Claim No. SCT 268418
Date: 20061212

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Baxter v. MacLeod's Farm Machinery Ltd., 2006 NSSM 37

BETWEEN:

JOHN S. BAXTER

CLAIMANT

-and -

MACLEOD'S FARM MACHINERY LTD.

DEFENDANT

Adjudicator: David TR Parker
Heard: November 6, 2006
Decision: December 12,2006

Counsel: Charles Ellis for the Claimant and defendant by Counterclaim
Robert Pineo for the Defendant and Claimant by Counterclaim

DECISION and ORDER

This matter came before the Small Claims Court of Truro and Province of Nova Scotia on the 6th day of November, A.D. 2006.

The Claimant appeared and was represented by Counsel Charles Ellis.

The Defendant appeared and was represented by Counsel Robert H. Pineo.

This claim concerns a snowmobile purchased by the Claimant from the Defendant. The Claimant claims there has been a fundamental breach of contract and requests the full amount paid to the Defendant for the snowmobile and related items be returned.

The Defendant puts the Claimant to the strict proof of the Claim, pleads the Sales of Goods Act R.S.N.S. 1989, c. 408 and denies the claim in general, asks that it be dismissed and counterclaims for the unpaid balance on the purchase price of the machine and related items.

The Claimant ordered a snowmobile and related items from the Defendant. The snowmobile and

equipment came to $11,150.00 and the Claimant paid $500.00 and received a trade-in credit of $2,500.00 leaving $9,447.50 owing. The Claimant also purchased related items in the amount of $401.53. This also included tax on the various items. To date the Claimant has paid $5,019.03 leaving a balance of $4,830.00 which is the amount of the counterclaim.

Facts

The Claimant purchased a new Polaris FST Classic snowmobile and related items from the Defendant in December 2005. The total amount owing on the machine after trade in of $2,500.00 and a deposit of $500.00 was $9,447.50 as reflected on invoice #12350 dated December 30, 2005. The related items including tax came to $401.53.

The Claimant has paid $5,019.03 as reflected on a statement from the Defendant.

The Claimant took delivery of the snowmobile in mid December 2005, and used it for the first time in January 2006.

The first time the Claimant used the machine he encountered a problem. It would shift into neutral when the machine reached 40 km per hour.

A temporary repair was completed by the Defendant however the repair resulted in the machine not having available to it a reverse gear.

In March the belt on the snowmobile broke and shortly after it was replaced a day or so later the snowmobile broke down and would not operate as a wire shorted out.

The gas gauge was also not working on the snowmobile.

The Claimant also complained of the engine becoming hot.

The Claimant also complained about the poor mileage he was getting from the machine.

The machine is now with the Defendant and has been fixed.

The Claimant said he wanted a four stroke engine for reliability and fuel efficiency. He said he went to two other places that sold this type of machine to check it out. When the dealership was "pulled from them" he then went to the Defendant another dealer, to buy the machine.

The salesperson from the Defendant Company said the Claimant knew what he wanted when he came to the Defendant dealership. He said that he did not recall discussing mileage with the Defendant and would not guarantee mileage on any snowmobile he sold. He explained that four strokes had hotter engines that two stroke engines and that was a characteristic of four stroke engines.

Claimant's Position

The Claimant said he purchased a new model, it was the first and last year the manufacturer made that model. He was interested in the reliability of a four stroke engine and he was interested in mileage. He said each time he drove the machine he had a problem. He argues that as it broke down on at least three occasions and only 500 km having been put on the machine, the transmission being one of the problems, a light issue and gauge issue All of the above amounted to a fundamental breach which goes to the root of the contract.

Defendant's Position

The Defendant said that it did not make representations either on mileage or anything else. The Defendant claims the Claimant knew what he wanted when he came into the shop and he was intent on buying that machine model.

The Defendant said there was never a total failure of consideration. It was a snowmobile that had some annoyances at the onset, but these have been rectified.

Analysis

I am not convinced that the Defendant sales person gave a guarantee of mileage to the Claimant. The salesperson was experienced, knew the Claimant from past dealings and mileage guarantees according to him could not and would not be given. It also seems unlikely the Claimant would rely on any such guarantee when he knew it was a new model and he did research on it prior to buying it and provided no evidence that Polaris made any comment on mileage. On balance it is just as likely that he made known to the first two dealers his requirement on having good mileage, whatever that might have meant. There is insufficient evidence before me to show the Claimant relied on the Defendant's skill and judgment in this area of concern and that the snowmobile did not measure up to some undeterminable standard as it relates to mileage.

The Claimant pleaded there was a fundamental breach of contract. The suggestion was that every time the Claimant took the snowmobile out on a run there were problems. This along with an apparent defect in the transmission and gas gauge and hot turbo all add up to a fundamental breach of contract.

The case *New Brunswick Power Corp v. Westinghouse Canada* [2006] N.B.J. No. 471 discusses when a design defect(s) amount to a fundamental breach. That case refers to *Sperry Rand Canada Ltd. v. Thomas Equipment* [1982] 135 D.L.R. (3d) 197 and *Canso Chemicals Ltd. v. Canadian Westinghouse Co. Ltd.* (1974) 54 D.L.R. (3d) 517 as cases dealing with defects amounting to a fundamental breach. Justice Coffin in the Canso case suggests there are two tests in determining what constitutes a fundamental breach.

- para16 I turn first to a consideration of the vexatious question whether there was here a "fundamental breach" of the contract as found by the trial judge. The nature of a fundamental breach, or putting it another way, what constitutes such a breach, has been

considered by various authors and courts. The following appears at pages 566-7 of Cheshire and Fifoot's Law of Contract, 8th Edition:

- "... Of what nature, then must a breach be before it is to be called 'fundamental'? There are two alternative tests that may provide the answer. The Court may find the decisive element either in the importance that the parties would seem to have attached to the term which has been broken or to the seriousness of the consequences that have in fact resulted from the breach. We have already suggested that the former is the happier approach to the matter. Not only is it more convenient to the parties, since it enables them to predict whether the breach of a particular term will justify the discharge of the contract, but it represents the general practice of the Courts over many years."

- para17 Lord Reid in Suisse Atlantique etc. v. N.V. Rotterdamsche, etc., [1967] A.C. 361, said at p. 397:
  - "One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but what was likely to happen in future ..."
- para18 As to the meaning of "fundamental term" Lord Upjohn [*page 314] in the Suisse Atlantique case (supra) said at pp. 421-2:
  - "There was much discussion during the argument upon the phrases 'fundamental breach' and 'breach of a fundamental term' and I think it is true that in some of the cases these terms have been used interchangeably; but in fact they are quite different. I believe that all of your Lordships are agreed and, indeed, it has not seriously been disputed before us that there is no magic in the words 'fundamental breach'; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept that breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat it as continuing on foot in which case he can sue for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or have been broken."
- “para19 In Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd., [1970] 1 All E.R. 225, Widgery, L.J., in considering whether a particular

breach was fundamental gave as a test the following:

- "... the first step is to see whether an 'event' has occurred which has deprived the plaintiff of substantially the whole benefit which they were to obtain under the contract ... if the event which occurs as a result of the defendant's breach is an event which would have frustrated the contract had it occurred without the fault of either party, then the breach is a fundamental breach for the present purposes."
- “para20 Whether a breach is fundamental or not must, in the last analysis, be decided by reference to the contract and the circumstances in each particular case.

This snowmobile had a problem with its transmission and a few other minor problems which have been rectified by the dealer and do not amount to the snowmobile not performing as a snowmobile, further there is no evidence that the contract between the parties is anything different than what the Claimant ultimately received. The tests required to show a fundamental breach of contract have not been met

In order for there to be a total failure of consideration as is alleged the machine must be totally defective as is also alleged. There is no evidence that this is the case. For these reasons the Claimant shall not succeed in his claim. The Defendant and Claimant by counterclaim shall succeed and the Claimant shall pay the remaining amount due the Claimant which amount all parties agree is $4,830.00. I shall also award court costs in my order.

IT IS HEREBY ORDERED THAT the claim against the Defendant be dismissed with no order as to costs.

AND IT IS FURTHER ORDERED that the Claimant John S. Baxter pay the Defendant MacLeod's Farm Machinery Ltd the following sums:

$4,830.00
80.00 Court costs
$4,910.00

Dated at Truro, this day of December, 2006.

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David T.R. Parker
Small Claims Court Adjudicator