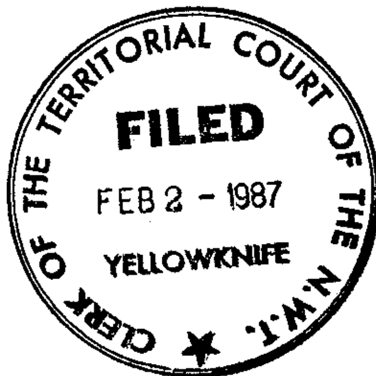
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

YELLOWKNIFE AUTO BODY (1983) LTD.

Plaintiff

and



WALLY POLUK

Defendant/
Counterclaimant

REASONS FOR JUDGMENT

given in Open Court by

His Honour Judge Thomas B. Davis

at Yellowknife, N.W.T. on the 26th day of January, 1987.

APPEARANCES:

For the Plaintiff - Roy Ferrier, Owner/Manager of Yellowknife Auto Body (1983) Ltd.

For the Defendant/Counterclaimant - Gregory Nearing, Student-at-Law

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B E T W E E N :

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Plaintiff

and

WALLY POLUK

Defendant

REASONS FOR JUDGMENT

Civil Claim # 1167 was filed by Yellowknife Auto Body (1983) Ltd. for $800.00 plus interest, against Wally Poluk, claiming that the Defendant owed the balance of $800.00 on the purchase of a motor vehicle. The Plaintiff said the purchaser had the vehicle inspected by an independent mechanic who found the vehicle to be sound. The claim was made because the date for payment of the balance had passed and the Defendant had indicated no intention of paying. On September 23, 1986, three days after the balance was to be paid, the Plaintiff wrote the Defendant, explaining the position of the Plaintiff as a company that sells privately owned vehicles on consignment for a commission. On such sales the Plaintiff recommends that the purchaser have the vehicle inspected, which was done in the transaction from which this claim resulted. The letter

also stated that the Plaintiff offered no warranties. Evidence given at the trial also showed that the Plaintiff intended no warranties on the sale to the Defendant, although the manager of the Plaintiff company did indicate that the vehicle appeared to be suitable for the purpose and use expressed by the Defendant, that being that he required the vehicle to get him around town.

One of the exhibits filed shows that the Defendant on September 17th, 1986, a few days before receiving the letter from the Plaintiff, made demand on the Plaintiff by Registered Mail for the return of the money paid on the purchase, in the amount of $2,400.00, plus the $551.50 the Defendant had expended in repairs done to the vehicle before he took it to drive on the road.

The facts generally are not in dispute, whereby the Defendant after having the repairs done by an independent garage, drove the vehicle for only a few miles and for a very short number of days when the truck came to a stop as a result of the motor breaking down. Evidence adduced at trial indicates that a nut which requires a special and heavy torque when tightened had come loose, causing the connecting rod from the piston to the drive shaft to disconnect and move freely in the interior of the motor, resulting in substantial noise and the discontinuance of the motor's operation.

Upon further examination it was learned that the motor, which was presumed by both parties to be in good operating order, was in fact a motor from a vehicle of a different year than the year of the vehicle being sold. It was also learned that the replacement motor was a gas motor which had replaced a different kind originally in the vehicle. This fact of a gas motor replacing a diesel has little bearing on the transaction since the parties both knew the vehicle contained a gas motor at the time of the sale. A consideration for the Court however is the legal effect of a 1972 motor being put into a 1979 vehicle. The transfer papers show it as a 1979 vehicle.

The main question for the Court on this Agreement of Sale therefore is whether or not the Plaintiff, as the alleged vendor, is entitled to the balance of the price or whether the Defendant as purchaser is entitled to his Counterclaim.

In defence of the claim, the Defendant says the product was defective. He files a Counterclaim for $2,348.00, which he says was the cost to replace the motor he had understood to have been a newer, not older, motor installed only about a year before the transaction.

The Defendant also included in his defence and Counterclaim a statement that the inspecting garage, Active Service and Maintenance Ltd., failed to check or observe that S.T.P. had been used to restrict a knocking sound in the motor. An adjournment in the proceedings was granted so that the Defendant could obtain advice from Counsel and include other parties as third parties in the action if others were responsible, but because neither procedure was used nor further evidence adduced on the point, there will be no finding by this Court on any possible liability of Active Service and Maintenance Ltd.

Evidence by another mechanic, Mr. Eggenberger, was received at the trial which indicated that it would be unlikely that any mechanic would, and that it would be very difficult to, predict the likelihood of the nut coming loose because such an occurrence is not one that can be discovered without physically removing the oil pan and testing each of the tightening bolts and nuts with a special torque measuring wrench. Such an examination is not ordinarily done on the limited check usually requested of a mechanic on the purchase of a second hand vehicle.

This witness from Age Automotive Ltd., whose evidence I readily accept, subsequently installed a replacement motor

in the vehicle for the Defendant at a cost of $2,345.00 as shown on an invoice as an exhibit.

However, using this evidence and finding that the vehicle appeared to the purchaser to be suitable for operation for his needs for an agreed upon price, the Court today must make its finding on liability based on the appropriate law and jurisprudence relating to commercial transactions.

I find that the Plaintiff is in the business of selling motor vehicles, for compensation, to the public. As such, transactions conducted by the Plaintiff which represented itself as the vendor, and made its claim as the vendor of the vehicle, is subject to any common or statute law relating to such commercial sales.

Because the Plaintiff in fact had not been the owner, but was acting as a sales agent for the owner, if the claim were brought in a different manner and possibly by even a different party, and if the Plaintiff had represented itself differently to the Defendant, the outcome of responsibility in the transaction may have been different. However, this Court must restrict itself to the factual representations made by and to the parties and to restrict itself to the pleadings as filed and the evidence as submitted at trial.

An adjournment was also granted to the Plaintiff to seek legal counsel after the Defendant had submitted legal precedent and argument that may have adversely affected the position of the Plaintiff in the matter if such were to be accepted by the Court.

The Plaintiff stands on its submission by its Owner/ Manager that the Plaintiff sold the vehicle that the Purchaser/ Defendant had seen and had tested by another mechanic, so that at the time of the sale, by not receiving the full price, the balance claimed was in the form of a repayable loan due to the Plaintiff. The pleadings do not refer to a loan but the evidence and submissions of the Plaintiff attempt to include such as a legal position entitling the Plaintiff to payment.

The evidence at trial satisfies me that neither the vendor nor the purchaser thought the motor was substantially older, being a 1972 model, than the vehicle, it being a 1979 model.

Was the difference such as to allow the purchaser to rescind the contract and return the vehicle upon learning of the age of the motor?

In an English case before the Court of Appeal, Beale vs Taylor, [1967] 1 W.L.R. 1193, the Court found that since the vehicle sold did not correspond to the description of the vehicle given by the vendor's advertisement to the purchaser, that even where the vendor made no warranties and was not aware of any false information being given to the purchaser, and where no one could see from looking at the car in the ordinary kind of examination that it was not as the parties had understood it to be, upon finding the difference, the purchaser had the right to return the vehicle for a full refund of the price.

In the case before the Court, neither Mr. Poluk nor the agent for the Vendor/Plaintiff knew that the motor was not, as ordinary people would expect to find under these circumstances. Therefore, on this undisclosed and unknown defect alone, the purchaser, following the case above, would have a good remedy and the right to return the vehicle. Since he kept the vehicle, the Court must make a financial adjustment based on the exhibits filed which shows that the Defendant has not paid a balance of $800.00 on the purchase, but has paid $2,348.00 for repairs to the defective motor replacement.

I am supported in making an assessment for damages rather than rescinding the contract by the decision in

Carr vs G & B Auto Mart Ltd., 1978, 5 W.W.R. 361, where Mr. Justice Hamilton of the Manitoba Queen's Bench allowed the cost of replacement of an engine when it was learned, subsequent to the sale, that the engine in the vehicle was not the type that originally came with the car.

Even though there were no warranties given, the Court held that the purchaser did not get a 1972 car and motor as bargained for, and was entitled to compensation as a breach of the condition under the Sale of Goods Act: that the goods must correspond with their description.

Mr. Justice Morse, of the Supreme Court of Manitoba, as reported in Wojakowski vs Pembina Dodge Chrysler Ltd., 1976, 5 W.W.R. 97, dealt with a motor vehicle sale in which the drive shaft was defective within a month of delivery. Because the purchaser had not fully or unconditionally accepted the vehicle, as there were other minor defects to be repaired by the vendor, the Court allowed the purchaser to reject the contract and to return the vehicle to the vendor as a repudiated contract.

In that case at page 103, Mr. Justice Morse stated that if the sale had been complete, and the purchaser had accepted the vehicle, then the purchaser would have the right

to sue for damages if there had been a breach of an implied condition as to fitness under the Sale of Goods Act. He further states that if there is a defect resulting in unfitness of the goods for the purpose, the remedy would be the cost of the repairs to satisfy a claim for damages.

Mr. Justice Morse further stated that the falling out of the drive shaft shortly after the sale, and other very minor defects, would have resulted in a complete failure of the automobile as an automobile thus resulting in a fundamental breach of the contract.

The English Court of Appeal in Crowther vs Shannon Motor Co., 1975-1, All E.R., p. 139, found that under the Sale of Goods Act, when a motor seized up on a second hand car within a few weeks and after driving only 2,300 miles, that the vehicle was not fit for the purpose for which it was sold, that being to be driven on the road, and the purchaser was entitled to recover his loss. A purchaser of a second hand vehicle must expect minor expenses and repairs but is protected if the defect is of a major nature making the vehicle unfit for the reasonable purposes for which it was intended by the purchaser.

Protection for a purchaser of a second hand vehicle is also found in the reasoning of the Appeal Court of Manitoba in the case Green vs Holiday Chevrolet-Oldsmobile Ltd., 1975, 4 W.W.R., 445, where the Court found a fundamental breach of an implied warranty of fitness when an engine exploded only two days after it had been purchased without warranties from the vendor. The Court also referred to the Consumer Protection Act of Manitoba which requires all goods in any retail transaction to be of merchantable quality unless the defects have been described by the vendor to the purchaser, and the vehicle was accepted with such defects.

For the purposes of the case before the Court, I must recognize substantial similarities between the Sale of Goods Acts and the Consumer Protection Acts of other Provinces with those in effect in the Northwest Territories as R.S.N.W.T., 1974, Ch S-2, and R.S.N.W.T., 1974, Ch C-12.

I am satisfied on the evidence at trial that there was an expressed desire by the Purchaser/Defendant that he wished to have a vehicle for the purpose of driving around town. Under Section 16(a) of the Sale of Goods Act, even without such expression, I would have found that the implication of such purpose did exist upon purchasing a vehicle in the absence of expressed contrary intentions. I also find that the sale

was admittedly in the course of the Plaintiff's business as the vendor, and therefore, there is an implied condition pursuant to Section 16 that the goods shall be reasonably fit for such purpose.

I also find as a fact that the vehicle sold was not fit for such purpose. I also find that neither the Vendor/Plaintiff, nor the Purchaser/Defendant were aware of the inadequacy of the motor until it broke down after only a few miles of driving and within less than three days of use by the purchaser.

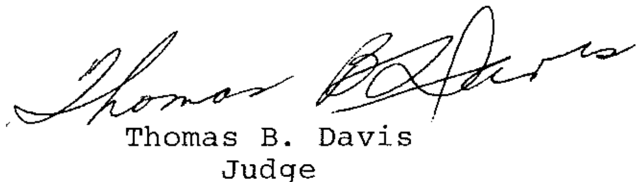
I also find that the defect in the motor's operation, resulting in its breaking down and necessary replacement, and the false, although honest representation of the type of motor, were not defects that a purchaser's examination ought to or would have revealed. Section 16(b) therefore implies a condition on the sale requiring that the goods be of merchantable quality as defined by the English Court of Appeal in Bartlett vs Sidney Marcus Ltd. filed in 1965. The goods must be in usable condition even though not perfect, and also must be reasonably fit for the purpose for which the goods are required.

Finding therefore that there was the breach of conditions of sale that I have noted, I hereby dismiss the claim of the Plaintiff.

I allow the Counterclaim of the Defendant in the amount of $2,348.00 and allow a setoff in the amount of $800.00, leaving a balance due and owing from the Plaintiff to the Defendant in the amount of $1,548.00.

There was mutual lack of knowledge on behalf of both parties about the condition of the vehicle and the motor, and there was no intended misrepresentation. I am not allowing costs to either party on this hearing.

Judgment may be entered for the Defendant against the Plaintiff in the amount of $1,548.00.



Thomas B. Davis
Judge