2006 **SCP No. 259405**

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Scotia Recovery & Investigative Services Ltd. v. Gray, 2006 NSSM 49

BETWEEN:

SCOTIA RECOVERY & INVESTIGATIVE SERVICES LIMITED

CLAIMANT

-and-

WILLIAM GRAY AND CHERI GRAY

DEFENDANTS

DECISION

HEARD: At Pictou on January 24, April 26, May 25, June 7, and June 21, 2006

DECISION: September 5, 2006

COUNSEL: J. Gregory MacDonald, Q.C., for the Claimants

Hector MacIsaac, Esq., for the Defendants

This matter was scheduled for hearing on January 5, 2006. By agreement by both parties, the matter was adjourned to a special sitting as the claimant had informed the court he would be calling eight witnesses. This matter was set over to January 24, 2006.

Preliminary Matter:

On January 24, 2006, the claimant and the defendant appeared with all witnesses for both parties present. The claimant requested the matter be adjourned sine die. The claim filed was for $15,000, the monetary limit under the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, as amended. An Act to Amend Chapter 430 of the Revised Statutes 1989, was made pursuant to Bill No. 236 to increase the monetary jurisdiction of the Small Claims Court to $25,000.00. Proclamation had not yet been made as of January 24, 2006. The claimant submitted the damages that they were alleging the claimant suffered were approximately $20,000.00. The claimant submitted if the matter were adjourned until after the new monetary jurisdiction of $25,000 came into effect, they would be amending their pleadings to claim up to the maximum of $25,000.00.

The defendant objected to the matter being adjourned arguing the matter should proceed immediately, and to do otherwise would prejudice both parties.

The claim was filed on December 2, 2005, and the Defence was filed on January 5, 2006. While recognizing the purpose and objective of the Small Claims Court is to provide speedy and inexpensive trials, it must be accepted that this matter was before the Court in less then three weeks after a defence was filed. One must also recognize that when the Small Claims Court Act came into effect, the jurisdiction of the Court was $1,500.00. This claim was for $15,000.00,

with an amendment before the legislature to increase that limit to $25,000.00. This was therefore by no means a small claims that was before the Court.

I considered whether either party would be prejudiced from a short delay; the effect a delay would have on hearing evidence from any of the many witnesses that would be called and whether there would be an issue with disappearance or waste of any documentary evidence. I found there would be no prejudice to the parties and all evidence could be preserved and witnesses available for a later date. The adjournment was granted and the matter set over to April 12, 2006. The parties subsequently informed the Court they would be prepared to proceed on April 26, 2006.

BACKGROUND:

This case involves the purchase of a used 1993 flat-bed tow truck, sold by the defendant registered owner, Cheri Gray to the claimant on May 2, 2005, for $25,000.00. Both parties filed Pre-trial Briefs; however, the claimant's Pre-trial Brief was not received until June 19, 2006, after the parties had completed all evidence and rested their cases.

The various claims set out in the claimant's Statement of Claim for damages against the

defendants are based on:

a) **fundamental breach of contract**;

b) **breach of expressed and implied warranties** arising out of the *Sale of Goods Act*;

c) **misrepresentation** of the engine as a "new or rebuilt engine"

d) loss of profits

EVIDENCE:

Frank Boudreau was called by the claimant. He is service manager at Kenworth Nova Scotia, New Glasgow. He was qualified as an expert as a mechanic for class 7 and 8 trucks since 1990. He was asked by the claimant to view the 1993 Hino 4-cylinder truck before the claimant purchased it from the defendant on May 2, 2005.

Mr. Boudreau referred to the September 13, 2005, invoice, Exhibit 1, tab 15(a) that showed complete engine rebuild at a cost of $8,975.60 (counsel agreed this invoice should total $8,308.31). He stated he couldn't say why or how the piston rings broke. He was asked to describe the motor when it was broken down to be rebuilt and he stated it was "worn". When asked if it was as a result of abuse, he stated he "couldn't tell". On cross-examination, he stated the cause could be from "wear"; or over revving the engine when going down hills too fast, which can cause the rings to break resulting in a massive oil blow-by; or simply by poor

maintenance. He could not say what the cause was that resulted in the rings breaking.

The claimant's agent, John Lodge, sought out Frank Boudreau prior to the claimant purchasing the truck. Mr. Lodge asked Mr. Boudreau his opinion on whether the claimant should purchase the vehicle. Mr. Boudreau stated he told John Lodge not to buy it because it was too small for the purpose which the claimant wanted to use the vehicle and it was not build for long hauls. Mr. Boudreau stated it was a city truck designed and built for driving in the city. Mr. Boudreau stated he knew the claimant was in the repossession business and that the claimant wanted to haul repossessed vehicles on the flat bed.

Mr. Boudreau stated that the average lifespan of an engine for this type of vehicle was 400,000 km, however, that varies with usage. The vehicle's Certificate of Registration on May 2, 2005, showed 469,200 km. Mr. Boudreau stated that Kenworth Nova Scotia did not do the service work on this truck for the claimant, i.e., oil, filter, and grease.

Mr. Roy Cornett was qualified as an expert witness for the claimant. Mr. Cornett worked for Pictou County Diesel from 1990 until it was sold to Kenworth Nova Scotia. He now works for Kenworth Nova Scotia. Mr. Cornett was asked to explain the difference between a rebuilt "head" and a reconditioned "head". He stated a rebuilt head could be anything that you "take out of the vehicle and replace or repair, or, it could be one that you work on "in frame". When asked what a "rebuild" engine was he stated a "rebuilt" engine could mean different things. He stated it could be an engine with new rings and new bearings installed. When asked what "all rebuild

and ready to go meant", he stated it could mean many things.

Mr. Cornett was asked what a "new drop in engine" meant. He stated it could mean someone rebuilt the motor or it could mean someone bought an engine and dropped it in the truck. He acknowledged it could mean a new engine dropped in as well. When asked how long a rebuilt engine could last, he stated it depends because something else could go bad, such as a cam shaft or head gasket. He acknowledged an engine overhaul as being the same as a rebuilt engine.

Mr. Cornett carried out the work set out on the invoice dated September 13, 2005. He agreed with Mr. Boudreau that the sleeves and rod mains were worn but still had lots of wear in them; he agreed with Mr. Boudreau that starting off in second gear versus low would be hard on the engine. He stated the air filter was in bad shape, that it was there in the engine awhile and the wire mesh had rotted off, and it was corroding away. He stated that if the filter is not changed at property times, dirt and grime could get in the engine and cause wear on cylinder walls.

Vince MacDonald is a licensed mechanic specializing in auto electric. He has worked at his profession for last 30 years. He was qualified as an expert. He was sub-contracted by O'Farrell Chev Olds to fix a starter taken off the claimant's vehicle in November, 2005. He stated he did not write the words "brushes worn out and bearings worn" shown on the O'Farrell invoice. He said these parts were worn and they all have a service life. He stated they could wear from being abused; turned over too much; or trying to start with dead battery. If new or

fairly new, they could have life span of 200,000-250,000 km if everything else is okay, but there are a lot of variables. He stated if he was rebuilding a motor or reconditioning a motor, the starter would not be part of the motor itself.

Jack Farrell is service manager for O'Farrell Chev Olds. He recalled the claimant purchasing the truck in question. He was referred to the invoice dated November 3, 2005, setting out oil, filter, and fluid check. He was asked what the standard interval was for service. He stated it depended what the vehicle is used for and on how it is driven. The vehicle on this date showed 504,606 km. The only invoice that predates the November 3, 2005, invoice is one from June 2, 2005, and that invoice did not show any service for oil, filter, grease and fluids. He was asked if there were any other invoices and he stated he couldn't say. When the claimant purchased the vehicle it had approximately 470,000 km on it. Therefore, it appeared the claimant had driven the vehicle approximately 35,000 km before changing the oil. The evidence of Mr. Lodge and Mr. Hessian, his employee, was that the vehicle was on the road everyday picking up vehicles and towing them to their storage yard in New Glasgow.

George MacQuarrie was called and qualified as an expert for the claimant. He is an automobile technician with O'Farrell Chev Olds. He obtained his mechanic license in 1988 and has been employed with O'Farrell since. He recalled the claimant's truck being brought to O'Farrell's on June 2, 2005, and work being carried out on the clutch and brake cable. He couldn't remember what the clutch looked like and thought it needed adjustment. He could not

say how worn it was. He stated the service life for a clutch could be a day or 200,000 km. He also stated the rubber casing on the brake cable was cracked and wasn't sure why the whole brake assembly was replaced.

Mr. MacQuarrie was asked on direct examination what a "rebuilt engine" meant. He stated everyone has their own opinion. He stated if he were to rebuild an engine, he would want to know what the customer wanted. For example, he stated someone could put a main bearing in and say the motor was rebuilt. He stated if work was done on the clutch and nothing else, that's not a rebuilt engine, but if one did work on the transmission, engine and rear end then it would be rebuilt. He would not give a time frame as to when a clutch needs adjustment. He gave a number of reasons why a clutch needs replacement or adjustment, including riding the clutch; abusive use such as popping the clutch and pulling away in high gear and carrying or pulling too much weight too long.

Mr. Chennell is owner/operator of T & W. Auto Recycle. He recycles motor vehicles and sell used auto parts. Prior to 1991 he was in towing business. The defendant, William Gray, bought his towing business in 1991. He knew the defendant had purchased the truck in question from Metro Towing of Halifax and said the truck was not used in the defendant's towing business. He stated he thought it was sub-leased to Rusty Campbell who runs Tri-County towing, as a backup truck. He saw the truck in question at the time defendant purchased it from

Metro Towing. He stated the defendant did repairs on the truck. Mr. Chennell is not a mechanic, notwithstanding he was asked what a drop-in engine meant.

Rusty Campbell was called by the defendant. Mr. Campbell is the present owner/operator of Tri County Towing. He was familiar with the truck in question sold by Mr. Gray to Scotia Recovery Limited, and he drove it himself on a couple of occasions. He stated the motor worked perfect and the clutch worked perfect and he had no difficulties with it when he drove it.

Peter Fraser was called by the defendant and was under subpoena. Mr. Fraser is owner/operator of Emergency Vehicle Lighting and Wiring. He received a call in July, 2005, from Scotia Recovery Services regarding the back up lights not working on the truck and the signal light on one side not working. He found the cause to be a ground wire. He stated this was a common maintenance problem. He also installed a new light and converter that he stated had a manufacture's defect. He saw the truck on Mother's Day weekend in the evening near Kemptown traveling towards Truro with a vehicle on its flat bed. He stated he attempted to pass it going down a hill. He stated he reached 130 km/hr before he could get by the claimant's vehicle and stated it took approximately ½ km to pass the vehicle. He stated he saw the truck in question after it was purchased by Mr. Gray from Metro Towing and knows that Mr. Gray did work to it.

Mr. Gray owned Tri-County Auto Centre from August 1990 to 1995. He closed the business in 1995 and sold the tow trucks to Rusty Campbell, present owner of Tri-County Towing. After closing the business, he worked off and on with Rusty Campbell in his towing business. At the time he ran the towing business, he had a one-ton Chev with a boom and a three or four ton 1987 International. He operated an auto sales dealership from 1997 to September, 2003. In 2002, he saw the 1993 HINO with NRC deck truck in question advertised in the *Auto Trader*. The advertisement reads:

> "1993 Hino with NRC Deck; good working tow truck; new motor. Last year spent $12,000; very low km; needs work for MVI (body, brakes, spring pin) $9,500. . . ."

Mr. Gray stated he purchased the truck "As Is Where Is", which is noted at the bottom of the advertisement, Exhibit 15. He stated he put a little over $10,000 in repairs on it after purchasing it, , including spring pins and bushings; extensive body work; and deck repairs, all of which took approximately six months to do at his home property. He stated it worked fine after the repairs and he then put it up for sale. It was first listed for sale on or about December 10, 2003, for $32,500.00. He advertised it in *Auto Trader* a number of times and reduced the price to $28,500.00 and then to $26,000.00. He sold the truck to the claimant for $25,000.00 on May 2, 2005.

On cross-examination, he was asked what a "brand new engine" is. He stated it means not rebuild; everything is new; never been used before. He described a rebuilt engine as one that could have new pistons or rings or it could be anything that is rebuilt from parts taken from

another used engine and some new parts and some parts that are not replaced as they don't need to be replaced. He described a "new drop-in engine" as one that could be new or rebuilt. He stated it was something other than what came off the assembly line at the manufacturing plant. He acknowledged on cross-examination he was advertising a rebuilt engine.

FINDINGS OF FACT-

(a) **Rebuilt; Reconditioned; Drop-in Engine**

I have carefully reviewed and assessed all the evidence and I have concluded and it is my opinion the words "rebuilt"; "reconditioned: and "new drop in engine" have no clear meaning to those witnesses who gave evidence and who were qualified as experts in the auto mechanic field. The evidence supports the finding that it depends upon who you talk to, as to what these terms mean. What is clear, however, in my opinion, is that they do not mean a brand new engine that has no mileage on it or one that came from the manufacturer as a new engine as opposed to a reconditioned or rebuilt engine.

(b) **Misrepresentation as "new or rebuilt"**

Mr. Tony Hessian has been an employee of Scotia Recovery Services since November, 2004. His duties involve the recovery of vehicles repossessed by banks and other institutions. He drives the tow trucks that are used to transport repossessed vehicles to the holding compound at Scotia Recovery Services' lot and from the Scotia Recovery lot to Halifax County where some of the repossessed vehicles are sold by private auction.

Mr. Hessian previously worked for six months with Tri-County Towing. He also worked at Truro Toyota as a laborer preparing cars for the sales lot; changing tires, etc.; at Beaton Toyota of Halifax for approximately one year; at Ruggles Towing for 2 ½ -3 years driving a tow truck; and at Ace Towing for six to eight months, driving two trucks.

Mr. Hessian was involved in the purchase of the 1993 Hino one-ton from the defendant. Before this truck was purchased, Scotia Recovery was using a ¾ ton with a wheel lift. He was asked by John Lodge to look at the 1993 Hino one-ton owned by the defendant Gray, in April, 2005. Mr. Lodge stated Mr. Hessian had more experience than John Lodge with tow trucks and therefore he wanted Mr. Hessian to look at this truck and report back to Mr. Lodge. Mr. Hessian went to Mr. Gray's property and viewed the truck. He stated it appeared to be in good shape, and freshly painted. He opened the cab and looked at the engine. He slid the rails back on the deck bed and stated they worked okay. He told Mr. Gray that Scotia Recovery was going to use the

vehicle for transporting repossessed vehicles.. He stated Mr. Gray said he drove the truck on the highway and it worked okay. Mr. Hessian did not ask or take the vehicle for a test drive. He stated he told John Lodge it looked good, clean and had new tires.

The next time the vehicle was viewed was when he, Mr. Hessian and John Lodge went to Mr. Gray's property to look at the truck. He stated Mr. Gray said it was a rebuilt truck; the motor was new and he had no problem with it. Mr. Hessian stated he was concerned with vehicle being over weight when carrying a vehicle as it only had 16 inch tires. He contacted Vehicle Compliance, at the Registry of Motor Vehicles to see if they would come to the Scotia Recovery yard to look at the vehicle if Mr. Gray would bring the vehicle over to Scotia Recovery. He stated Mr. Gray declined to bring it over as there was no insurance on it, nor was it licensed.

Mr. Hessian acknowledged that the truck was used to haul two vehicles at a time, one on the deck and one towed behind and he had never been overweight.

After this second viewing, he and John Lodge discussed the vehicle purchase and they concluded it was what they needed and proceeded to buy it. Scotia Recovery then used the vehicle on a daily basis, picking up repossessed vehicles from Sydney, Amherst, Halifax and South Shore.

Mr. John Lodge is the owner/operator of Scotia Recovery Services. He is a civil process server; acts as a private investigator at times; acts as an agent for the various banks in reposing and transporting vehicles to a private auction in Halifax County, known as Adesa Group. He has operated Scotia Recovery for approximately 11 years. He also has a storage facility for vehicles and trailers and other equipment he has repossessed. He stores the reposed vehicles in this compound until they are resold. Mr. Lodge acts as agent for banks in selling repossessed vehicles from that location.

He had expressed an interest in the 1993 Hino owned by Gray, over approximately a year. He wanted a larger vehicle than his ¾ ton to increase revenue and productivity. The 1993 Hino one-ton would give him the option of hauling one vehicle on the steel platform, plus haul a second vehicle from the back.

Shortly after hiring Tony Hessian in November, 2004, he talked to Mr. Hessian about purchasing the 1993 Hino one-ton. Mr. Lodge first saw this truck on a car lot on Westville Road where he went to view it. He knew William Gray, the defendant, and said he knew Mr. Gray and his wife for about a year. He did not buy it at that time. He subsequently saw the vehicle advertised in the *Auto Trader* numerous times. He said the advertisement said it was "completely new and rebuild". Exhibit #1, is the advertisement appearing in the *Auto Trader*. The advertisement says "…, **truck looks and works like new. Must be seen, all rebuilt and ready to go. Price $26,500. Possible trades**…"(my emphasis). It is clear , in my opinion, that Mr. Lodge's recollection of the advertisement saying the truck was "completely new and rebuilt"

is incorrect.

Mr. Lodge stated when he looked at the truck it looked like it came out of a paint shop. He looked at the option of purchasing a new truck for $60,700.00 or buying a used truck. Shortly after hiring Tony Hessian in November, 2004, he talked to Mr. Hessian about the claimant purchasing the used 1993 Hino one-ton truck. Later he and Toney Hessian looked at the 1993 Hino one-ton truck at Mr. Gray's home property. He lifted up the hood and everything was clean and spotless. He told Mr. Gray he wanted something to transport vehicles he had reposed from various locations, to and from New Glasgow, Nova Scotia. He stated Mr. Gray trumped up the vehicle by saying it had a brand new drop in engine. He said he did not buy the vehicle at this time. He wanted to think about it. He talked to his wife. He stated he was talking to his wife in their yard a few days later when Mr. Gray drove by. Mr. Gray stopped and they talked about the car Mrs. Gray had previously purchased from Mr. Lodge as a repo in April, 2004. Mr. Gray wanted to know if Mr. Lodge was interested in the 1993 Hino truck. Mr. Lodge stated he told Mr. Gray he hadn't made a decision yet. He then stated Mr. Gray said it was a good truck with a new drop-in engine. Mr. Lodge stated his wife did not want him to buy the truck. It was Mr. Gray's evidence the purpose of this meeting was to talk about weight limitations as the result of a concern raised by Mr. Hessian.

Mr. Lodge's view was that he was getting a truck with a new engine at a price less than the cost of a new truck. He knew it was not a new truck. He stated he thought it had a new engine. He acknowledged that he purchased a vehicle with 469,000 km on it. He stated he

purchased it based on Mr. Gray and Mr. Campbell's statements that it was a good truck and based on what he saw. The asking price was $26,500.00. Mr. Lodge negotiated the price down to $25,000.00. He stated he made the cheque/draft out to Bill Gray and took it to his house. He stated he didn't know if he left it with Sherry, Mr. Gray's wife. Later than afternoon of May 2, 2005, he stated Mr. Gray passed him pieces of paper, Exhibit 1, Tab 7, and a receipt for $25,000.00 that states "Sold As Is Where Is Condition", signed by Sheri Gray, and dated May 2, 2005. Later in his testimony, Mr. Lodge stated that he was given the receipt at the same time as when the cheque was handed to Mr. Gray. His evidence on what took place when he went to Mr. Gray's property on May 2, 2005, to take delivery of the truck and pay the purchase price is different from the evidence of Mr. Gray.

Mr. Lodge stated the words "Sold As Is Where Is" were never mentioned and it was after he handed Mr. Gray the cheque that Mr. Gray gave him the receipt. He was asked if he read the receipt, Exhibit 1, Tab 7, after it was given to him and he stated he couldn't say for one hundred percent sure he did. On re-direct, he stated the receipt was in a file folder handed to him at the time he handed the cheque to Mr. Gray. When asked if he saw it in the file folder, he said he saw it. When asked by the Court to explain what he meant when he said the receipt was given to him after he gave the cheque to Mr. Gray, he responded by saying he handed the cheque to Mr. Gray and Mr. Gray handed him the receipt and a box containing items.

Mr. Lodge stated there was no discussion on the day he took possession of the vehicle about a new drop-in engine. He stated the vehicle was registered in Sheri Gray's name and that

was why she signed the receipt.

On cross-examination, Mr. Lodge was shown a Bill of Sale document used by the bank when selling vehicles from the claimants premises-i.e., vehicles repossessed and sold on behalf of banks by Scotia Recovery Services (see Exhibit 12). This document states, intra alia, the unit is sold in "As Is" condition. Mr. Lodge stated he uses this document on every sale and he discusses it and goes through it in detail with the purchaser, including the meaning of "As Is". He stated "As Is" means as it is purchased on the lot. He acknowledged he had no concerns about the receipt signed by Sheri Gray that had these words typed in bold print.

Mr. Lodge acknowledged he did not inform the defendant about any problems he was having with the truck until November, 2005, some six months after he purchased it. He had called Mr. Gray to ask if there was any warranty on the engine and was told it probably was up, in reference to any warranty that may have been on the engine when installed by Metro Towing before Mr. Gray purchased it.

Mr. Lodge was asked if he discussed the issue of a new drop-in engine with his wife. He stated his wife was present when Mr. Gray said, in his yard, the truck had a new engine.

Mrs. Lodge, the wife of John Lodge, was asked about a meeting that took place in their yard with Mr. Gray, John Lodge and herself being present. She agreed it took place approximately one year ago. She stated Mrs. Gray had purchased a vehicle a year earlier from

their yard (Scotia Recovery yard) and they talked about how she liked it.

Mrs. Lodge was asked if she had discussed her testimony or the issues regarding this truck with Mr. Lodge, her husband, before coming to Court and she said "no". I found this somewhat surprising as Mr. Lodge stated his wife did not want him to buy this vehicle. She stated she heard Mr. Gray say at this meeting before the truck was purchased from the defendant that the truck had a brand new drop-in engine in it and it was totally rebuilt. I did not find Mrs. Lodge's evidence creditable, either in regards to her discussing her evidence with her husband before coming to Court or her recollection of the discussions between Mr. Lodge and Mr. Gray the day Mr. Gray appeared at their yard, before Mr. Lodge decided to buy this truck.

Mr. William Gray, the defendant, stated he purchased the truck in question "As Is Where Is". It required a lot of work to pass inspection. He paid $9,100.00 for it on September 27, 2002. He registered it first for three months and again for three months and then put it up for sale. He acknowledged it was up for sale for some time due to limited market because of its towing capacity. He stated the claimant started expressing an interest in it in May, 2004, when he worked at Auston Auto Sales, on Westville Road. The next time he talked with John Lodge was in February/March, 2005. He stated he and Rusty Campbell were at Scotia Recovery when Mr. Lodge said Mr. Gray should sell him this truck. The next time they talked about this truck was when Mr. Lodge called him in April, 2005, asking more information about the truck.

Mr. Gray stated he spent a lot of time on repairing the vehicle after he bought it, including putting on rear wheel seals; exhaust and front end bushings. He stated he did not do any work on the motor.

Mr. Gray stated Tony Hessian came over to his property to look at the truck in the Spring of 2005. Mr. Gray started up the truck after connecting the battery. He asked Tony Hessian to look under the vehicle for any leaks. Mr. Hessian did and found none. He stated Mr. Hessian asked about the deck and what could be carried on it. He stated he told Mr. Hessian the engine was replaced when it had around the 400,000 km on it and was replaced with a complete drop-in engine. He stated he told Mr. Hessian that Metro Towing told him the original engine seized up and they put in a drop in engine. He told Mr. Hessian the vehicle now had 470,000 km on it.

A few days later, Mr. Lodge called Mr. Gray to say he and Mr. Hessian were coming over to look at the truck. The truck was taken out of his garage and started. Mr. Lodge was shown the hydraulics, the engine, the new fenders, etc. Mr. Lodge was then told things Mr. Gray did to rebuild the truck. Mr. Gray stated there was no discussion about what Mr. Lodge was going to haul but he did inform them that the truck could haul two vehicles, however, it was a four cylinder and not a V8.

He stated the next Saturday, he went down to Mr. lodge's house to discuss weight restrictions that had been raised by Mr. Hessian and that he couldn't let Tony Hessian take the vehicle over Mt. Thom as he had no license or insurance on the vehicle.

Mr. Gray denied he told Mr. Lodge at this meeting that the truck had a brand new drop in engine. He stated their conversation was about weight restrictions when hauling vehicles. The next day he sent an E-mail to Mr. Lodge on the weight issue. He stated it was not advisable to be hauling two vehicles at a time on a daily basis due to the size of the truck.

Two-three days later, he stated Mr. Lodge came over again, looked at the truck and asked what would be the best price for the truck. Mr. Gray said $25,500.00 and Mr. Lodge stated he would think about it. The next day, Mr. Lodge telephoned again and asked for best price. Mr. Gray said $25,000.00 and Mr. Lodge accepted that offer.

Mr. Gray stated in his evidence that there was no warranty given with the truck, only that it was what it is. On May 2, 2005, Mr. Gray stated he and Mr. Lodge went to Mr. Gray's garage where the truck was located. He stated there was a file folder with wiring diagram, permit and receipt for truck in it. He stated he told Mr. Lodge about the oil; filter number written on the inside of the file folder; the type of grease the truck needed; and type of oil for rear-end. He stated Mr. Lodge had not given him a cheque at this time. He stated he gave the receipt for $25,000.00 to Mr. Lodge and that he always reads any document to a purchaser and that has been his practice over the years. After reading the receipt to Mr. Lodge, he said Mr. Lodge stated, hopefully he doesn't have any trouble. He stated Mr. Lodge did not ask for any warranty and there was no discussions about a warranty. Mr. Lodge was shown the PTO and it was explained the truck was not easy to drive. He stated when Mr. Lodge pulled away, he noted Mr. Lodge had it in the wrong gear and when he tried to get it into first gear it made a noise.

Two weeks later, Mr. Lodge called to inquire about an oil filter and Mr. Lodge stated the truck was working great. Mr. Gray never heard from Mr. Lodge again until the Statement of Claim was served on him in November, 2005. Tony Hessian had called Mr. Gray to inform him the engine failed and Kenworth had rebuilt the engine. There was no other discussion of this fact.

Mr. Gray acknowledged on cross-examination that he was advertising the truck as a rebuilt engine. He stated he purchased it to fix up and resell. He thought it had 465,000 km on it when he purchased it and 469,000 when he sold it. He stated he had no motor problems with it during the time he owned it, and he did not work on the engine or the rear end. He stated he told Mr. Lodge what happened to original engine when the vehicle was still owned by Metro Towing, i.e., a hole had been found in oil pan and the engine seized up and the engine had to be rebuilt. He stated he did not say to Mr. Lodge there was a new drop in engine but he agreed it could have been a new engine or a new drop in engine. The advertisement that appeared in the *Auto Trader* on September 27, 2002, that was placed by Metro Towing when the truck was up for sale states: "new motor last year, spent $12,000…"

LAW AND DECISION:

1. **Fraudulent or Negligent Misrepresentations**:

It is alleged that some of the representations made by the defendant are untrue and were

either fraudulent or negligent.

I would interpret the representations in question to be as follows:

i) verbal statement of Mr. Gray that the truck had a new drop in engine or rebuilt engine;

ii) verbal statement of Mr. Gray that he had spent several thousand dollars on repairs after he purchased it from Metro Towing;

iii) the written advertisement appearing in the *Auto Trader* that stated the truck "…looks and works like new. Must be seen, all rebuilt and ready to go…"

With respect to the claimant, I do not find any of the forgoing representations to be misrepresentations, either fraudulent or negligent.

The general principles of this doctrine were recently referred to by Cromwell J.A. in **Barrett v. Reynolds et al** (1998), 170 N.S.R. (2d) 201, who referred to **Queen (D.J.) v. Cognos Inc**., [1993] 1 S.C.R., 87; 147 N.R. 169; 60 O.A.C. 1; 99 KLR (4th) 626:

> "In **Queen (D.J.) v. Cognos Inc**., [1993] 1 S.C.R. 87; 147 N.R. 169; 60 O.A.C. 1; 99 D.L.R. (4th) 626, at p. 110, Iacobucci, J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation: 1. there must be a duty of care based on a 'special relationship' between the representor and the representee; 2. the representation in question must be untrue, inaccurate or misleading; 3. the representor must have acted negligently in making the

misrepresentation; 4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and, 5. the reliance must have been detrimental to the representee in the sense that damages resulted."

Issue (i) & (iii)

In the present case, the claimant saw an advertisement in the *Auto Trader* that read: "…truck looks and works like new. Must be seen, all rebuilt and ready to go…" Mr. Lodge went to see the truck on at least three occasions before he bought it. He talked to Frank Boudreau, before he bought it, and was told it was a piece of junk. He sent his assistant Tony Hessian over to the defendant's property to inspect the truck as he had more experience with these trucks. He relied on Mr. Hessian's opinion the truck looked good and it would fulfill their needs. Mr. Lodge stated that when Mr. Gray dropped by Mr. Lodge's residence before the truck was purchased, Mr. Gray said it had a new engine or new drop in engine in it. Mr. Lodge did not state in his evidence he relied on this representation.

Mr. Lodge is in the business of repossessing and selling vehicles by private sale as an agent for the banks that he represents on the repossession. He is very familiar with the conditions of those vehicles and of those vehicles being sold "as is where is". Mr. Lodge knew at least on the day he consummated the purchase and before he took delivery that this vehicle was being sold "as is where is" and there were no warranties.

I found that the claimant knew he was buying a vehicle that was being sold with a rebuilt

engine and ready to go and that he knew he was not getting a new engine with all new parts from the manufacturer or a new vehicle. He mulled over the purchase for over six months before buying this truck and make inquiries about whether he should purchase it. He did not, in my opinion, rely on the representation of the defendant that it had a new drop in engine. I accept the claimant's evidence and Mr. Hessian's evidence that they were told the truck had a new engine or new drop-in engine. However, I find these words or statements were not misleading to the claimant and not relied on by the claimant. Mr. Lodge stated he purchased this vehicle because it was cheaper to buy this vehicle that had a rebuild or new drop-in engine than a new vehicle from the manufacturer which he stated would cost approximately $67,000.00. He was also not in my opinion induced by the defendant into purchasing the vehicle based on this statement.

The defendants, Gray, informed the claimant before he purchased the vehicle that he purchased it from Metro Towing and that they had to replace the engine as a result of dirt getting into the oil pan. Mr. Lodge knew this vehicle had it's engine replaced with a rebuilt or drop in engine in it and that this replacement engine had approximately 70,000 km on it since being installed or dropped in by Metro Towing. This information was volunteered to him by the defendant, months before he purchased it. If he had any doubts, he could have asked Mr. Gray further questions or contacted Metro Towing to inquire as to what type of engine they put in the vehicle.

I also find any innocent representation as to the drop in engine did not constitute misrepresentation. As noted earlier in this decision, a rebuilt engine, or a drop-in engine or a new

drop-in engine have different meanings to different people. Not one of the numerous witnesses called could say with any certainty what these words meant. It is clear however these words do not mean the engine is brand new in the sense that it consists of all new components; never used and manufactured by one of the car and truck manufacturers.

I found the claimant was not mislead with any statements made by the defendant or the advertisement that appeared in the *Auto Trader*. I find the claimant knew what he was buying at all times and was not misled and those statements made by the defendant were not untrue. The claimant had not satisfied it's burden that those statements were inaccurate, untrue or misleading.

With respect to the advertisement in the *Auto Trader*, as noted earlier in this decision, the terms rebuilt, reconditioned and drop-in engine or new drop-in engine, have different meaning to different persons, including the witness called by the claimant and qualified as "experts". The claimant knew he was buying at least a vehicle with a different engine in it and he knew the vehicle had extensive repairs to it and he knew the vehicle had 400,000 km on it with approximately 70,000 km on the engine that had been replaced. These representations were never fraudulent or negligent.

The claimant has been in the business of repossessing and selling used vehicles "As Is" for approximately eleven years. He knows the difference between a brand new engine and engine with numerous kilometers on it. He knew he was buying a used vehicle and he knew the engine had been replaced. I accept the defendant's evidence as to what he told the claimant

about this vehicle and the engine. The vehicle that the claimant purchased was no different from what the claimant thought it was getting or what it bargained for. A used vehicle with a replacement, "rebuilt" or "drop in" engine in it.

The claimant's action for misrepresentation is dismissed.

Issue (ii)

The defendant produced receipts for various repairs he carried out on the vehicle. He stated he did not carry out any repairs to the engine or drive train and there was no evidence by the claimant that the defendant made any representations regarding repairs to the engine or money he expended on the engine or drive train. It was obvious from the evidence that the defendant had taken a vehicle that required extensive body repairs and other minor repairs to make it ready for the roads, including new fenders, painting the entire cab, work on the deck, etc. I found there was no effort by the defendant to mislead the Court on the work he carried out and I find there was no misrepresentation with regards to the monies he spent on the truck before it was sold to the claimant.

SALE OF GOODS ACT:

The claimant relies upon the provisions of the **Sales of Goods Act**, R.S.N.S. 1986, c. 408 ("the Act") and in particular section 17, subsections (a) and (b) thereof. The section states as follows:

> **"Quality of fitness for particular purpose**
>
> 17 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
>
> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for sale of a specified article under its parent or other trade-name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

Under subsection (a) the goods must be reasonably fit for the purpose for which the goods are required and under subsection (b) the goods shall be of marketable quality.

The onus is on the claimant to establish, on a balance of probabilities upon a preponderance of evidence.

Under s. 17(1) (a) of the **Act** it must prove:

> (a) it made known to the defendant the purpose for which the goods were required;
>
> (b) it relied on the defendant's skill or judgment;
>
> (c) the goods are of a description it is in course of the defendant's business to supply; and
>
> (d) the goods were not fit for the purpose for which they were required.

And under s. 17(b) of the **Act** it must prove:

> (a) the goods were bought by description;
>
> (b) from a seller who deals in goods of that description; and
>
> (c) the goods were not of merchantable quality.

In my opinion, **the Sale of Goods Act**, supra, s. 17(a) and (b) does not apply in this case as the defendant was not carrying on business as a car dealer and was not a "seller" who deals in goods of that description. The defendant ceased to carry on a business as a car dealership in

September, 2003. He sold the Hino truck to the claimant in May, 2005, from his residential home and had been trying to sell this vehicle from his home for approximately one and one-half years. He had surrendered his dealership license in 2003 and at the time of this sale in May, 2005, was working part time with Rusty Campbell.

Notwithstanding my finding that the defendant was not a "seller" as defined by the **Act** or carrying on business or dealing in goods of that description, and therefore the **Act** does not apply, I would also have found that s. 17(a) and (b) do not apply as, in my opinion, based on the evidence before me, the claimant did not rely on the defendant's skill or judgment. The claimant stated he informed the defendant the purpose of buying a larger truck than the three-quarter ton truck had been using as a tow truck. The claimant wanted to haul a vehicle on top of the flat bed as well as haul a vehicle behind the truck. The defendant stated he acknowledged that this Hino one ton could be used for that purpose. The claimant stated that while he had numerous repairs to the vehicle over the course of a year, he stated the vehicle now works fine for its intended purpose after having the repairs to the engine made by Kenworth Nova Scotia in September, 2005. The vehicle was in my opinion fit for the purpose for which the claimant required. Further, as noted earlier, the claimant was not relying on the defendant's skill and judgment. He relied on the opinions given to him by Mr. Hessian. He ignored the opinions of Mr. Boudreau and C. Lodge, his wife, who both told him not to buy it.

FUNDAMENTAL BREACH

The claimant submits that due to the following repairs carried out on the vehicle between May 2, 2005, and March 8, 2006, there was a fundamental breach of the contract and damages have arisen from that breach:

- June 2, 2005-- clutch and brake cable repaired or replaced
- July 18, 2005-hydraulic cylinder greased
- July 8, 2005-short in light on deck of truck
- July 28, 2005-replace motor mount
- September 13, 2005-rebuild engine
- November 3, 2005-oil change and filter
- November 17, 2005-starter rebuilt
- January 19, 2006-rear axle repaired
- March 8, 2006-replace spring pins and bushings

Pace, J.A., in **Keefe v. Fort** (1978, 27 N.S.R. (2d) 353 (C.A.) canvassed the law on

fundamental breach. The plaintiff purchased a used car after thoroughly inspecting it and test-driving it. Subsequently, the plaintiff discovered that the car needed a new engine. Pace, J.A. referred to **Canso Chemicals Ltd. v. Canadian Westinghouse Company Ltd.**, where MacKeigan, C.J.N.S., at pp. 344-45 said:

> --whether in consequence of (the breach) the performance of the contact became something totally different from that which the contract contemplated"-Lord Dilhorne in **Suisse Atlantique** supra at p. 393.

> --a situation fundamentally different from anything which the parties could as reasonable men have contemplated…: Lord Reid in **Suisse Atlantique**, at p. 397.

> --a breach which goes to the root of the contract"-Idem p. 399.

> --when there is such a congeries of defects as destroy the workable character of the machine: **Pollock & Co. v. Macrae** [1922] S.C. (H.L.) 192 at p. 200.

- -destroying the whole contractual substratum" Lord Wilberforce in **Suisse Atlantique** at p. 443;

> --totally different performance of the contract from that intended by the parties" and which will "undermine the whole contract"-sellers, L.J. in **Hong Kong Fir Shipping Co.**

Limited v. Kawaski Kisen Kaisha Ltd. [1962] 1 All E.R. 474 (C.A.) at p. 479.

- -an "event"…which has deprived the plaintiffs of substantially the whole benefit which they were to obtain under the contract"-Widgery L.J. in **Harbutt's Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd.** [1970] 1 All E.R. 225 at p. 239.

In **Keefe v Fort** there were no exclusionary clauses. The trail judge stated:

> "The contract in my view at the time was that the buyer was purchasing a used vehicle and the seller was selling a used vehicle, and that there was no fundamental breach and that the doctrine of caveat emptor applies…"

Pace, J.A. added:

"…in my opinion, the doctrine of fundamental breach was never intended to be applied to situations where the parties have received substantially what they had bargained for."

In **Peters v. Parkway Mercury Sales Ltd.** (1975), 10 N.B.R. (2d) 703, 58 DLR (3d) 128, Hughes, C.J. N B said at pp. 134-135:

> "…persons who purchase used cars, especially older models with substantial mileage, must expect defects in such cars will come to light at any time."

In the present case, with the exception of the repair work carried out on September 13, 2005, when the motor was rebuilt and January 19, 2006, when the rear axle assembly required repair, the repairs were in my opinion nothing more than what one would expect with a used vehicle with 470,000 km on it.

The evidence of Frank Boudreau was that Mr. Hessian should have recognized and been aware of the bearing in the back wheel that was over heating and should have seen the smoke emanating therefrom and stopped the vehicle before the rear axle assembly was destroyed. I accept Mr. Boudreau's evidence and found Mr. Hessian was negligent in driving the vehicle until it no longer would move under its own power.

It is unfortunate that the engine had to be rebuilt a little more than four months after the vehicle was purchased. The evidence of Mr. Tony Hessian was that he was responsible for greasing the vehicle and Mr. Lodge was responsible for changing the oil and service work. Mr.

Hessian greased what he thought were the items that needed grease. He had no training or experience in greasing trucks. Between May 2, 2005, and March 8, 2006, there was evidence that Mr. Lodge called the defendant within approximately two weeks after he purchased the vehicle to inquire what type of oil to put in the vehicle. On August 5, 2005, four liters of oil were put in the engine at Kenworth Nova Scotia and on November 3, 2005, the engine oil was changed at O'Farrell Chev Olds. The claimant couldn't say if the oil was changed at any other times. Mr. Boudreau stated the regular service work such as oil and grease changes was not done through Kenworth Nova Scotia. Parts such as bushings and shackles, Exhibit 4, appeared to lack proper greasing, as noted by Mr. Boudreau. The defendant, Mr. Gray, stated he was surprised when he was told by Mr. Hessian the engine had to be rebuilt as result of an oil blow back. All of these facts and evidence made it difficult to draw any conclusions as to why the engine blow back occurred. Although the vehicle was in poorer condition in some respects than either party probably knew, I am of the opinion the defects did not amount to "such a congeries of defects as to destroy the workable character of the machine."

Lord Denning, M.R. in **Bartlett v. Sidney Marcus Ltd.** [1965] 1 All E.R. 753, at p. 755 said:

> ". . . A second hand car is "reasonably fit for the purpose" if it is roadworthy condition fit to be driven along the road in safety, even though not as perfect as a new car.
>
> Applying these tests here, the car was far from perfect. It required a good deal of work to be done on it; but so do many second hand cars. A buyer should realize that, when he buys a second hand car, defects may appear sooner or later; and in the absence of an expressed warranty has no redress…"

The claimant in it's Brief referred to the case of **Baggell's Launderers and Cleaners Ltd. v. Eastern Automobile Co. et al** (1991) 111 N.S.R. (2d) 51. This case is distinguishable from the case at bar as it deals with the purchase of a new vehicle and maintenance was not an issue. Goodfellow, J. also refers to the comments of MacKeigan, C.J. in **Canso Chemicals Ltd. v. Canadian Westinghouse Co. Ltd.**, supra, in reference to what constitutes a "fundamental breach", which I have referred to earlier in this decision and adopt.

I have carefully considered all of the evidence and the case law and find that while the repairs to this second-hand vehicle with 470,000 km on it when purchased, were many, they did not amount to a fundamental breach, going to the root of the contract. Mr. Lodge contracted for a used 1993 four cylinder truck with steel deck, and he received a used truck with a rebuilt or drop-in engine installed by a previous owner, Metro Towing. He knew what he had bargained for and accepted that bargain. Interestingly, he never contacted the defendant at any time after he purchased it on May 2, 2005, until he started an action in November, 2005, and had the documents served on the defendant. One would have thought if he had a complaint or concern with any defect or repairs, he would have contacted the defendant immediately to discuss these issues. Instead, he remained silent for approximately six months and carried out repairs without informing the defendant.

This is a civil case and the plaintiff is bound by the civil burden of proof. I find he has not proven on a balance of probabilities that there was a fundamental breach and therefore his claim is dismissed on this ground.

AS IS WHERE IS

Although I find it unnecessary to deal with the defendant's claim that the vehicle was sold "As Is Where Is." I feel compelled to set out my findings, in any event, on this issue.

The receipt, Exhibit #1, Tab 7, states:

> "Received from Scotia Recovery (John Lodge) the sum of $25,000 for one 1993 Hino FB vin #JHBFB1531P1310714 complete with 18 foot NRC tilt load deck and wheel lift.
>
> "SOLD AS IS WHERE IS CONDITION"
>
> Signed: Cheri Gray

The defendant, Mr. Gray, stated the receipt was given to John Lodge when Mr. Lodge came to Mr. Gray's residence to pick up the truck and deliver the cheque in the amount of $25,000.00, on May 2, 2005. He stated he handed the receipt to Mr. Lodge before he received the cheque from Mr. Lodge. He stated Mr. Lodge read the receipt at that time and that it was his practice to always read the receipt to a purchaser. He developed this practice as a car dealer. The claimant stated first the cheque was given to Mr. Gray and then Mr. Gray gave him the receipt. Later in his testimony, he stated he could have gotten the receipt first. It is not important whether Mr. Lodge got the receipt before or after he handed the cheque to Mr. Gray. What is relevant is that immediately upon receiving the receipt, either before or at the same time the cheque was

delivered, while at Mr. Gray's residence, and before he took delivery of the vehicle, he read the receipt and knew it contained the words "As Is Where Is".

Mr. Lodge stated he uses a Bill of Sale document exactly as that which he used when selling a vehicle to Sheri Gray on April 28, 2004, every time he sells a vehicle which he repossess for one of the banks and then resells by private sale as the bank's agent. On the Bill of Sale it states under the heading "Purchaser Acknowledges the Following":

"-the unit is sold in "AS IS" condition;
-no warranty is given or implied on the unit…"

Mr. Lodge acknowledged that he reads all the clauses on the Bill of Sale to the purchaser and he fully understands the meaning of the words "AS IS" condition.

There is no doubt in my mind and I find as a fact, Mr. Lodge knew he was purchasing the truck "As Is Where Is" and there were no warranties with the sale.

The doctrine of "caveat emptor" plays a part where the Act does not come into effect and where there has not been a fraudulent or negligent misrepresentation or where fundamental breach has not been proven.

In this case, the claimant chose to purchase a used vehicle with the condition "As Is

Where Is." He made that decision based on his physical inspection and upon the opinion of his assistant Tony Hessian. He chose not to have the vehicle inspected or test driven and if the vehicle was not up to his expectations then he must accept what he got. He chose to take the vehicle knowing it was "As Is Where Is." The doctrine of *caveat emptor* applies.

I will accordingly dismiss the action of the claimant. There will be no costs.

Dated at Pictou, Nova Scotia this 5th , day of September, 2006

Issued at Pictou, Nova Scotia this , day of , 2006.

Ray E. O'Blenis
Adjudicator