PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. No. 63810
S.C.C.H. No. 15740

IN THE COUNTY COURT
OF DISTRICT NUMBER ONE

Between:

CHEBUCTO FORD SALES LIMITED

Appellant

- and -

J. D. MACISAAC

Respondent

Cameron R. Anderson, Esq., Counsel for the Appellant.
J. D. MacIsaac, Q.C., appearing on his own behalf as Respondent.

1989, January 9th, Palmeter, C.J.C.C.:- This is an appeal by way of Stated Case from a decision of Daniel B. Morrison, Q.C., an Adjudicator of the Small Claims Court of Nova Scotia wherein he awarded the respondent claimant the sum of $2,908.93 together with costs of $25.00.

The appellant lists two grounds of appeal, namely, erroneous in point of law and a denial of natural justice. The facts as found by the learned adjudicator are set out in the Stated Case as follows:

> 1. The claimant, J. D. MacIsaac, resides at Halifax, in the County of Halifax.
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> 2. The defendant company, Chebucto Ford Sales Limited, has a place of business in the City of Dartmouth, and at all material times was engaged in the sale of new and used motor vehicles.
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> 3. In the month of May, 1985 the claimant attended at the defendant's place of business, and voiced the purpose of his visit to the defendant's Sales Manager.
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> 4. The Sales Manager, James (Jim) Connolly on learning that the claimant was interested in purchasing a new "pickup"

truck as a means of transportation in getting to and from his home and the cottage, directed the claimant to the "truck" manager's area, and accompanied the claimant to the Sales Manager's station and advised of the claimant's interest in purchasing a new pickup truck.

5. The claimant asserted to the sales person that he wanted a truck with long life, economical to operate and dependable - The claimant and the sales person viewed various models on display and the features of the models discussed - The claimant was the user of gasoline operated motor vehicles, and to this end his interest in buying a "pickup" truck was a vehicle operated by gasoline.

6. The claimant and the sales person engaged in a question and answer conversation relative to the merits of the various models viewed - The primary concern of the claimant relative to dependability, a long life free of major defects and economy was stressed by the claimant - These assertions of the claimant led to the mention of the word "diesel", and which brought a quick retort from the sales manager to the effect "now we are talking".

7. The claimant was not experienced in the operation of a diesel pickup truck, and queried the sales person as to its dependability and economy as compared to a gasoline operated vehicle - The purchase price for a "diesel" operated pickup truck was considerably higher, but the benefits in the long run outweighed the gasoline operated vehicle.

8. The claimant liked what he heard, and relying on the various assertions of the sales person decided that he would buy a 1985 Ford Ranger (diesel) pickup truck.

9. On July 12, 1985 the claimant purchased a 1985 Ford Ranger (diesel) pickup truck with "cap" at a cost of $13,687.10 (Provincial Tax included.) With the purchase the claimant received the basic warranty coverage.

10. The claimant was asked if he wished to purchase the "extended warranty program" and he replied that he was not interested in the program as he had the "Consumer Protection Act" as a warranty.

11. The claimant operated his 1985 Ford Ranger without any major problems during the period of July 12, 1985 to January 1, 1988 - During said period he had the Ford Ranger serviced in accordance with the "manual's" recommendations, and on December 1, 1987 the claimant took the 1985 Ford Ranger to the defendant's place of business for routine check, change of oil and filter.

12. On January 1, 1988 the claimant was operating his 1985 Ford Ranger Pickup, and was headed in the direction of Windsor, in the County of Hants. He noted that the vehicle was malfunctioning, and he pulled over to the side of the road. The motor would spin, but would not catch.

13. The claimant's Ford Ranger was towed to the Defendant's place of business with a request from the claimant to determine the cause of the "no start" - To do so it was necessary to disassemble the engine.

14. The findings of the mechanics associated with the disassembling of the engine revealed that the "cylinder head and camshaft" and parts and materials in connection therewith required replacement at a probable cost of Three Thousand Dollars ($3,000.00).

15. The claimant, upon learning of the findings of the Defendant's mechanics, voiced his concern to the Sales Manager and demanded that the named defendant repair the Ford Ranger at no cost to him.

16. The Sales Manager undertook to contact management of the defendant company as well as Ford Company of Canada representatives in the Atlantic area - A couple of weeks later the claimant was told that his "warranty" had expired, and any repairs effected on the 1985 Ford Ranger would be done at the expense of the claimant.

17. The claimant elected to have the repairs done at the named defendant's place of business for the following reasons:

(a) The claimant had an inoperative truck;
(b) The engine of the 1985 Ford Ranger was disassembled;
(c) The claimant had hopes that the defendant company would relent in its stance of hiding behind the expired warranty, and show goodwill.

18. The defendant company repaired the claimant's 1985 Ford Ranger, and made it roadworthy at a cost of $2,908.93 to the claimant - He paid the said amount under protest under date of February 2, 1988.

19. An examination of the defective parts removed from the disassembled engine was conducted by two technicians of Ford Motor Company. Their findings were to the effect that the inspection revealed a metal transfer between the bearing surface of the cylinder head and the camshaft. The technicians found that this would have caused the camshaft

to cease turning with the resultant engine stoppage, and it appeared to them that the camshaft gear drive pin sheared off - The probable cause as far as the technicians could determine was a lack of lubrication to the camshaft bearing surface. The technicians also noted that the camshaft showed wear on the lobes which is consistent with a lack of adequate lubrication.

20. A couple of months later the claimant was heading homeward, and noticed signs of engine heating - The claimant arranged to have the Ford Ranger towed to the Defendant's place of business - Repairs were effected to correct a "lube" problem at a cost of $154.00.

21. The claimant, unhappy with the stance taken by the named defendant company, commenced proceedings in Small Claims Court to recover the sum of $2,908.93 from the Defendant Company.

22. The defendant company did not file a Defence to the claim of the claimant, and the matter came on for hearing at Halifax on August 30, 1988.

23. The claimant appeared in person, and on his own behalf. He was supported by Gerald Mills, a former owner of transport vehicles and heavy machinery covering a period in excess of Thirty-Five (35) years.

24. At the request of the claimant Mr. Mills examined the camshaft and noted the burned out bearing - He attributed the burned out bearing to oil starvation.

25. Mr. Mills also pointed out that in his experience with motor vehicles covering a period of Thirty-Five (35) years it is unusual for a vehicle with mileage of 40,000 to break down from damage noted by him in his examination of the parts removed by the defendant company from the 1985 Ford Ranger Pickup Truck.

26. The defendant company appeared through Mr. Arthur MacDonald, Service Manager - He has been in the automotive repair business for a period of Twenty-Five (25) years - He inspected the parts taken from the disassembled engine, and in his opinion the parts were damaged through a lack of lubrication.

27. The claimant contended at the hearing that he did not get what he bargained for, namely, a motor vehicle envisaged in the Consumer Protection Act.

28. The claimant also contended that the 1985 Ford Ranger was not of merchantable quality and durable for a reasonable period of time.

29. The claimant further contended that he relied on the assertions and representations of the defendant's sales staff to the effect that the Ford Ranger (Diesel) would prove dependable, and economical to operate.

30. The defendant company contended that all motor vehicles have problems, and that if the claimant wished to protect himself from malfunctions occurring in his 1985 Ford Ranger he should have purchased the "extended warranty" protection plan.

31. I found and determined on a review of the evidence as a whole that the defendant company through its representatives and assertions led the claimant to believe that he was purchasing a "pickup" truck durable for its purposes, and for a reasonable period of time.

32. I further found and determined on the facts as adduced that the 1985 Ford Ranger was not abused or misused - It was used as a means of travelling from his cottage in the Windsor area and his home in the City of Halifax.

33. I also found that the 1985 Ford Ranger was not of "merchantable" quality, and in arriving at such finding I accepted the explanation of Mr. Gerald Mills that the damaged parts did not result from normal wear.

34. I determined and I so find, on the facts, that the claimant relied on the reliance given him that the Ford Ranger was suitable to be driven without major defects, and I inferred such reliance from the circumstances of the sale.

35. I allowed the claimant the sum of $2,908.93 together with costs in the sum of Twenty-Five ($25.00), and which said sum of $2,908.93 comprised the sum paid to the named defendant covering repairs effected to the 1985 Ford Ranger.

At the request of counsel for the appellant the learned adjudicator stated the following case for consideration by this court, namely:

1. Did I err in finding that the Consumer Protection Act R.S.N.S. 1967 applies to the claim of the claimant;

2. Did I err in finding that the 1985 Ford Ranger (Diesel) purchased by the claimant from the defendant was not of "merchantable" quality;

3. Did I err in finding that the claimant relied on the assertions of the Sales Manager to the effect that the 1985 Ford Ranger (Diesel) would last him for a reasonable period of time;

4. Did I err in finding that the sale of the 1985 Ford Ranger (Diesel) to the claimant was expected to operate like a motor vehicle, and that the defendant is liable to the claimant in contract for the loss incurred by the claimant.

Dealing first with the submission by the appellant as to denial of justice counsel states that the learned adjudicator failed to consider the defence filed by the appellant. A Defence was filed however the learned adjudicator in paragraph 22 of the Stated Case made the finding that the appellant had not filed a Defence. However, on questioning by this court counsel for the appellant indicated that all of the matters in the filed Defence had been placed before the learned adjudicator and had been argued at the time of the hearing. Under the circumstances I do not find the appellant was denied natural justice merely because the adjudicator stated no Defence was filed. All matters in the Defence were placed before the adjudicator at the hearing.

Dealing with the issues as outlined by the learned adjudicator. First of all did the adjudicator err in finding that the **Comsumer Protection Act** (the "Act") applies to the claim of the respondent. Section 20C(1) of the **Act** states as follows:

20C(1)

"In this Section and Section 20D 'consumer sale' means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale,

(a) to a purchaser for resale;

(b) to a purchaser whose purchase is in the course of carrying on business;

(c) to an association of individuals, a partnership or a corporation; or

(d) by a trustee in bankruptcy, a receiver, liquidator or a person acting under the order of a court."

There is no question that the appellant was engaged in the sale of new and used motor vehicles. The respondent purchased a motor vehicle. This is the "ordinary course of business" which is envisaged by the **Act.** There is no exemption for car dealers. The **Act** would definitely apply if the circumstances warrant and I would answer the first question in the negative.

Secondly, did the adjudicator err in finding that the motor vehicle purchased by the respondent from the appellant was not of "merchantable" quality. Section 20C(3)(h) of the of the **Consumer Protection Act** states:

> "Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:
>
> (h) a condition that the goods are of merchantable quality, except for such defects as are described:"

The question to be determined is what is "merchantable". In my opinion this definition is determined by the circumstances in each particular case.

I accept the definition of merchantable quality as accepted in the case of **Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association,** [1969] 2 A.C., 31, [1968] 2 ALL E.R. 444 (H.L.);

> "...the goods should be in such a state that a buyer, fully acquainted with the facts, and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them obtainable for such goods if in reasonable sound order and condition and without special terms."
>
> [**Australian Knitting Mills Ltd. v. Grant** (1933), 50 C.L.R. 387, at p. 413.]
>
> Ref: **Bristol Tramways Co., Ltd. v. Fiat Motors Ltd.,** [1910] 2 K.B. at p. 841.

Counsel for each party referred to **The Sale of Goods** (London: Pitman Publishing Limited, 1975, 5th Ed.) by P.S. Atiyah. At p. 91, Professor Atiyah is quoted:

> "It will be apparent that the concept of merchantability is an extremely flexible one, and this flexibility is in no way restricted by the new statutory definition. It does not seem to be going too far to say that, in effect, the concept merely requires the goods to be of the sort of quality reasonably to be expected having regard to all the circumstances of the case. The new definition, far from being, as definitions frequently are, a straight-jacket, turns out to be largely a non-definition; it delegates to the Court the task of deciding what is reasonable and the circumstances of each particular case, guided no doubt by general acceptance of what reasonableness requires in various classes of cases."

This concept of merchantability is I suggest quite flexible and must be defined by relationship to the circumstances of each particular case.

In the matter before me it is clear that the learned adjudicator accepted the evidence of the witness Mills for the respondent that the damaged parts did not result from normal wear and therefore concluded that the motor vehicle was not of "merchantable quality". There was evidence before the learned adjudicator upon which he could make this finding. I can find no error in his finding in this regard and I would therefore answer the second question in the Stated Case in the negative.

The third question is whether the respondent relied upon the assertions of the Sales Manager of the appellant that the motor vehicle would last for a reasonable period of time. Both parties agree that certain representations were made by the Sales Manager and that the appellant relied upon them. It is clear that the sales manager knew the purposes for which the respondent required the motor vehicle. The appellant argues that the vehicle performed properly for over two and one half years for some 72,000 kilometers and that this would constitute a "reasonable period of time";

> Section 20C(3)(j) of the **Act** states:
>
> "Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:
>
> (j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would

> normally be put and to all the surrounding circumstances of the sale."

The evidence is clear and the learned adjudicator so found that the respondent used the motor vehicle precisely in the manner described to the appellant and that the motor vehicle was serviced by the respondent in accordance with the manufacturers manual.

The appellant makes a great deal of the fact that the problem arose after the manufacturer's warrant period had elapsed and also that the respondent did not purchase the "extended warranty plan" which was offered. In my opinion there is no magic in either the basic warranty or the extended warranty plan. If the goods were in themselves not merchantable and durable for a reasonable period of time the seller does not get off the hook by reason of ending of warranty or failure to purchase an extended warranty plan.

Based on the facts as found by the learned adjudicator, 72,000 kilometers or two and one half years or both is not in my opinion a reasonable period of time having regard to the use to which the respondent was putting the motor vehicle. The respondent cites the case of **Murrant v. Cross Investments Limited**, 74 N.S.R. (2d), 419, where the plaintiff purchased a new yacht and after one year of operation the main mast broke. Tidman, J. on finding that the defendant supplied a defective mast and thereby committed a breach of s. 20C(3)(j) of the **Consumer Protection Act** said at p. 429

> "I find that the demasting was caused by an improperly constructed mast. It was not durable for a reasonable period of time having regard to the use to which the boat would normally be put. I can find nothing in the evidence to indicate that the boat's crew was responsible for the demasting. They were in my opinion using the boat in a way a boat would normally be used."

In the case before me the learned adjudicator found that the appellant had supplied a defective motor vehicle and thereby committed a breach of s. 20C(3)(j) of the **Act**. I find no error in this finding and I would answer question three in the negative.

The last question is whether the learned adjudicator erred in finding that the motor vehicle sold to the respondent was expected to operate like a motor vehicle and that the appellant was liable to the respondent in contract for the loss incurred. In my opinion the learned adjudicator did not err and correctly awarded the sum of $2,908.93 together with costs to the respondent.

In it's memorandum to this court the appellant states as follows:

> "As a policy consideration, the appellant asks this court to consider the ramifications of allowing the purchaser of a motor vehicle to return to the dealer two and one half years or 72,000 kilometers later to allege that a component defect in the vehicle requires repair in view of the warranty systems established in the motor vehicle retail industry and the accepted practice of offering extended warranties to consumers such as the claimant in this case."

I do not consider this submission to have any credibility whatsoever. The doctrines of "merchantability" and "reasonably durable for the purpose" are flexible and must be applied to the circumstances of each particular case. In this case they were applied and the appellant was found wanting. On other circumstances the same decision might not have been reached. The practice cf offering extended warranties in my opinion is not as "accepted" as the appellant would wish this court to believe, A purchaser is still protected under the **Consumer Protection Act**, notwithstanding any of these extended warranty plans offered by car dealers.

I have answered all questions posed by the learned adjudicator in the negative and I would accordingly dismiss the appeal. As the respondent acted as his own counsel I decline to award any costs.

A Judge of the County Court
of District Number One