2018 S.C. BW. No. 479481

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Bank of Montreal v. Ernst*, 2019 NSSM 21

BETWEEN:

BANK OF MONTREAL,
one of the Chartered Banks of Canada

Claimant

-and-

STEVEN L. ERNST a.k.a. STEVEN LESLIE ERNST a.k.a. STEPHEN L. ERNST and CARRIE L. ERNST a.k.a. CARRIE LUE ERNST a.k.a. CARRIE L. MANUEL

Defendants

DECISION AND ORDER

Place of Hearing:	Bridgewater, Nova Scotia
Date of Hearing:	May 10th, 2019
Heard Before:	**Gavin Giles, Q.C., Chief Adjudicator**
Appearances:	For the Claimant: **Jonathan J. Saumier**
	For the Defendants: **Shawnee Gregory**
Date of Decision:	June 4th, 2019

Gavin Giles, Q.C., Chief Adjudicator

INTRODUCTION:

(1) The Plaintiff seeks the recovery of $19,699.17 from the Defendants. The Claimant's claim against the Defendants is joint and several.

(2) The Defendants dispute the Claimant's claim.

(3) The Defendants say, generally, that they knew that they owed the Claimant money. But they were not sure how much they owed. And they were frustrated in their attempts to both ascertain the amount they owed and their efforts to repay the amount they owed. They say that the Claimant was the sole cause of their frustration. They say that their frustration arose as a direct result of the actions or inactions of the Claimant.

(4) Accordingly, the Defendants say that the Claimant has lost its right to recover whatever it was owed.

(5) Additionally, the Defendants say that they lost out on a significant financial benefit which was all but certain to come their way but for the actions and inactions of the Claimant.

(6) The Defendants seek the dismissal of the Claimant's claims. In the alternative, the Defendants seek a substantial – though not specified – set-off against the Claimant's claims

FACTS:

(7) The Defendants borrowed $41,443.66 from the Claimant on March 9th, 2013.

(8) The Defendants negotiated their loan through the Claimant's lending agent: Steele Volkswagen. Steel Volkswagen at the material time was an automobile dealership located in Dartmouth, Nova Scotia.

(9) The Defendants were at the time purchasing a new car. A 2013 model Volkswagen "Jetta Highline" car. The Defendant, Ms. Ernst, referred to the car as her “dream car”.

(10) The Defendants made the purchase of Ms. Ernst’s dream car with neither trade-in allowance nor down-payment. They borrowed the whole of the purchase price from the Claimant, inclusive of taxes and certain other extra charges.

(11) The Defendants’ borrowing was at a high interest rate (6.99% annually) and for an extended term (84 months, or seven years).

(12) The Defendants’ experiences with the car and the Claimant’s loan were not happy ones. The car was one of the infamous Volkswagen diesels, more about which will be set out below. The car malfunctioned frequently and required frequent expensive repairs.

(13) Ms. Ernst was a very high mileage driver. She drove the car many ten of thousands of kilometers annually. The car thus went out of warranty very soon. After that, the Defendants were on their own for the car’s required repairs. They spent more than $9,000 to that end. But the car never really did work as intended; or as the Defendants expected it would.

(14) The Defendants also experienced some financial challenges and frequently missed loan payments. In Ms. Ernst’s cross-examination, she could not confirm, but did not dispute, counsel’s suggestion that in total, some 25 monthly

loan payments were missed. She denied in cross-examination that the Defendants were in financial difficulty.

(15) Ms. Ernst testified to two principal reasons as to why the Defendants' loan payments to the Claimant were missed. Part of it was the timing of the loan payments; which were taken by way of automatic withdrawal from Ms. Ernst's account, usually a few days before her bi-weekly pay was deposited. Part of it was the additional and unexpected repair costs the car required.

(16) As regards the former reason, Ms. Ernst testified to on-going efforts with the Claimant to change the monthly loan payment date so that it would coincide with the Defendant's pay periods (or pay days). The Claimant never did effect any change to the monthly loan payment date.

(17) Between March 9th, 2013 and the time frame in 2017 when matters as between the Claimant and the Defendants came to a head, there would have been some 50 monthly loan payments due. If the Defendants had in fact missed 25 monthly payments, that would have meant one in two. The Defendants' loan payment record was not strong.

(18) Weak payment record or not, it appears that missed loan payments to the Claimant were routinely doubled up by the Defendants. The result was that the Claimant's loan was seldom in default for any more than a few days, maybe weeks. The Claimant did not seem overly concerned. If it was, the evidence before me didn't show it.

(19) Luck smiled on the Defendants with respect to the car in the spring of 2017. At the time, Volkswagen Canada was in the throes of its well-known and

well-publicized buy-back program with respect to several of its diesel cars which had been sold over the previous several years.

(20) The Defendants' car was one of the cars which fit the parameters of Volkswagen Canada's buy-back program. By not later than April of 2017, the Defendants were engaged with Volkswagen Canada's agent in an effort to perfect and complete the latter's buy-back of the car. Ms. Ernst testified in cross-examination that at the time, the Defendants were current on their loan payments to the Claimant.

(21) Volkswagen Canada's buy-back program was important to the Defendants. Volkswagen Canada was tentatively offering a buy-back from the Defendants at many times greater than the actual cash value of the car at the time. The buy-back amount would have been either sufficient or close to being sufficient to permit the Defendants to pay off the Claimant's outstanding loan. That would have given the Defendants a clean slate. The Defendants were thus very motivated to pursue whatever opportunities they might have had with Volkswagen Canada at the time.

(22) In order to enter into the buy-back arrangements with Volkswagen Canada for the car, the Defendants were required to produce their bill of sale for it. The Defendants didn't have it and had to obtain it.

(23) It was not clear in the evidence what all the Defendants did to attempt to obtain the bill of sale for the car. But one of the things they did do was communicate with the Claimant to see if they could obtain a copy of the car's bill of sale that way.

(24) Ms. Ernst began to communicate with a “Mr. Cousins” at the Claimant in early May of 2017. It was not clear in the evidence how Ms. Ernst got to Mr. Cousins or in fact what his role with the Claimant was. That role became clearer later on.

(25) For reasons not at all clear in the evidence, the Claimant conducted itself poorly with respect to the Defendants' numerous inquiries of it which were aimed at securing the car’s bill of sale and any other information which might have been required by Volkswagen Canada about the car, information which the Claimant either had or to which it had access.

(26) According to Ms. Ernst, she discussed with Mr. Cousins what she needed and why she needed it. According to Ms. Ernst, she told Mr. Cousins that the Defendants were very motivated to sell the car back to Volkswagen Canada. She told Mr. Cousins that the Defendants wanted to repay the loan in full and “get into another car.

(27) Rather than providing the information being sought by the Defendants straightaway, or to the contrary, refusing to provide at all, the Claimant engaged the Defendants in an extended run-around.

(28) Ms. Ernst testified to some quantifiable and verifiable effort on the parts of the Defendants to communicate with the Claimant. The Claimant rarely responded in kind. Instead, the Claimant's regrettable approach seemed to be a combination of toll-free telephone numbers, voice-mail messages left but not returned, and local Nova Scotia Claimant (or branch) representatives either unable or unwilling to provide the Defendants with accurate or any information about both the car and the loan.

(29) At this juncture, the Defendants made the decision that they would withhold further loan payments from the Claimant in an effort to motivate its positive response to their requests for the car's bill of sale. This decision was a rash one. It was ill-conceived. It was poorly thought out. And there were likely other avenues which the Defendants could have considered. The Steele Volkswagen dealership being just one of them. Why the Defendants did not pursue that avenue was not in evidence.

(30) Without my intending to be exhaustive, Ms. Ernst offered several examples of her unsuccessful communications with the Claimant.

(31) There was the March, 2017 print out from the Claimant's branch at Quinpool Road and Harvard Street, in Halifax, Nova Scotia. It was tendered into evidence as Exhibit #5. It showed the amount owing to the Claimant by the Defendants as $19,776.16; $1,984.82 which was shown as past due.

(32) Ms. Ernst testified that the Defendants were inquiring into some loan consolidation at the time and were seeking confirmation as to Claimant's loan. They understood the $19,776.16 figure shown on the statement. They were unclear on the $1,984.82 figure. They did not think that they were that far in arrears.

(33) Next, there was the letter from the Claimant's "I. Cousins" – assumed to be the same Mr. Cousins referred to above – to Ms. Ernst dated June 9th, 2017. It was a demand letter. It alleged that the loan was "seriously delinquent". That the loan's balance was $23,920.20 (not the $19,776.16 referred to above). That $1,198.82 was owed immediately (not the $1,984.82 referred to above). And that if payment (of the $1,198.82) was not made within seven days, the car would be repossessed.

(34) The I. Cousins letter urged Ms. Ernst "to contact the undersigned immediately". But I. Cousins did not appear to be available to take calls. Ms. Ernst testified that she called I. Cousins three times between June 13th and June 30th, 2017. Ms. Ernst testified that she left messages for I. Cousins all three times. Neither I. Cousins nor anyone else from the Claimant ever called Ms. Ernst back.

(35) Throughout this period, the Defendants' past due indebtedness to the Claimant continued to climb. Loan payments were not being made. The buy-back of the car by Volkswagen Canada was not advancing. And the Defendants had no apparent traction at all with the Claimant regarding the regularization of their loan account. The situation became untenable.

(36) Despite I. Cousins appearing to have become mute throughout this period, others within the Claimant's administrative hierarchy remained engaged with the Defendants' loan account and car.

(37) Specifically, on June 30th, 2017, representatives of the Claimant, perhaps of its agent, Paragon Inc., attended at the Defendants' residence and repossessed the car. There was no prior notice. And though such notice is neither required nor common, the evidence appears clear that leading up to the repossession of the car, the Defendants had been working – some might say struggling – with the Claimant to regularize the loan account. Why the Defendants had failed is something which they cannot fully explain and which the Claimant in its evidence before me chose not to try to explain.

(38) Following the car's repossession, Paragon Inc. delivered to each Defendant a Notice of Intention to Sell. The Notice was dated July 4th, 2017. Delivery was by some form of registered or certified mail. The Notices were signed for by the Defendants on July 6th, 2017

(39) Amongst other things, the Notices provided that:

→ Paragon Inc. was acting as the Claimant's agent

→ The balance of the loan owed by the Defendants to the Claimant was $24,053.03, of which $1,717.34 was "the amount required to reinstate the obligation of the Debtor as of the date of this notice"

→ The *per diem* charge was $4.61

→ The daily storage charge for the car was $25.00

→ Repossession charges were estimated at $2,400

→ Payment could be made to Paragon Inc. in Toronto

→ Paragon would provide local payment details if asked

→ Unless payment was received on or before July 31st, 2017, the car would be sold

→ Disposition of the car would be by private or public sale on or after July 31st, 2017

(40) The Notice offered no explanation for the new figures set out in it. One presumes that they were related to additional missed loan payments.

(41) The Notice offered no explanation of the various charges set out.

(42) The Notice offered no contact information by which the Defendants might communicate with a warm body at Paragon Inc. in any effort to respond substantively to the Notice.

(43) It was still clear that the Defendants wished to do what they could to repatriate the car. They were still anxious to complete the buy-back of the car with Volkswagen Canada. Because of a death in the Defendants' family, Ms. Ernst had received what she testified to as a "small inheritance". The Defendants thus had the resources necessary to respond to the Claimant's (or Paragon Inc.'s) demands. And responding to these demands is just what the Defendants wanted to do and were trying to do.

(44) July and August represented a whirlwind of activity on the part of the Defendants in their attempts to come to terms with the Claimant on the loan account. Their calls to the Claimant, and to its various offices and representatives, were many and varied. The Defendants wanted the car back. They had the means to pay the Claimant (or Paragon Inc.) to get the car back. Unbeknownst to them, Paragon Inc. (or someone or some agency acting on its behalf) had taken the car to Toronto where it had been slated for sale.

(45) Referred to above were the Defendants' attempted communications with I. Cousins in June of 2017. These attempted communications were not successful. But Ms. Ernst did speak with I. Cousins on July 5th, 2017. He told her to call a Mr. Paolo Carini. Mr. Carini also represented the Claimant.

(46) Mr. Carini's advice to the Defendants was helpful. He told the Defendants that in order to repatriate the car, they would have to pay $1,700 in loan arrears and $2,400 in repossession fees to Paragon Inc. He told the Defendants that the Paragon Inc. standard (perhaps a customer service standard) was to reply to repossessed vehicle inquiries within 48 hours. When asked by Ms. Ernst about how the Defendants would get the car back from Toronto, Mr. Carini had no answer.

(47) Ms. Ernst made several calls to Paragon Inc. in July of 2017; more specifically on July 19th and July 26th, 2017, when she left messages. She did not receive responses to either message. She did not send money to Paragon Inc. either.

(48) When challenged on her failure to send money to Paragon Inc. on cross-examination, Ms. Ernst testified that she did not know precisely how much to send nor precisely where to send it.

(49) On August 1st, 2017, Mr. Carini communicated with Ms. Ernst by way of e-mail message. His tone was pleasant and familiar: "Hi Carrie". He attached the car's bill of sale; something the Defendants had been seeking from the Claimant for at least four months.

(50) Ms. Ernst replied on August 8th, 2017. She told Mr. Carini that the Defendants had heard nothing back from Paragon Inc. She asked for his advice on what to do. He replied that the Defendants should be in communication with a Mr. Mijo Rados of Paragon Inc.'s "Recovery Operations". She was. He never replied.

(51) The Defendants provided the car's bill of sale to Volkswagen Canada's agent on or near August 1st, 2017. The agent replied on August 10th. The reply confirmed a buy-back offer of a net $17,593.16. This was a sum which the Defendants were prepared to accept. But it was too late. Paragon Inc. had sold the car on behalf of the Claimant on July 31st, 2017.

(52) After its repossession of June 30th, 2017, the car was appraised by Paragon Inc. on July 6th, 2017. The appraisal report was not strong. It put the average cash value of the car at $6,000. When it was sold on July 31st, 2017, Paragon Inc. received $6,200. Net of taxes and expenses, the sale of the car

produced $5,569.16 for the Claimant. Its claim is for the balance of its loan to the Defendants less the $5,569.16.

(53) It appears that from the totality of the evidence that the Toronto buyer of the car, from the Claimant or from Paragon Inc., may have been speculating in Volkswagen Canada buy-backs. Soon after August 19th, 2017, the Defendants learned that Volkswagen Canada no longer had any interest in dealing with them. Volkswagen Canada had completed the car's buy-back arrangements with its Toronto buyer. A safe assumption, judicially noticed, is that the Toronto buyer of the car earned a not insignificant buy-back premium.

SUMMARY AND CONCLUSIONS:

(54) The Claimant's claim is allowed in part. The Defendants will pay to the Claimant the sum ***$2,106.01***. That is the difference between the $19,699.17 the Claimants have claimed and the net $17,593.16 which the Defendants would have received from Volkswagen Canada had the buy-back of the car been completed.

(55) The Claimant, as a creditor, owed certain duties to the Defendants as debtors. Such duties arise in addition to the obligation of good faith performance as an "organizing principle" in contract law.

(56) In addition to good faith performance, a creditor has a general obligation to take reasonable steps to protect and advance a debtor's interests. That does not mean that that a creditor is obligated to protect a debtor's interests at the expense of its own interests. It means only that a creditor cannot, by either its actions or its lack of action, harm the debtor's position to any greater extent than is necessary to realize on its debt. That is especially so in circumstances in which the

creditor's actions or its lack of action do not advance the creditors interests but cause significant harm to the debtor and to its interests.

(57) These are duties which stand independently of the duty of good faith contractual dealings. That duty is on a heightened threshold requiring the establishment of an oblique motive, something not proved against the Claimant. The more general duties are on a much more reduced threshold. A threshold more akin to a simple failure to perform or a negligent performance, both resulting in loss.

(58) There may well have been no obligation on the part of the Claimant to entertain the Defendants' requests for the car's bill of sale. In context, it may have been sufficient for the Claimant to respond to the Defendants' inquiries by refusing to assist or by directing the Defendants to another avenue; such as Steele Volkswagen, as noted above.

(59) But in failing to engage with the Defendants in a meaningful and responsible manner, the Claimant created the circumstances by which the Defendants lost their significant opportunity with Volkswagen Canada. That opportunity would have all but squared them with the Claimant.

(60) Not to be discounted was the Defendants' rash decision to stop making their loan payments. But the effect of this rash decision evaporated not later than early June of 2017. Thereafter, as the evidence clearly showed, the Defendants were driven to the satisfaction of their obligations to the Claimant and it was only the Claimant which stood in the way.

(61) Already canvassed in detail were the Claimant's roadblocks or its apparent inability (or refusal) to communicate in response to the Defendants'

inquiries in any regular, rational or meaningful manner. There was also the problem of the Claimant's various statements which indicated, variously, what the Defendants owed and when. Finally, there was the Claimant's decision to seize its loan security when there was no objective evidence that the seizure was required so as to protect the Claimant's interests. In fact, had the Claimant put the same energy into responding to the Defendants' attempts to bring the loan current as it did in seizing and ultimately disposing of the car, the dealings between the two would very likely have had a happier, and much more constructive, ending.

(62) Simply put, the Claimant cannot have it both ways. It cannot contend its right to the repayment of its loan whilst at the same time standing in the way of its borrower's repayment attempts. And though one can well understand the likely overall efficiencies to be derived from the Claimant's clearly compartmentalized approach to its lending, loan administration, recovery and security realization operations, they did not work well in this case. For that, the Claimant must own the more substantial responsibility.

(63) I have considered as well the Claimant's claim for pre-judgement interest. In the circumstances, I will exercise my discretion to deny that aspect of the Claimant's claim.

ANALYSIS:

(64) In *Dynamic Transport v. OK Detailing Ltd*., [1978] 2 SCR 1072, the Supreme Court of Canada (per: Dickson, J. (as he was)) dealt with an agreement of purchase and sale for land which required sub-division approval pursuant to the provisions of the *Planning Act* (Alberta). The agreement did not address who would obtain this approval, the purchaser or the vendor. Business efficacy implied that it was the vendor. The vendor refused.

(65) The value of the land increased dramatically in the interim. The vendor's refusal to obtain sub-division approval was tied to his hope for a higher price. It was held at trial that the vendor was obligated to "act in good faith and take all reasonable steps to complete the sale." This determination was upheld by the Supreme Court of Canada.

(66) The scenario in *Dynamic Transport* is analogous to the circumstances of the Defendants in these proceedings in at least three ways:

a. The impugned contracting party had the ability, through inaction, to deprive their contracting partner of a benefit accruing to them under the contract (the ability to take possession of purchased land in one instance and the ability to dispose of the car and repay their debt in the other);

b. There was no explicit contractual provision requiring the impugned party to act; and

c. The impugned party had the ability to benefit from their inaction, raising the issue of bad faith performance (selling the property to a third party at a higher price in one instance and repossessing the Vehicle and claiming a benefit under the Settlement Program in the other).

(67) It could be argued that *Dynamic Transport* is distinguishable from the facts and matters of these proceedings because obtaining the subdivision approval (in *Dynamic Transport*) was a condition precedent for performance of the agreement of purchase and sale. Obtaining the bill of sale of the car was not necessarily a condition precedent for the performance of the loan agreement.

(68) That being said, the Pre-Payment clause of the Claimant's Conditional Sales Contract for Consumer Purchase permitted the Defendants to pre-pay the loan's "outstanding balance, in whole or in part, at any time without notice, penalty, bonus or prepayment charges." And it would be difficult to perceive of a pre-payment provision in any loan agreement which did not at the same time imply an obligation on the part of the lender to provide such pre-payment information which the borrower might reasonably require and request.

(69) In my opinion, the Claimant's provision of such information to the Defendants in these proceedings would be no different from the vendor in *Dynamic Transport* taking all reasonable steps to complete its sale, as held by the Supreme Court of Canada to have been its obligation.

(70) In *Bank of Montreal v. Kundi*, 2019 ABQB 126, the Alberta Court of Queen's Bench (per: Graesser, J.) the plaintiff took action against the defendant mortgagors for the legal costs of certain foreclosure proceedings. The defendants had fallen into arrears on property taxes but their mortgage payments of principal and interest were in good standing. The defendants had also made arrangements, acceptable to the municipality, to pay down their property tax arrears over time.

(71) The plaintiff paid off the property tax arrears without informing the defendants. There was no imminent threat of a tax sale. And the plaintiff was not aware that the defendants had made their arrangements, acceptable to the municipality, to pay down their property tax arrears over time.

(72) The plaintiff then informed the defendants that they would need to reimburse them for the arrears or face foreclosure proceedings.

(73) The defendants attempted to make arrangements to pay off the property tax arrears, but the plaintiff failed to communicate its requirements and intentions in a timely manner. The plaintiff shunted the defendants between various of its departments.

(74) The plaintiff also unilaterally cancelled the defendants' automatic mortgage payments and initiated foreclosure proceedings. This hurt the defendants' credit and prevented them from re-financing the mortgage with another bank. The defendants faced a forced sale of their home as a result.

(75) In declining to award costs to the plaintiff, the Court held it to have acted unreasonably and inequitably. The Court found that foreclosure proceedings were not necessary. The Court also found that the plaintiff had partially contributed to the defendants' inability to pay off the mortgage. Notably, the Court did not find that this conduct rose to the level of "bad faith" because there was no identified ulterior motive for what the plaintiff did and didn’t do.

(76) *Kundi* does not deal directly with a creditor's cause of action against a debtor, even in set-off (as the Defendants in these proceedings have pleaded in the alternative). But the case very much discusses the obligations of a creditor in a fact scenario very similar to the one in these proceedings.

(77) *Kundi* implies – at least – that a creditor has a contractual obligation to not undermine the ability of the debtor to repay her or his debt. Furthermore, the Court in *Kundi* established that, even absent a bad faith motive, it is still unreasonable and inequitable to undermine the ability of a debtor to repay.

(78) Banks have also been held to owe generalized duties of care to their customers.

(79) In *Pawluk v. Bank of Montreal*, 1994 Carswell Alta 134 (aff'd 1997 CarswellAlta 5 (ABCA), leave to appeal to SCC refused,168 WAC 234), the Alberta Court of Queen's Bench (per: Andrekson, J.) held that banks have a general duty to their customers to exercise reasonable care, diligence and competence, and to engage in reasonable banking practices. This duty can arise either from contract or the general law of tort.

(80) Among other issues, *Pawluk* addressed whether a bank could be liable for an employee's failure to follow reasonable internal procedures when attempting to secure new credit on behalf of a customer. The Court ultimately held that the bank was not liable for that breach of duty because (a) the employee in question was attempting to act in the best interests of the plaintiff and (b) the employee's irregular conduct was not a significant factor in the bank's decision to deny new credit to the plaintiff.

(81) *Pawluk* demonstrates that a plaintiff can, in principle, sustain a cause of action for a bank's breach of duty of care relating to an employee's unreasonable handling of a credit account. *Pawluk* is distinguishable from the matter at hand because the employee in that case was making an effort to promote the best interests of the customer. There is no such evidence supporting the plaintiff actions and failures to act in these proceedings.

(82) Finally, in *Ubacol Investments Ltd. v. Royal Bank*, 1995 CarswellAlta 207, the Alberta Court of Queen's Bench (per: Kent, J.) held as follows regarding to the duty of care owed by debtor to a creditor:

> The requirements for finding negligence in the context of the relationship between Ubacol and the bank are not difficult. There was a contractual relationship between the two. There was also a debtor/creditor relationship. Those two

> relationships created the requisite proximity so that the bank owed Ubacol a duty to act as a reasonable banker. A failure to do so which was the proximate cause of damage would result in a finding in favour of Ubacol. The standard of care which the bank must maintain will vary from customer to customer. With some, the relationship will be embodied only in the written documents which are signed at the beginning of the relationship. With others, the contractual relationship will have been amended by the conduct of the parties throughout the relationship. That will create expectations that the bank or the customer becomes entitled to rely upon.

(83) There could be little question in these proceedings but that the Defendants were driven to come to terms with the Claimant. First, the Defendants appreciated their contractual re-payment obligations. Second, it was in the Defendant's own interests that they come to terms with the Claimant to address the subject loan and dispose of the car by way of buy-back to Volkswagen Canada.

(84) There could also be little question in these proceedings but that the Claimant was driven to come to terms with the Defendants. But not only was the Claimant making demands –as was its right – it was offering the Defendant communication and inquiry methods to which the Claimant then did not respond.

(85) There was nothing which the Defendants did or failed to do which served to frustrate this process. The frustration was found solely in the Claimant's inability or lack of interest in communication with the Defendants as the circumstances warranted. And the Defendants sustained a substantial loss in the process. See also: *West v. Alberta Treasury Branches*, 2005 ABPC 285.

CONCLUDING COMMENTS:

(86) The Claimant extended a loan to the Defendants so they could buy a new car. The Claimant had reasonable, and contractually-binding, expectations

that the loan would be repaid. The Defendants' attempts at re-payment were noble but were flawed.

(87) There appears to be nothing in the evidence to suggest that the Claimant would not be fully paid by the Defendants. The only "wrinkle" was the opportunity that came to the Defendant's attention in 2017 that they could be made all the whole with respect to the car as a result of Volkswagen Canada's buy-back program.

(88) In attempting to avail themselves of that program, the Defendants did no more than was reasonable. They required some documents. They didn't have them. They thought the Claimant would have them (and did have them). They asked the Claimant for the documents. The Claimant stalled and rendered the Defendants around.

(89) As a rash and ill-conceived self-help remedy, the Defendants determined that if they withheld their loan payments from the Claimant, it would turn to with the documents they required. Rather than do that however, the Claimant turned to with relatively aggressive collection attempts; which, whilst within the Claimant's own purview, were not likely and reasonably warranted in the circumstances.

(90) Nevertheless, the Defendants made every reasonable effort to accede the Claimant's requests for re-payment. The Defendants had the necessary funds. They were making numerous inquiries about when and how to remit them. The Claimant remained effectively mute in the face of these inquiries .

(91) Notwithstanding the Defendants' communications to the contrary, the Claimant determined that its recourse was to repossess the car. Once that had

occurred, on June 30th, 2017, the car effectively fell down a "black hole"; never, from the Defendants' perspective, to be seen again.

(92) At all of these times, the Defendant was working on perfecting the buy-back of the car by Volkswagen Canada. The Defendants were of the view that this buy-back by Volkswagen Canada would make them whole, or essentially so. These thoughts by the Defendants had been communicated by them to the Claimant. Whether the Claimant was unmoved or did not have the wherewithal to respond reasonably is immaterial. The Claimant owed correlative duties to the Defendant and failed in them.

(93) In the circumstances, the Claimant's claim is allowed, but only in part. The Defendants' pleaded set-off is also allowed.

(94) The Defendants will pay to the Claimant the sum of $2,106.01. The remainder of the Claimant's claim is dismissed, as is the Claimant's claim for pre-judgment interest.

(95) I will receive counsels' written submissions as to Costs if, in fact, any are sought. Those written submissions will be limited to five single-space pages each. They will be filed not later than June 21st, 2019.

_____

Gavin Giles, Q.C., Chief Adjudicator,
Small Claims Court of Nova Scotia

Solicitors:

For the Claimant: Burchells, LLP
For the Defendants: Power Leefe Ready Rafuse

Halifax, Nova Scotia
June 4th, 2019