

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA  
Cite as: City Motors Ltd. v. Shorten, 2005 NSSM 9

BETWEEN:

Name	City Motors Limited	Claimant
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Name	Kevin Lawrence Shorten & Lisa Anne Cook	Defendant
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D E C I S I O N

Appearances:

Kathy Scarfe and Stephen Scarfe on behalf of the Claimant;  
Kevin Shorten and Lisa Anne Cook on their own behalf.

1. This matter came on before me on May 10, 2005. I heard the evidence of Stephen Scarfe and Kathy Scarfe on behalf of the Claimant; and the evidence of Lisa Cook and Kevin Shorten on their own behalf.
2. What follows constitutes my findings of fact with respect to the contracts that were entered into between the Claimant and the Defendants. The findings of fact are based on my review of the documents filed, as well as the evidence given. Where there is any conflict between the evidence of the Defendants and that of the Claimant, I preferred the former. Neither Ms. Scarfe, nor Mr. Scarfe were part of the contractual negotiations that took place between the Claimant's salesman (David Marshall) and the Defendants.
3. In the summer of 2003 Mr. Shorten was looking for a car. He saw a car on the City Mazda lot, and on June 16, 2003, he spoke to Mr. Marshall about the car. He was interested in purchasing the car which was listed at \$9,995.00. It was a second hand Mazda 1999 Protégé.
4. Mr. Marshall told Mr. Shorten that Mr. Shorten would not be able to obtain financing to purchase the vehicle. He was not enough of a credit risk. Mr. Marshall went on to say that if Mr. Shorten could obtain the signature of his common law spouse, the defendant Lisa Cook, to the Agreement then the purchase could probably go through, because with the two names on the financing agreement, they could probably obtain the necessary financing to close the deal.
5. Mr. Shorten left and went to speak to Ms. Cook. He brought her back to the sales office on July 16th.
6. Ms. Cook told Mr. Marshall that she was uncertain about the deal because the purchase price (and in particular, the financing lease arrangement and the monthly payment) was "pretty steep for us". They tried to negotiate a lower price but Mr. Marshall refused. In any event, at that point Mr. Shorten and Ms. Cook indicated,

with some hesitation, that they were prepared to go ahead with the deal. A Bill of Sale in the name of Mr. Shorten and City Mazda was prepared on July 16, however it was not accepted on that day because a credit check still had to be performed. The Bill of Sale made that clear because on the place for signature there appeared the following wording:

"Vendors acceptance: This offer to purchase is not binding on the vendor unless signed by an authorized official of the vendor."

7. In other words, while this document was called a "Bill of Sale" by Mr. Scarfe, on its face it was really only an offer to purchase which became binding only upon acceptance by the vendor (i.e. City Mazda). The acceptance was not given on July 16<sup>th</sup> because it was still subject to the credit check of Mr. Shorten and Ms. Cook. On the same day Ms. Cook and Mr. Shorten filled out an application form for a credit check through the Royal Bank.
8. The understanding was that the credit check would be performed, and that once it was, the deal could go through.
9. Before Mr. Shorten and Ms. Cook left, however, Mr. Marshall requested a deposit of \$1,000.00. He told Mr. Shorten that someone else had been looking at the car, and that the only way he could hold the car pending the credit application was if he had a deposit. He told Mr. Shorten and Ms. Cook that if he had the deposit, he could tell the other person that was interested in the car that they had a buyer, and accordingly hold the person off.
10. On the strength of that representation, Mr. Shorten left a \$1,000.00 deposit with the Defendant.
11. Mr. Shorten and Ms. Cook then left the sales office.
12. On the way home, they discussed the offer to purchase. They started to think about it and the monthly payments and their ability to meet them. While they were on their way home, they learned of a private sale, and went to see the car. The car would have suited their purposes and was much less expensive than the one they had offered to purchase from City Mazda.
13. That evening Mr. Shorten called Mr. Marshall, told him about the private sale, and said that they wanted to buy that car instead. He asked for his money back. He told Mr. Marshall that they could not afford the car they had offered to purchase from City Mazda, and that they could not guarantee that they would be able to pay for it over the term of the proposed lease.
14. Mr. Marshall refused to return the money. He said that he would return it only in the event that the credit check was not approved.
15. Mr. Shorten argued with Mr. Marshall. Mr. Marshall got his manager to call Mr. Shorten. This person told Mr. Shorten that they would not give the \$1,000.00 back but they would give the \$500.00 back. In other words, they were going to keep \$500.00 in the event that Mr. Shorten backed out of the deal. Mr. Shorten was irate but he was fearful of losing the \$500.00. As Ms. Cook said in evidence, "\$500.00 to people who do not have a lot of money, is a lot of money".

16. Mr. Shorten accordingly felt that he had no choice but to proceed with the deal, because otherwise he would lose \$500.00.
17. The credit check went through on July 17<sup>th</sup>, and Mr. Shorten and Ms. Cook were called.
18. Mr. Shorten and Ms. Cook came in on July 18, 2003, to fill out the Financing Lease Agreement. The Agreement was with City Motors Limited. Mr. Scarfe indicated that City Motors Limited and City Mazda (the owner of the vehicle) were related companies, and to all intents and purposes, City Motors Limited was simply the financing wing of City Mazda.
19. The Financing Lease Agreement contains the following provision:

“18: Default. . .if you are in default, City Motors Limited may terminate this lease, take back the vehicle and sell it at a public or private sale. . .even if City Motors Limited takes the vehicle, you must still pay at once (a) the difference, if any, between the unpaid lease vehicle amount (item 16) and the net amount received by City Motors Limited at sale plus (b) all other amounts then due under this lease. . . .”
20. The financing lease called for an annual interest rate of 19.95%. The leased vehicle amount (i.e. the purchase price) was \$9,995.00, with a residual value at the end of the lease of \$1.00.
21. The defendants ended up making 15 monthly payments of \$376.17 on the lease. Mr. Shorten lost his employment, and fell behind. In addition, the car had to be taken off the road because of an extensive failure in its exhaust system at a point in time when he did not have the money to repair it. The vehicle was repossessed by the Defendant. It was put up for auction at Adesa, a wholesale auctioneer of vehicles. The high bid for the vehicle was \$3,300.00. City Mazda matched the highest wholesale bid, and took the vehicle back.
22. At the hearing Mr. Scarfe indicated that since City Mazda and City Motors Limited were to all intents and purposes the same, all that happened was that a bookkeeping entry showed City Mazda “paying” City Motors Limited \$3,300.00 for the vehicle.
23. Mr. Scarfe was not able to say what City Mazda had valued the car at. Nor was he able to say whether or not it had actually been sold by City Mazda. His impression was that it was still on the lot.
24. The Claimant, City Motors Limited (i.e. the lessor under the financing agreement) then advanced a claim totalling \$4,110.90 against the Defendants. The claim was for, in essence, the balance owing on the lease, minus the \$3,300.00 that had been “paid” by City Mazda for the vehicle after it had been repossessed and after it had been offered for sale by auction by Adesa.

Issues

25. On the evidence and documents before me, I was of the view that there were two issues in this claim:
- a. can City Motors Limited rely on the terms of the Leasing Agreement given the circumstances into which the original Purchase Agreement between its related company, City Mazda, and Mr. Shorten; and
  - b. if so, has City Motors Limited established its loss under clause 18 of the Lease Agreement.

Issue 1: Can City Motors rely on the City Mazda Purchase Agreement?

26. I am satisfied on the evidence that:
- a. when Mr. Shorten left the deposit of \$1,000.00 there was no Agreement of Purchase and Sale; all there was was an Offer to Purchase;
  - b. before City Mazda accepted the Offer to Purchase, Mr. Shorten was free at any time to withdraw his offer to purchase the vehicle;
  - c. accordingly, City Mazda was not entitled to refuse to permit Mr. Shorten to withdraw his offer to purchase; not was it entitled to hold the deposit pending a decision on its part to accept the offer;
  - d. that being the case, City Mazda's refusal to agree to return the deposit, prior to the credit check being performed, and accordingly prior to its acceptance of the offer was wrong;
  - e. \$500.00 was to Mr. Shorten and Ms. Cook, a "lot of money to someone who didn't have much money";
  - f. City Mazda knew that, inasmuch as it had already advised Mr. Shorten that he could not obtain financing on his own behalf, but required someone else to provide him with sufficient credit to permit the purchase to go ahead;
  - g. Mr. Shorten's eventual "agreement" to enter into the Agreement of Purchase and Sale, and Ms. Cook's agreement to the lease, was extracted under financial duress to the knowledge of both City Mazda and City Motors, and accordingly;
  - h. neither City Mazda nor City Motors can establish that there was, in fact, a willing agreement between a willing seller and a willing buyer.
27. If there was no true agreement, then the lease (and in particular, clause 18) is not effective to bind Mr. Shorten or Ms. Cook. In other words, I am of the view that the evidence establishes a defence of *non est factum*.

28. Even if I am wrong in this, and even if there was a legally binding financing lease agreement, in my view on the evidence and on the findings of fact as stated above, City Motors is estopped from insisting upon the terms of its lease agreement. City Motors “knew” that Mr. Shorten and Ms. Cook were unwilling to enter into the deal; knew that their finances were stretched by the deal; knew that there was a distinct possibility that they would not be able to honour the deal; and knew that it was extracting their agreement only by threatening to withhold the \$500.00 of the \$1,000.00 deposit.

Issue 2: Can City Motors Rely on Clause 18?

29. If am wrong with respect to issue 1, it is also my opinion that City Motors’ claim must fail, because it fails to establish the measure of its damage.
30. Clause 18 makes clear that the measure of City Motor’s damage under the lease is the difference between the outstanding lease and “the net amount received by City Motors Limited at sale”.
31. The difficulty here is that there has not in fact been a sale.
32. City Motors takes the position that there has been a sale, because it was exposed to public auction and received an arms-length offer of \$3,300.00. In my view, that is not sufficient to establish the true value of the car at sale. I say this because the fact that City Mazda “matched” the bid justifies an inference that City Mazda itself thought the car was worth more than \$3,300.00; and in particular, that it could obtain more than \$3,300.00 by way of a sale. There could be no other reason for City Mazda’s refusal to let the vehicle go to the arms-length purchase for \$3,300.00.
33. All we know then is that the vehicle was worth some amount **more than** \$3,300.00. Mr. Scarfe was not able to say what City Mazda had valued the car at; nor could he say what it was being offered for sale to the public at. The onus is on City Motors to establish its loss, and in particular the value of the car by way of sale. City Motors has failed to do that. City Motors has accordingly failed to establish its claim. It may be that when the vehicle is sold there may be some difference between the outstanding lease and the sale; on the other hand, there may be a surplus. I accordingly dismiss the claim.

Dated at Halifax  
this 18th day of May

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ADJUDICATOR  
W. Augustus Richardson

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Court File  
Claimant(s)  
Defendant(s)