



Civil Resolution Tribunal

Date Issued: July 17, 2018

File: SC-2018-001244

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *McCracken et al v. Harbourview Autohaus Ltd et al* 2018 BCCRT 336

B E T W E E N :

William Albert McCracken and Marianne Jeanette McCracken

APPLICANTS

A N D :

Harbourview Autohaus Ltd. and LGM Financial Services Inc. dba.
Volkswagen Protection Plus

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This is a summary decision about whether the Civil Resolution Tribunal (tribunal) should refuse to resolve this dispute under section 11 of the *Civil Resolution Tribunal Act (Act)*.
2. For the reasons given below, I have decided to refuse to resolve this dispute.
3. Only the evidence and submissions relevant to this decision are referenced below. This is not a final decision as to the substance or merits of the dispute.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the Act. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. Under section 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager (also known as a tribunal facilitator).

ISSUE

6. The issue is whether the applicant is pursuing a claim against the respondent that has already been resolved through a class action settlement.

BACKGROUND

7. The question of whether the tribunal should refuse to resolve this dispute under section 11 of the Act arose during facilitation and was referred to me by the case manager for a decision.
8. The applicants William Albert and Marianne Jeanette McCracken say they purchased a car and an extended warranty through the respondent car dealer Harbourview Autohaus Ltd. (Harbourview) in September 2014. The extended warranty cost \$2,528.00.
9. The manufacturer disclosed that the car had nitrogen oxide emission levels exceeding the standards to which it had been certified. A class action was brought seeking damages and other relief for about 105,000 Canadian Volkswagen car owners or lessees. A class action settlement was later approved.
10. In early September 2017, the applicants' car was bought back by Volkswagen Canada as part of the class action settlement. The applicants signed a release in exchange for the buyback payment.

POSITION OF THE PARTIES

11. The applicants agreed to a buy back price for the vehicle but were not separately refunded for the extended warranty. They claim here for the warranty amount, which they say is not covered by the class action settlement release. The

applicants argue that they accepted the buyback amount under protest about the extended warranty. They also say that they accepted the buyback payment under duress.

12. Harbourview agrees that, on September 12, 2014, the applicants purchased the Volkswagen Protection Plus Mechanical Breakdown Protection Vehicle Service Contract (extended warranty) costing \$2,528.00, for their 2015 Volkswagen Golf.
13. Harbourview says that Volkswagen Group Canada Inc. provided the extended warranty and that the respondent LGM Financial Services Inc. (LGM) administered it. Harbourview describes itself as the “selling dealer” but says it is not a party to the extended warranty.
14. Harbourview says that because the applicants accepted a settlement for a vehicle buyback amount plus a damages payment, and signed the release, they are precluded from bringing a claim for refund of the extended warranty.
15. LGM says it is not a party to the contract for the extended warranty. It says the claim should be dismissed against it. LGM also says that the Release is a complete defence to the claim.

LAW AND ANALYSIS

16. Section 11(1) of the Act provides that the tribunal may refuse to resolve a claim within its jurisdiction if the claim (a) has been resolved through a legally binding process or (b) if the request for resolution does not disclose a reasonable claim or is an abuse of process.
17. For the reasons given below, I agree with the respondents that the class action settlement precludes the applicants from now claiming a refund for the extended warranty.

18. The Ontario Superior Court of Justice approved the national class action settlement under which the applicants accepted their buyback, calling it “fair and reasonable and in the best interests of the class”. In *Quenneville et al v. Volkswagen Group Canada Inc. et al*, 2017 ONSC 2448, at footnote 9, the Court wrote that “...the Buyback plus Damages Payment will exceed the retail values of the eligible vehicles as of the day before the Announcement by as much as 112 to 128 percent. This “surplus” will address many of the individualized concerns about not being sufficiently compensated for ... extended warranties.”
19. The court’s comments demonstrate that the approved class action settlement encompassed claims for extended warranties, under the damages portion of the settlement.
20. Because they did not opt out of the class, the applicants are subject to the terms of the Settlement Agreement Release.
21. The Settlement Agreement Release in the class action states, at section 5.3, that the settlement releases all claims, with my bold emphasis added “...arising out of or in any way related to the 2.0-Litre Diesel Matter and extends to Released Parties, defined in section 5.2 as including “any and all persons and entities involved in the ... sale, leasing, repair, **warranting** ... or distribution of any Eligible Vehicle, even if such persons are not specifically named in this Section, including without limitation all Authorized VW Dealers...”
22. On August 15, 2017, the applicants also signed an individual release which repeats the release of any claims against persons or entities involved in warranting the car.
23. On their own evidence, the applicants accepted the payment and signed the release. They say they had the release a month before they signed it, which I find was ample time to review it prior to finalizing the buyback. The buyback offer included an option to refuse the offer and submit to arbitration. Because the applicants accepted the payment, the terms of the both the individual release and

the Settlement Agreement Release became effective. The releases provide that, upon accepting the benefits, the applicants can bring no further claims about the buyback or relating to the vehicle in any way, including regarding its warranty.

24. By entering into the Settlement Agreement and release, I find the applicants expressly released any claims they had relating to the warranting of their vehicle. Therefore, I find that this dispute is an attempt to bring a claim that has already been fully resolved through a legally binding process.
25. There is no evidence that the applicants accepted the buyback payment under duress or made their payment “under protest”, aside from their argument that they did not receive enough money and needed to accept the payment.
26. To establish duress, the law requires something more than economic pressure or dissatisfaction with an offered settlement amount. Duress is a pressure that places the party in a position where they have no “realistic alternative” but to submit to it (see *Stott v. Merit Investment Corp.* 1988 CanLII 192 (ON CA), 63. O.R. (2d) 545 (Ont. C.A.) at page 561). The applicants had a realistic alternative in their ability to reject the buyback offer, but chose to accept it.
27. As well, although it is not necessary for me to decide here, the extended warranty appears to be an agreement between the applicants and Volkswagen Group Canada Inc., which is not a named respondent in this dispute. I say this because the signatory to the extended warranty agreement is someone “authorized by selling dealer on behalf of Volkswagen Canada Inc.”
28. Further, even if I had not found the dispute was fully resolved, the agreed appeal mechanism in the settlement agreement was arbitration, not this tribunal.
29. For these reasons, I refuse to resolve this dispute pursuant to section 11(1)(a) and (b) of the Act. There is no remaining claim because the Release precludes it, and the claim was resolved through a legally binding settlement agreement.
30. The tribunal will refund to the parties all fees paid to the tribunal in this dispute.

ORDERS

31. I order that the tribunal refuse to resolve the applicants' claims in this dispute, under s. 11(1)(a) and (b) of the Act.

Julie K. Gibson, Tribunal Member