating the vehicle”. By signing the document, the purchaser acknowledges that he is responsible for the cost of having the vehicle inspected prior to registration and that the vehicle may need repairs in order to obtain an Inspection Certificate.
- (32) Dooley stated that Form 20 had been completed and signed by Boudreau and was submitted with the registration of the vehicle, however, Boudreau denied having signed Form 20.
- (33) Dooley also stated that his copy of Form 20 was given to Bezanson when Bezanson did his investigation, however, Dooley had provided a written statement to Bezanson two days after the vehicle transfer occurred in which the following question and answer appear, “Did you fill out a Form 20?”- Answer “No”.
- (34) Bezanson produced the vehicle transfer documents obtained from Access Nova Scotia consisting of a complete record of the title documents that Dooley presented to transfer title. These documents included a copy of Form 20 which was signed on behalf of the seller but it was not signed by Boudreau. Dooley acknowledged that these were true copies of the documents used to transfer title.
- (35) Dooley had purchased the vehicle only a week or so prior to selling it to Boudreau. He paid \$4,800.00 plus taxes for the vehicle. He stated that he was not aware of the details of any previous repairs to the vehicle nor was he advised by the seller of any previous problems with

the cooling system. Boudreau did produce evidence of problems with the cooling system, however, this related to the previous owner prior to the purchase of the vehicle by Dooley. There is no direct evidence that Dooley had any previous knowledge of the problems with the cooling system.

- (36) Dooley stated that the problems with the cooling system were “inflicted” by Boudreau driving the vehicle after the problems first came to his attention, that it was a simple problem, namely, a broken wire that subsequently caused a series of issues with the vehicle.

FINDINGS

- (37) There are various inconsistencies in Dooley’s evidence, the most glaring of which are that he stated that Boudreau signed Form 20 and that his copy of Form 20 was given to Bezanson when Bezanson was investigating Boudreau’s complaint. I find, however, that the Form 20 used to transfer the vehicle was not signed by Boudreau and that Dooley presented title transfer documents to Access Nova Scotia, including this Form 20, yet two days later signed a statement during Bezanson’s investigation in which he stated that a Form 20 was not completed.

- (38) Generally, I would characterize his evidence as contradictory and self-serving, and it is not reliable. Where Dooley’s evidence differs from Boudreau’s, I accept Boudreau’s evidence.

- (39) The Bill of Sale contains a condition as follows:

“6. WARRANTIES: I understand that there are no warranties or representations given by the dealer regarding the vehicle or affecting my rights or those of the dealer, other than those contained in this agreement or set out in any applicable legislation or manufacturer’s warranty.”

- (40) There is no evidence of any express warranties made by Dooley to Boudreau at the time of sale concerning the condition of the vehicle.
- (41) Since it is an accurate statement that Boudreau had the vehicle checked by a mechanic before he purchased it, it is not significant whether or not Boudreau in fact placed his initials by those words. Boudreau’s initials are not found by the words “As is. No warranty stated or implied.” I find that those words were written on the document at a time subsequent to the date that the transaction took place.
- (42) I find that the vehicle was not sold on an “as is” basis. Form 20 was not completed as it should have been. The Bill of Sale was not signed in the appropriate place as it should have been. There is no evidence that the vehicle was advertised as being sold on an “as is” basis

or “as traded” as Dooley testified would have been the norm. The inspection sticker was not removed from the vehicle.

ANALYSIS OF LEGAL ISSUES

- (43) The principle of caveat emptor or “buyer beware” applies.
- (44) As the purchaser, Boudreau is obligated to perform whatever inspections are required to satisfy himself as to the condition of the vehicle before purchasing same.
- (45) In the absence of express warranties, Boudreau is still entitled to rely upon the statutory protections to base a finding of liability against Dooley.
- (46) The problems with the cooling system arose a very short time after Boudreau purchased the vehicle. While there was no direct evidence that Dooley was aware of the problems with the cooling system, there is evidence that these problems had been brought to the attention of the previous owner, another car dealer, who sold the car to Dooley shortly before he sold it to Boudreau.
- (47) Having found that the sale of the vehicle was not an “as is” transaction, the issue then becomes to what extent can Boudreau, as purchaser, rely upon the warranties under the Consumer Protection Act since no evidence was provided that there were any warranties or representations provided by Dooley regarding the mechanical condition of the vehicle and the agreement specifically contained a condition that there were no such warranties other than those contained “in this Agreement or set out in any applicable legislation or manufacturer’s warranty”.
- (48) This issue requires examination of other cases decided pursuant to Sections 26(3)(h) and (j) of the Consumer Protection Act which provide as follows:

“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:

(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.”

- (49) MacIsaac v. Chebucto Ford Sales Ltd., 1989 CarswellNS 406, a decision of the Nova Scotia County Court, makes the following findings which apply to the case at hand:

- (a) The Consumer Protection Act applies to transactions of sale between persons engaged in the ordinary course of business in the sale of new and used motor vehicles.
 - (b) The issue of whether the goods are of merchantable quality is to be decided on a case by case basis.
 - (c) The definition of merchantable quality is found in the case of Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association (1969) 2 A.C. 31, (1968) 2 All E.R. 444 (H.L.) as follows:

“... the goods should be in such a state that a buyer, fully acquainted with the facts, and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them obtainable for such goods if in reasonable sound order and condition and without special terms.”
 - (d) The definition of “reasonably durable for the purpose” is also applied on a case to case basis.
 - (e) The warranties under the Consumer Protection Act apply regardless of the existence or nonexistence of dealers warranties.
- (50) In Penney v. Brett Pontiac Buick GMC Ltd., 1990 CarswellNS 531, Justice Boudreau of the Nova Scotia Supreme Court (Trial Division) also held that a finding that the vehicle is not durable for a reasonable period of time is a question of fact in each case. In that case, the Small Claims Court Adjudicator had found that the vehicle was not reasonably durable under Section 20C(3)(j) of the Consumer Protection Act even though the vehicle had been sold on an as is basis, and this finding was upheld on appeal.
 - (51) In McAsphalt Industries Ltd. v. Chapman Bros. Ltd., 2008 CarswellNS 754, Justice LeBlanc of the Nova Scotia Supreme Court, when dealing with the issue of merchantable quality pursuant to the Sale of Goods Act, referred to the definition of merchantability in the case of Murray v. Sperry Rand Corp. (1979) 96 D.L.R. (3d) 113 (Ont. H.C.) wherein the term was defined as meaning that the goods were “reasonably fit for general purposes such goods serve”.
 - (52) Reference was also made in that case to Grant v. Australian Knitting Mills Ltd. (1936) A.C. 85, (1936) 1 W.W.R. 145 (P.C.) in which it was held that an item is not merchantable if “it has defects unfitting it for its only proper use but not apparent on ordinary examination: ...”
 - (53) At paragraph 56 of the McAsphalt Industries case, Justice LeBlanc states:

“Also in Henry Kendall & Sons v. William Lillico & Sons Ltd., Lord Pearce stated that goods may be unmerchantable if there is a hidden defect and no warning is supplied, even if the goods would have been merchantable with a warning of the defect (p. 487).” (sic)

- (54) In Neal v. Corkum, 2004 CarswellNS 605, Adjudicator Richardson of the Nova Scotia Small Claims Court held that the warranties in the Consumer Protection Act apply to a sale of used vehicles and apply to “as is where is” sales transactions. He stated at paragraph 18 as follows:

“However, since the warranty of durability depends upon “the use to which they would normally be put and to all the surrounding circumstances of the sale:” s. 26(3)(j), it is clear that secondhand car warranties may be less extensive than those associated with a new car;”

- (55) Adjudicator Richardson reviews a number of cases in which the purchaser of used vehicles experienced serious problems with the vehicle shortly after purchase. He stated at paragraph 24:

“The remedies for such a breach include, in a proper case, recision or, in the more usual case, the amount reasonably expended to correct the deficiencies to make the car road worthy:” (sic)

- (56) He held as follows:

“... that the nature and extent and number of required repairs meant that the vehicle was neither of merchantable quality, nor durable for a reasonable period of time, thereby constituting a breach of the conditions implied under s. 26(3)(h) and (j) of the Consumer Protection Act.”

- (57) Reference was made in this decision to the case of Robertson v. Seddon (1997) N.S.J. No. 27 in which Associate Chief Justice Palmetier held that when a vehicle is purchased on an as is condition, then “... the purchaser ... cannot be expected to receive much warranty under the Act if in fact there should be any.” This case is distinguishable from the present case since I have found that the sale did not take place on an as is basis.
- (58) In applying these principles to the case at hand, I have considered all of the facts and circumstances in arriving at the conclusion that the vehicle in this case was not of merchantable quality and not durable for a reasonable period of time having regard to the use which it would normally be put and to all of the circumstances surrounding the sale.
- (59) The circumstances surrounding the sale are of particular importance. There was an attempt by Dooley to characterize the sale as an as is transaction when in fact it was not. Had Dooley removed the safety inspection sticker as he was obligated to do and presented Boudreau with

the Form 20 document, then this would have alerted Boudreau to the fact that the vehicle was being sold not safety approved. Dooley's efforts to characterize the sale as an as is transaction are consistent with him having knowledge that there were some issues with the vehicle, and I am prepared to impute such knowledge to him in these circumstances. I simply do not believe that Dooley, an experienced car salesman, forgot to remove the safety inspection sticker. His statement to Bezanson that a Form 20 was not completed, made two days after he presented title transfer documents to Access Nova Scotia which included a Form 20, speaks volumes. I find that Boudreau has been misled by Dooley's actions.

- (60) The serious breaches by Dooley are not saved by the fact that Boudreau took the vehicle to a licensed mechanic for a checkup. The inspection done was of a general nature without delving into issues to the extent that might have been done had a full safety inspection been completed. I conclude that had Boudreau been fully acquainted with the facts, he would have either not purchased the vehicle at all or negotiated a substantially different purchase price.
- (61) For these reasons, I find that the statutory protections have been breached and that Dooley is liable to Boudreau for the amount necessary to make the vehicle roadworthy.

DAMAGES

- (62) Boudreau seeks recovery of the following amounts:
 - (a) \$1,300.00 for the cooling system;
 - (b) \$219.00 for the parts for the motor vehicle repairs;
 - (c) \$300.00 cash for renting his friend's premises for purposes of effecting the motor vehicle repairs;
 - (d) \$348.00 costs of rental of a vehicle for ten days;
 - (e) \$400.00 for the exhaust for the motor vehicle inspection.
- (63) With respect to the amount sought for the cooling system, this amounts to approximately one-half of the actual cost, and I find in the circumstances that the amount being claimed is more than reasonable for the reasons expressed earlier in this decision.
- (64) With respect to the amounts for the motor vehicle inspection, in order to find for the Claimant, it is necessary to find that the amounts incurred were damages arising from the breach. The burden of proof is on the Claimant. Based on the evidence provided, I am unable to conclude that the amounts spent by Boudreau regarding the repairs required for the motor vehicle inspection were incurred as a result of the breaches by Dooley. I disallow this aspect of the claim.

- (65) Since the period of time for which the vehicle rental is claimed relates to the period when the cooling system was being repaired and since this cost is reasonable and arises from the Defendant's breaches, I will allow this item.
- (66) Boudreau shall recover the amount of \$1,648.00 damages from Dooley.

COSTS

- (67) Since the Claimant has been successful, I shall allow his costs of \$87.06 for the filing fee and \$106.00 travel costs to Court (allowed pursuant to Small Claims Court Regulation 15(f)), for total costs of \$193.06

Dated at Dartmouth, Nova Scotia,
on October 23, 2009.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant(s)
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