

CLAIM NO. 183403  
Date: 20021031

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA  
Cite as: Burnett v. Autowheels in Motion Ltd., 2002 NSSM 7

BETWEEN:

Name: Brian Burnett & Janice Kelly CLAIMANT

Name: Graham Gaetz as Autowheels in Motion Ltd. DEFENDANT

### DECISION

**Revised Decision:** The text of the original decision has been revised to remove personal identifying information of the parties on August 22, 2007.

Appearances:

Brian Burnett and Janice Kelly, on their own behalf;  
Graham Gaetz, on behalf of Autowheels in Motion Ltd.

- [1] This matter came before me on September 24, 2002.
- [2] I heard the evidence of Brian Burnett on behalf of the Claimant; and the evidence of Mr. Gaetz and Chris Mitchell, a mechanic, on behalf of the Defendant, Autowheels in Motion Ltd.
- [3] This matter arises out of an agreement of purchase and sale between the Claimant Brian Burnett and the Defendant Autowheels in Motion Ltd. that was entered into on July 4, 2002. It was for the purchase by the Claimant of a 1990 Vista wagon.
- [4] The Claimant claims that the automobile was not fit for the purchase for which it was intended; was not merchantable; and that in all the circumstances the contract ought to have been rescinded and the purchase price of \$3750.00 (including HST) ought to be refunded to him.
- [5] The Defendant, on the other hand, maintains that the vehicle was a used vehicle; and that it was in any event subject to a used car warranty for thirty (30) days on the powertrain on a 50/50 basis when repairs were performed at the Defendant's premises. It also takes position that it had extended the warranty, and that all of the subsequent problems that the Claimant experienced with the vehicle ought to be under the warranty; and that the Claimant ought to have no further or other remedy.
- [6] Having heard the evidence of Mr. Burnett, which is recorded in a written statement that he prepared as part of his oral evidence (see Exhibit C-2), and having heard the evidence of

Chris Mitchell and the evidence and submissions of Mr. Gates, I am satisfied that the following facts occurred:

- a. Mr. Burnett purchased the vehicle on July 4, 2002, after test driving it around the neighbourhood, but without highway driving;
- b. He purchased the vehicle in large part in reliance upon the verbal representations made to him by the Defendant's sales staff and employees that the vehicle was in remarkable condition for its age ; and that such condition was evidenced by a mechanic, Chris Mitchell, who was held out to the Claimant as being independent;
- c. In fact, Mr. Mitchell was an independent mechanic in name only, in as much as he performed all of the mechanical and warranty work for the Defendant;
- d. The vehicle was not in road worthy condition, in as much as significant problems developed with the vehicle the day after the purchase on its first use on a highway;
- e. After ongoing problems with the vehicle, Mr. Burnett demanded his money back no later than July 12, 2002; but
- f. Mr. Burnett was put off from time to time by a number of representations and promises from both Mr. Mitchell and Mr. Gates that the problems would be corrected;
- g. The Defendant knew that the vehicle was not in exceptional condition at the time of sale to the Claimant, but was rather in a very problematic condition that required substantial work on its electrical, oil and clutch mechanisms; and
- h. Another mechanic has estimated the total cost of repairing the vehicle's transmission in the range of \$1,800 - \$2,600; see Exhibit C-3.

[7] I am satisfied that the July 4, 2002, contract was a "consumer sale" within the meaning of s. 26 (1) and s. 27 of the *Consumer Protection Act*, RSNS 1989, c.92, as amended. I am also satisfied that by reason of s. 26 (3) of the *Consumer Protection Act*, the contract contained the following implied conditions or warranties:

- i. That the car should be reasonably fit for the purpose of commuting (which purpose had been made known to the Defendant at the time of the purchase);
- ii. That it was a condition that the car be of merchantable quality; and
- iii. That it was a condition that the car "shall be durable for a reasonable period of time having no regard to the use to which it would normally be put and to all of these surrounding circumstances of the sale:" s.26 (3) of the *Act*.

[8] I am also satisfied that the verbal representations that were made to the Claimant prior to his entering into the agreement became express warranties, pursuant to the provisions of s.28 A (1) (A) and s. 28 A (2) of the *Act*.

[9] I am further satisfied that the Defendant fundamentally breached the above noted warranties and conditions. The vehicle was not on July 4, 2002, either fit for its intended

purpose; nor was it merchantable; and most particularly it was not “durable for a reasonable period of time” after the sale. Indeed, it did not endure beyond the first day of the transaction.

- [10] In these circumstances I am satisfied that the Claimant is entitled to rescission of the contract. This will require him to deliver the vehicle back to the Defendant.
- [11] It would appear from the evidence that the Claimant did have some use of the vehicle, and I would ordinarily have reduced the amount of recovery to allow for that use. However, it is clear on the evidence that the Claimant “purchased” that use only by means of additional repair costs that he had to incur in order to keep the vehicle operational.
- [12] On this basis I am satisfied that in these circumstances the Claimant ought to be entitled to a recovery of the full purchase price upon delivery of the vehicle to the Defendant.

Dated at Halifax  
this            day of  
October, 2002.

)  
)  
)  
)

\_\_\_\_\_  
ADJUDICATOR  
W. Augustus Richardson

Original  
Copy  
Copy

Court File  
Claimant(s)  
Defendant(s)