

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Van Luxembourg v. Mercedes-Benz Canada Inc.*, 2018 NSSM 78

Claim No: SCCH 465182

BETWEEN:

PAUL VAN LUXEMBURG

Claimant

-and –

MERCEDES-BENZ CANADA INC.

Defendant

Paul Van Luxembourg – self represented.

Robert Mroz represented the Defendant, Mercedes-Benz Canada Inc.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

- (1) The Claimant, Paul Van Luxembourg purchased a Mercedes-Benz E350 vehicle from a dealership in Montreal in August 2016. The vehicle came with a 2 year/160,000 km warranty.
- (2) In 2017, while having his vehicle serviced, a problem was discovered with the vehicle. The car was taken to O'Regan's Mercedes-Benz in Halifax where the cause of the problem was determined to be the turbocharger damaged from oil and matter which by passed a seal. Mr. Van Luxembourg sought to have the repairs paid under his warranty. The Defendant, Mercedes-Benz Canada Inc. ("Mercedes") declined warranty coverage asserting that work was performed on the vehicle outside of its dealer network and, additionally, no real damage was caused.
- (3) For slightly different reasons noted below, I have found for the Defendant.
- (4) The evidence provided in this proceeding has been well-presented. While I have not referenced all of the evidence in this decision, I have considered all that was tendered and given it the appropriate weight.

Issue

- Are the problems with the Claimant's vehicle covered by the warranty?

The Evidence

- (5) Paul Van Luxemborg testified on his own behalf. He stated that when his car had approximately 118,250 km on it, he took it for routine maintenance to Jack Lowe's Service Centre in Waterville, Nova Scotia. He was advised by the mechanic that his turbocharger was damaged. As he was aware the vehicle was under warranty, Mr. Van Luxemborg instructed the technician to put everything back together and he would contact Mercedes.
- (6) Mr. Van Luxemborg contacted Mercedes directly. After investigations, he was simply advised they would not honour the warranty, although no reason was actually given. Mr. Van Luxemborg relies on the provisions of the warranty. These are reviewed further in these reasons.
- (7) He entered into evidence a series of photographs showing an oil-stained and cut seal along with the seal itself. In addition, there is a photograph of the turbocharger showing where the fan blades are bent. He attributes this to work that was performed in August of 2016 by a Mercedes technician prior to buying the car. He submits that all indications are that the seal damage was present at the time he purchased his vehicle. There was no sign of the broken seal until the parts were removed. It was not serviced at his mechanic. He was apparently told that the turbocharger was serviced at 55,000 km. This is not shown in the service booklet tendered into evidence.
- (8) He indicated the air filters were changed at 60,000 km and 118,000 km. In his opinion, this is first time the seal was off the pipe. There were no overt signs of problems at that point.
- (9) Under cross-examination, he confirmed the vehicle was purchased in August 2016, at which time, the vehicle's mileage was approximately 75,000 km. Upon purchasing the vehicle, he instructed the dealership in Montréal to check the engine and clear the codes. Any subsequent service was conducted at O'Regans or Jack Lowe's, depending upon the nature of it. At 86,000 km, he confirmed he went to Jack Lowe's for an oil filter change and a change to the interior cabin filter. On July 7, 2017, he acknowledged the problem with the turbocharger and the problematic seal was replaced. The only other service he had performed was body work from where an errant raccoon ran in front of his vehicle.
- (10) He does not do any work himself other than cleaning the car and occasionally checking the fluid levels.
- (11) He confirmed Mercedes recommended he replace the turbocharger. He has continued to drive the car anyway as it cost almost \$9000 to replace the turbocharger. He was advised by Jack Lowe's that the seal must have twisted under

it and into the turbocharger.

- (12) Thomas John Stenason is a technician at O'Regan's Mercedes-Benz in Halifax. He has worked for the O'Regan's group for approximately seven years. He estimates he has serviced about a thousand vehicles, 99% of those vehicles are Mercedes-Benz. He described E-class model vehicles as having a V6 turbocharged diesel engine. Of the thousand or so vehicles which he has repaired, he estimates under 50 of them needed a turbocharger replaced. On the motion of his solicitor, I qualified Mr. Stenason as an expert on the repair of Mercedes-Benz vehicles.
- (13) He described the role of the turbocharger, namely to use the pressure of excess gases to run the wheels and press fresh air into the cylinder. Its purpose is to create more power. There are two halves to a turbocharger, the cold half deals with fresh air while the hot half is made of cast-iron for the hot gases which spin the impeller and compresses the fresh air. Fresh air is then directed to the engine. In order to service the oil filter, it is necessary to move the intake and the intake tubes, each are held in place by a clamp. The seal is necessary to keep the air in and oil from leaking out. The seal is made of rubber so that it withstands oil and heat. He examined the Claimant's vehicle and noted that once the inlet pipe is moved the seal takes on a different shape. This could cause the oil in the engine to go past where the seal was not working. He believes the seal had been pushed back in far enough that it caught the edge of the turbocharger and damaged both the seal and blades. He noted that if there were a tear in the seal, it would not fit. He advised Mr. Van Luxemborg how to fix the problem. He reported this to Mr. Keith Croucher whose job was to communicate the results to the customer. Mr. Stenason is convinced the problem with the engine is the seal was reinstalled incorrectly. It had been a problem which he had previously discussed with the Claimant.
- (14) Under cross-examination, he described the process of checking the vehicle to see if anything needs repair. He identifies any faults or body damage, followed by a review of the maintenance history of the vehicle to determine if oil changes have been done in time. When they are uncertain, Mercedes recommends changing all filters. If filters are not changed then the pressure changes and the engine is in danger of stalling. The work order found in Exhibit 10 was discussed with the customer. He indicated there is a service bulletin circulated by Mercedes-Benz which describes moving parts without proper loosening. He indicated that occasionally one sees parts around. He indicated they recommend not driving the car once they are instructed by the on-screen monitor in the dash. Typically, a turbocharger lasts the life of the engine, around 250,000 km. He indicated the work should be perfectly in balance. He believes broken impellers would cause an imbalance and shorten the life of the engine. He recommended changing the fuel filters as he does not believe they were changed.
- (15) He confirmed that if one fails to change the fuel filter, it becomes restricted. This shown by a lit engine light. Eventually, the engine loses power. Fuel filters generally last less than 80,000 km, at which time many are still functioning. The recommended interval for a 2011 E class Mercedes-Benz is 30,000 km.

The Warranty

(16) Mr. Van Luxemborg referred to the provisions of the warranty. Specifically, the *Service and Warranty Information 2011* booklet (“the warranty”). Mr. Mroz introduced into evidence an unsigned copy of the Extended Limited Warranty Contract (“the Extended Warranty”).

(17) The Extended Warranty provides for additional coverage to the vehicle for a period of twenty-four months since it was purchased or the vehicle’s mileage reaches 160,000 km. The seals and gaskets for the powertrain are covered for 120,000 km. The coverage applies to:

“1. ENGINE: Engine block, cylinder head(s), cylinder head gasket(s), all internally lubricated parts, intake and exhaust manifolds, timing chain cover, flywheel, flexplate (driven plate), vibration dampener (harmonic Balancer), coolant pump, turbocharger, supercharger and clutch, belt tensioners and motor mounts.”

(18) It is noteworthy that the Extended Warranty stipulates:

“THIS WARRANTY IS IN ADDITION TO ANY OTHER EXPRESS WARRANTY THAT MAY BE IN EFFECT ON THE VEHICLE AT THE TIME THIS WARRANTY IS PURCHASED...”

(19) I raise this as it would appear the Claimant’s vehicle was also covered by the Emission Performance Warranty.

(20) On page 21 of the warranty, the turbocharger is identified as a Mercedes-Benz emission related component as are all “Emission related hoses, clamps, belts, pulleys, tubes, fittings, sealing devices, mounting hardware.” Therefore, I find the parts are covered by the Emission Performance Warranty as well as the Extended Warranty.

(21) Page 17 of the warranty, states as follows:

“Emission Performance Warranty

Parts replaced under this warranty become the property of the warrantor. The warranty period starts on the date vehicle was delivered to the first retail purchaser or put into service as a dealer demonstrator or (Mercedes-Benz Canada) company vehicle.

The emission control system hundred new Mercedes-Benz vehicle was designed, built and tested using genuine Mercedes-Benz parts and the vehicle is certified as being in conformity with Canadian emission control regulations and requirements as set forth in the Emission Control Systems Warranty. Accordingly, it is recommended that any replacement parts used for maintenance, repair or replacement of emission related components be genuine Mercedes-Benz Service Parts or Authorized Remanufactured Parts.

The owner may elect to have maintenance, replacement or repair of the emission control devices and

systems performed by any automotive repair establishment or individual, and may elect to use other than genuine Mercedes-Benz Service Parts or Authorized Remanufactured Parts for such maintenance, replacement or repair without invalidating this warranty or the Emission Control Systems Warranty...”

(22) On page 19 it states:

“This warranty does not cover:

a. Malfunctions in any part caused by any of the following: misuse, improper adjustments, modification, alteration, tampering, disconnection, improper or inadequate maintenance, or use of leaded gasoline for catalyst equipped vehicles.”

The Law

(23) In Nova Scotia, a manufacturer’s warranty is considered part of the contract of sale of an automobile. This principle is prescribed under s. 28A of the *Consumer Protection Act*.

“Express warranties

28A (1) For the purpose of this Section, a manufacturer, seller or lessor makes an express warranty respecting an automobile where the manufacturer, seller or lessor makes a statement respecting the automobile either

(a) as part of a written contract for the sale or lease of the automobile by the seller or lessor to a purchaser or lessee; or

(b) to the public or any part of the public, no matter in what manner the statement is made, including any advertisement.

(2) Where a manufacturer, seller or lessor makes an express warranty of the kind described in subclause (1)(b) respecting an automobile and subsequently sells or leases the automobile to a purchaser or lessee, the express warranty is deemed, for the purposes of this Section, to be part of the contract of sale or lease.

(3) Where an express warranty forms part of a contract of sale or lease of an automobile, each subsequent purchaser or lessee who acquires an ownership or leasehold interest in the automobile has the same rights and remedies under the express warranty as if the subsequent purchaser or lessee were the original purchaser or lessee under the contract.

(4) No person shall charge or collect any fee for the transfer of a warranty by the operation of subsection (3).”

(24) I find the *Service and Warranty Information 2011* and the Extended Warranty are express warranties which are binding on the manufacturer.

(25) In considering the interpretation of contracts in Canada, I quoted the following in *Wilmot v. Toyota Canada 2011 NSSM 48*:

“The governing legal principle in the interpretation of contracts is summarized by Fridman, *The Law of Contract*, 5th ed at p. 454:

”Where there is no ambiguity in a written contract it must be given its literal meaning. (p.454)”

”Words must be given their plain, ordinary meaning, at least unless to do so would result in an absurdity.”

Finally, where there is ambiguity, the *contra proferentum* rule applies:

"In cases of doubt, as a last resort, language should always be construed against the grantor or promissory under the contract. (p. 458)".

(26) The onus is on the Claimant to prove his claim on the balance of probabilities.

Findings

(27) In reviewing the evidence, I find the Claimant has not discharged the onus. I accept the evidence of Tom Stenason and Mr. Van Luxemborg that the seal was damaged or misshapen and caused oil to leak. The impellers in the turbocharger are bent. The seal is made of rubber and torn. I must attempt to determine how the damage was caused based on the evidence.

(28) I reject the argument that Mr. Van Luxemborg breached the warranty by having a third party perform the services. As noted above, this is clearly contemplated by the language of the emissions warranty.

(29) The onus is on Mr. Van Luxemborg to prove the problem was a defect covered by the warranty or Extended Warranty. I am not prepared to infer that the seal was in its current condition (or on its way to being in that condition) when he took delivery of the vehicle. The most plausible explanation was that it was damaged while being repaired.

(30) I accept Mr. Stenason's evidence that it was necessary to move the inlet pipes to service oil filters and other parts. There is a method prescribed by Mercedes to accomplish this objective. I conclude that it was not followed at some point. In my view, that is the most logical explanation. The vehicle has been serviced by a Mercedes dealer before he purchased it and by Jack Lowe's after the purchase. I find it happened at one of those locations. The onus is on the Claimant to prove the breach. I find he has not done so.

(31) Furthermore, while not raised before me, I do not find a breach of the implied warranties found in s. 26 of the *Consumer Protection Act*.

(32) The claim should be dismissed.

Provisional Assessment of Damages

(33) Had I found the warranty to be applicable, and had the work been performed successfully, I would have been prepared to award Mr. Van Luxemborg the full cost of repairs.

Summary

(34) For the foregoing reasons, I find the Claimant has not proven liability against the Defendant. The claim is dismissed.

(35) An order shall be issued accordingly.

Dated at Halifax, NS,
on February 23, 2018;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)