Claim No: 379465

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Randolph v. Tibbs, 2012 NSSM 19

BETWEEN:

ANDREA RANDOLPH

Claimant

- and -

LINDO TIBBS

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 12, 2012

Decision rendered on June 25, 2012

APPEARANCES

For the Claimant Self-represented

For the Defendant Self-represented

BY THE COURT:

[1] The Claimant in this case is suing the Defendant for the sum of $2,959.47, which is the amount that she claims to have spent (or will need to spend) repairing the used car which she had purchased from the Defendant not even two weeks previously.

[2] I note at the outset that the Claimant sued Lindo Tibbs personally in this matter, notwithstanding that the bill of sale for the purchase of the vehicle was between herself and a company known as Lindo Tibbs Auto Sales Limited. In recognition of the fact that the Claimant is obviously inexperienced in legal matters, I will treat the name of the Defendant “Lindo Tibbs” as a misnomer. I am satisfied that there is no prejudice to the company or to Mr. Tibbs personally if the claim is amended to reflect the fact that the proper Defendant is the limited company. The style of cause will be amended accordingly.

[3] The car was purchased on January 17, 2012. It was a 2005 Ford Focus, with more than 97,000 km on the odometer. The purchase price was $5,000.00, tax included, which was broken down on the invoice to be $4,347.83 plus HST.

[4] The Claimant and her mother both testified that they were shopping for this vehicle, and took a test drive with Mr. Tibbs in the backseat. They seemed to be somewhat offended by the fact that Mr. Tibbs had not allowed them to drive the vehicle off the lot by themselves. Mr. Tibbs explained that it is his practice, whenever possible, to accompany customers on a test drive so that he can answer any questions that they may have about the vehicle. I believe it is common experience that many car salesmen do make a practice of going along

on test drives, and (for what is worth) I find there to be nothing suspicious or out of the ordinary in the fact that Mr. Tibbs did so in this case.

[5] The vehicle in question was a standard transmission. The Claimant, by her own admission, had not driven a standard for several years and she needed to become familiar with shifting gears again.

[6] The Claimant testified that she felt that she was getting a reliable vehicle. I will say more later on about the Defendant's practices when selling vehicles.

[7] The Claimant says that it was on January 29, 2012 that the problem with the car first surfaced. She tried to start the car, but the clutch would not engage. In other words, the car was simply not drivable. She testified that she called Mr. Tibbs on his cell phone that very day to find out what he was prepared to do to help her. Her evidence was that he said that because she had not purchased any form of warranty, that there was nothing that he was prepared to do. Accordingly, the Claimant said that she had the vehicle towed to a garage where work was done and other problems diagnosed over the next few weeks.

[8] Mr. Tibbs has a different recollection. He says that he received no such call on January 29, and that had he received a call about the vehicle he would have directed the Claimant to take the vehicle to Major Discount, which is the garage that does all of his repair and diagnostic work, to determine the source of the problem. He would have done this without necessarily taking responsibility for the repairs. He also noted that January 29, 2012, was a Sunday. Had the Claimant called his office, the call would have been automatically forwarded to his cell phone, and it would have been indistinguishable from a call directly to his cell phone. He produced as evidence his cell phone bill from Telus Mobility for

the period from January 13th all the way to February 24th. This particular cell phone carrier is in the practice of listing every single call either originating on someone's cell phone or being received by that cell phone. As such, it should be a fairly accurate indicator of calls being made and received. In fact, there are several calls from the Claimant's cell phone on January 17, which was the day that she was purchasing the vehicle. However, for January 29 there is not a single call which could plausibly be said to have originated from the Claimant. Just in case she was mistaken by a day or two, all of the calls from January 27 to 31 have been looked at, and there is not a single call from either of the two numbers that the Claimant says she might have called from, namely her landline or her cell phone.

[9] The significance of this is that Mr. Tibbs insists that he should not be held responsible, quite apart from any other issues, when he was not given an opportunity to inspect the problem before the Claimant went ahead and had other mechanics perform work on it. The other significance is that this discrepancy casts some real doubt on the Claimant's credibility.

[10] My impression of the Claimant is that she is a well-meaning woman, and that she is legitimately upset with the fact that her vehicle has not performed as she had hoped. However, the evidence before me strongly indicates that she made no such call to Mr. Tibbs on the day that the vehicle broke down. There is no reasonable explanation for why a call would not show up on Mr. Tibbs's bill. From a credibility point of view, Mr. Tibbs presented himself in an entirely straightforward manner with absolutely no credibility issues as far as I am concerned. I can only speculate as to why the Claimant might not be telling the truth about having called Mr. Tibbs.

[11] I also accept that Mr. Tibbs would not likely have simply brushed off the Claimant. Whether he would ultimately have taken full responsibility for the vehicle is another question, but I accept that his approach would have been to investigate the problem further, had he known about it. He testified, and it had the ring of truth about it, that the very first notion that he had about the problems with the car was when he was served personally with the Small Claims form. That did not happen until March 6. By then, the matter was scheduled for a hearing and the car had already been worked on by another garage.

[12] This is only one of several problems that the Claimant has with her case. All of the issues that surfaced with this vehicle concerned the clutch and transmission. I heard evidence from her mechanic, as well as two knowledgeable people called by Mr. Tibbs. All of them agreed that a standard transmission and clutch are items that can fail in a very short period of time. This is because they are very susceptible to poor driving habits. It is not unheard of for a clutch to fail in a matter of mere days when subjected to improper driver habits. The same is true of a manual transmission generally.

[13] The two witnesses called by Mr. Tibbs were a mechanic employed by, and the owner of Major Discount, which is a fairly large service facility. The testimony was to the effect that Mr. Tibbs brings all of his vehicles to Major Discount prior to putting them up for sale. This includes vehicles that he purchases at auction, as well as trade-ins. This vehicle happened to have been a trade-in. The testimony was that the vehicle is given more than the perfunctory inspection that often takes place in order to obtain a motor vehicle inspection sticker. Mr. Tibbs insists that his vehicles be test driven, and if there are any serious problems he either has them repaired or he returns the vehicle to auction where it will be sold on a “as is where is” basis.

Is there a warranty?

[14] An obvious threshold question is whether this vehicle was sold with any form of warranty, express or implied. The invoice dated January 17, 2012 says very little. There is a box where, if checked, it could be stipulated that the vehicle was being sold on an “as is, where is” basis. That box is not checked in this case. On the calculation of the purchase price, there is a line item for warranty, which is blank in this case but suggests that the option of purchasing some form of extended warranty has been extended but not taken up. Unlike other bills of sale that I have seen there is no language excluding express or implied warranties.

[15] The extent, if any, of the obligations of a vendor of used cars has been a thorny issue for courts everywhere. There are cases that appear to apply the principle of *caveat emptor* (buyer beware) with great strictness, while other courts have been more forgiving and allowed relief in favour of consumers. Cases in other provinces are of limited value without looking closely at their statutory framework. In Nova Scotia, there is an implied warranty in relation to consumer goods or services provided for under the *Consumer Protection Act* of Nova Scotia. That Act is specifically addressed to professional sellers of goods, like the Defendant. This distinction is important, as it places legal responsibilities upon dealers that are not placed on private sellers. The Act begins by stating:

> 2 (n) "seller" means a person who is in the business of selling goods or services to buyers and includes his agent, but does not include a person or class of persons to whom this Act is by the regulations declared not to apply;

[16] It goes on to provide the following:

Implied conditions or warranties

26 (1) In this Section and Section 27, "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 .....

(2) In this Section and Section 27, "purchaser" means a person who buys or agrees to buy goods or services.

(3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

.....

(f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

.....

(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.

.....

28 (1) Any written term or acknowledgment, whether part of a contract of sale or not, that purports to negative or vary any of the conditions or warranties set out in this Act or states that the provisions of this Act or the regulations do not apply or that a benefit or remedy under this Act or the regulations is not available, or that in any way limits or abrogates, or in effect limits, modifies, or abrogates, a benefit or remedy under this Act or the regulations, or that in any way limits, modifies or abrogates any liability of the seller including any limitation, modification or abrogation of damages for breach of any of the conditions or warranties set out in this Act or the regulations, is void.

[17] What this all means is that a professional seller implicitly warrants that consumer goods are “merchantable” and free of any hidden defects, and “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.” It also means that any effort to exclude or limit the seller’s responsibility under these sections is void. In other words, the seller warrants that the goods will be merchantable and durable, and nothing in the contract of sale nor the manufacturer’s warranty limits or necessarily delineates that responsibility. As already noted, there is no effort in the invoice to exclude the warranty, and as such I do not need to consider whether such an exclusion would be void under the act.

[18] There is no question that this Act applies to the sale of motor vehicles, as well as other manufactured goods, which fact may surprise some sellers who believe erroneously that the existence of a manufacturer’s warranty excuses them from any direct responsibility for what they sell. In the case of *Ron MacGillivray Chev Geo Olds Ltd. v. Munroe* (1994) 134 N.S.R. (2d) 186, the Supreme Court of Nova Scotia heard an appeal from a Small Claims Adjudicator who had held a car dealership responsible for the cost of repairing some defects in a vehicle that manifested after the manufacturer’s warranty had expired. The Supreme Court dismissed the appeal and approved of the reasoning of the Adjudicator that had applied the provisions of the *Consumer Protection Act.*

[19] All of this begs what is perhaps the bigger question, namely how far does the warranty extend? What kind of promise is actually being made with respect to a clutch and manual transmission that, as far as we know, had been driven almost 100,000 km? And given the evidence that bad driving can cause a

manual transmission to fail in a very short period of time, how much do we really know about the state of the transmission at the time of sale?

[20] There is good reason to restrict the application of the implied warranty in the case of used vehicles that are older models with considerable mileage. This vehicle was between six and seven years old, and had been driven almost 100,000 km.

[21] I cannot ignore the evidence of the Defendant's witnesses, and of Mr. Tibbs himself, who confirmed that the vehicle had been inspected and pronounced in reasonable condition to be sold to the public. Obviously the vehicle was drivable at the time of sale, and the Claimant test drove it herself. Although she claims that there was some noise when the vehicle was placed in second gear, which she described as a faint grinding sound, there is no indication that she raised this with Mr. Tibbs either during the test drive or thereafter. Had it been a concern, she could have stipulated that this be repaired or, at least, looked into before the sale would be made. This she did not do. Nor is there any indication that in the days following the sale she made any effort to communicate to Mr. Tibbs any problems that she was experiencing.

[22] The problems eventually discovered by the mechanic who attended to the repair of the vehicle would probably not have been discovered on an inspection. An automobile transmission, as far as I understand the evidence, is a sealed device that is expensive to open up. Without opening it, the only way to detect whether there is a transmission problem would be to examine its performance. As already discussed, the vehicle was test driven before being put up for sale by the owner of Major Discount, and found to be operating properly. It was also test driven by the Claimant with her mother and Mr. Tibbs in the vehicle at the same

time, and there was no problem noted that could have alerted anyone to a transmission issue.

[23] Nevertheless, it is difficult to say that this vehicle proved itself to be reasonably durable. I believe that most objective observers would say that a vehicle should not suffer this serious a transmission problem in such a short time. According to the sales contract, the kilometres on the vehicle at the time of sale totalled 97,517. The repair invoice dated February 10, 2012 shows an odometer reading of 98,129, which means that the vehicle had been driven all of 612 km in the time that the Claimant had owned it. While the Claimant had not driven a manual transmission for some time, she did have prior experience on a manual transmission and most people would say that this is a skill that one can easily recover, like riding a bicycle. Mastering a manual transmission is not rocket science.

[24] Accordingly, I am prepared to make finding that there has been a breach of the implied warranty of reasonable durability, and that some amount is recoverable as damages.

Damages

[25] I must now consider the proper measure of damages. This in turn raises other issues. One of those issues is that, as I have found, the Claimant did not give Mr. Tibbs a reasonable opportunity to inspect the vehicle and possibly rectify the problem. A claimant who has suffered compensable damages has an obligation to mitigate his or her loss. That means that he or she must take the most cost-effective route possible, and if that route is not taken, he or she will be

limited to recovery of only that amount which is considered to have been inevitably incurred. Put another way, the Claimant does not have a blank cheque to spend the Defendant's money. In the case here, I'm not satisfied that the Claimant has necessarily incurred all of the expenses that she claims. Had Mr. Tibbs been alerted to the problem in a timely fashion, his people may have been able to address the problem in a more cost effective manner.

[26] There is another issue, namely that of "betterment." When the Claimant bought her car, she was buying one with a transmission and clutch that may never have been replaced over 100,000 km of driving, and as such it was something of a ticking time bomb. With the new transmission and clutch that she will now have, the likelihood is considerable that she will not have this ticking time bomb problem. In other words, she is ending up with something better than what she purchased. It is not sufficient to say that she bargained for a used vehicle, and that is what she still has. She will now have a used vehicle with a recently serviced transmission and clutch, which in the normal course of things should provide better performance and not require servicing as soon.

[27] In my view, the Claimant should be entitled to recover some but not all of her expenses. The amount of her invoice dated February 10, 2012 was $1,608.41, which included $870.11 for parts, $528.50 for labour, with the balance being taken up by HST. I believe there is some measure of justice, taking into account the mitigation and betterment issues, in ordering the defendant to pay one half of this amount, namely $804.20. I recognize that the claimant also seeks compensation for further work that she would like done to the vehicle, but in my view her warranty does not extend that far.

[28] Accordingly, the claimant shall be entitled to $804.20 plus her cost of filing this claim in the amount of $91.47.

Eric K. Slone, Adjudicator