



# Civil Resolution Tribunal

Date Issued: April 2, 2019

File: SC-2018-003757

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nawrot et al v. Dusange et al*, 2019 BCCRT 412

BETWEEN:

KYLE NAWROT and ROBERT NAWROT

**APPLICANTS**

AND:

SYDNEY DUSANGE, PAUL DUSANGE, and DOROTHY OTTOSON

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Shelley Lopez, Vice Chair

## INTRODUCTION

1. This dispute is about a private used car sale and alleged misrepresentation about defects and odometer fraud. On April 17, 2018 the applicant Kyle Nawrot (Mr. Nawrot) bought a used 2002 Acura RSX for \$3,400 from the respondents Sydney

Dusange (Ms. Dusange) and Paul Dusange (Mr. Dusange). Mr. Nawrot bought the car for his son, the applicant Robert Nawrot. The respondent Dorothy Ottoson is the car's prior owner. The applicant claims a total of \$2,868.83, being \$1,358.83 for vehicle repairs and \$1,500 as compensation related to the alleged odometer fraud.

2. Mr. Dusange stated in his Dispute Response he bought the car for his daughter, who I infer is Ms. Dusange. Mr. Dusange denied altering the odometer and denies any knowledge of the car's alleged mechanical problems. Ms. Ottoson says any problems with the car after she sold it are not her responsibility.
3. The applicants are represented by Kyle Nawrot. Ms. Ottoson is self-represented. While he participated, Mr. Dusange was self-represented. As discussed further below, Ms. Dusange failed to file a Dispute Response and is in default.

## **JURISDICTION AND PROCEDURE**

4. These are the tribunal's formal written reasons. The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (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. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUE**

8. The issue in this dispute is whether, in the context of a used private car sale, the applicants are entitled to compensation from any of the respondents for alleged misrepresentation about defects and for odometer fraud.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim such as this, the applicants bear the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
10. As referenced above, on April 17, 2018 Mr. Nawrot bought the car from the Dusanges. The evidence shows he paid cash. For the purposes of this decision, any damages award is payable to Mr. Nawrot rather than his son Robert Nawrot, as there is no evidence before me that Robert Nawrot has ownership of the car or paid anything for it.
11. The ICBC records show Ms. Dusange was the car's registered owner as of November 3, 2017, after the car's purchase from Ms. Ottoson. However, Mr. Dusange advertised the sale to Mr. Nawrot and says he paid for the car.
12. In a FaceBook message to Mr. Nawrot's wife, Mr. Dusange described the car as "everything works". The applicants had the car inspected by a mechanic before purchase, which showed a mild oil leak and a burnt headlight. During a 15 to 20-

minute test drive, there were no stalling issues. The odometer reading was 194,895 kilometers. Mr. Dusange replaced the burnt bulb and Mr. Nawrot took responsibility for fixing the oil leak, which was around \$100. Mr. Nawrot says there were no other issues identified on inspection.

13. I will address Ms. Ottoson's liability first. The applicants' claims are about alleged misrepresentations made by the Dusanges in the car's sale to them, which I find have nothing to do with Ms. Ottoson, the car's prior owner. The only claim against Ms. Ottoson can be that she had something to do with the odometer having been fraudulently rolled back.
14. Ms. Ottoson sold the car on September 11, 2017 to Sydney Dusange for \$2,350 in cash. She says she was not present the day it was sold, and her sister sold the car for her. Ms. Ottoson says the buyer left without completing the necessary transfer tax forms correctly nor was she left with a copy. Ms. Ottoson says that on the tax form in evidence the buyers' address is incorrect (it is shown as the same as Ms. Ottoson's) and the odometer reading was also filled out incorrectly (it shows 183,000 kilometers). Ms. Ottoson says she had to make inquiries of the Insurance Corporation of British Columbia (ICBC) to get this information, and she provided copies of her October 2017 emails and a photocopy of an RCMP file number. Looking at the transfer/tax form, it is apparent the handwriting is different in the sections for the seller's information (Ms. Ottoson's) and the buyer's information (Ms. Dusange's). The selling price is also listed as \$3,500, rather than \$2,350. There is no explanation before me as to the different amounts.
15. Due to the irregularities in the transfer form, Ms. Ottoson ultimately had the car's registration in her name cancelled on October 3, 2017. The delay in the formalization of records is consistent with the fact that Sydney Dusange did not insure the vehicle in her name until November 3, 2017.
16. Ms. Ottoson's mechanic records show the odometer was 293,000 kilometers in June 2017, which is shortly before she sold it to Sydney Dusange. According to her Craigslist ad, she advertised the vehicle with that mileage on August 28, 2017.

Given the different handwriting and Ms. Ottoson's evidence on this point, I accept that Ms. Ottoson was not the person who completed the inaccurate 183,000 mileage entry on the transfer form showing the sale of the car from her to Ms. Dusange.

17. In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 (CanLII), the judge said that because fraud is a very serious allegation, which carries a stigma, it requires evidence that is clear and convincing proof of the elements of fraud, including the mental element (intention). The 4 elements of civil fraud, also known as fraudulent misrepresentation, are as follows, as set out by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, at paragraph 21:

- a. A false representation made by the respondent;
- b. Some level of knowledge of the falsehood of the representation on the part of the respondent (whether through knowledge or recklessness);
- c. The false representation caused the applicant to act; and
- d. The applicant's actions resulted in a loss.

18. While the applicants speculate that Ms. Ottoson must know Sydney Dusange because Mr. Ottoson's address was set out for both buyer and seller on the tax form, I find the applicants have not proved Ms. Ottoson engaged in odometer fraud. I am unable find Ms. Ottoman liable based on the fact that she left the signed tax form blank for the buyer to complete, as alleged by the applicants. On balance I find the applicants' claims against Ms. Ottoson must be dismissed.

19. I turn next to the liability of Paul and Sydney Dusange.

20. I find the undisputed evidence is that shortly after they bought the car it started stalling intermittently.

21. Generally, private sales of used cars are governed by the principle of “buyer beware”, subject to some limits set out in section 18(c) of the *Sale of Goods Act* (SGA) that state the goods must be reasonably durable in all of the circumstances of the sale. However, buyer beware is set aside where a buyer is induced to buy the car based on the seller’s fraud or if there was non-innocent representation: *Nixon v. MacIver*, 2016 BCCA 8, *Nevmerjitski v Ratinov*, 2018 BCCRT 293.
22. There are 2 aspects of the applicants’ claims against the Dusanges: the alleged odometer fraud and the alleged misrepresentation about defects. I will deal with the odometer fraud first.
23. I find it is more likely than not that after the Dusanges bought the car the odometer was rolled back around 100,000 kilometers. My reasons follow.
24. First, I refer to my conclusion above that the odometer showed 293,000 or so when Ms. Ottoson sold it to Ms. Dusange. This is also consistent with a Carfax Canada report from May 7, 2018 that showed the car had 212,000 kilometers in October 2012 and 251,564 kilometers in December 2014. Yet, I find Mr. Nawrot has shown the car at the time of purchase had 194,895 kilometers, which is undisputed.
25. Second, Ms. Dusange is in default in this proceeding. She was served by registered mail but did not file a Dispute Response as required. Where a party is in default, liability is generally assumed, meaning the applicants’ position is assumed to be correct. While Mr. Dusange said in his Dispute Response his daughter bought the car with the kilometers that she was told it had, he did not specify a particular mileage. Significantly, there is no evidence or explanation before me from Ms. Dusange about the car’s condition or about the odometer fraud allegation. In addition, as noted above, while he filed a Dispute Response, Mr. Dusange chose not to provide evidence or submissions for this dispute.
26. For these reasons, I find Ms. Dusange is liable for the car’s incorrect odometer reading at the time she sold the car to Mr. Nawrot. I make this finding against her

given her default status and because of my conclusion that the odometer was changed after Ms. Dusange bought the car from Ms. Ottoson.

27. Mr. Nawrot claims \$1,500 for the 100,000 kilometres increased mileage from 194,000 to 294,000 kilometers, with \$1,500 being just under half the price he paid for the car. I find \$1,500 would be excessive in these circumstances, for a 2002 car. On a judgement basis, I find Sydney Dusange must pay Kyle Nawrot \$800 for the increased mileage.
28. I find the applicants have not proved Paul Dusange's liability for the odometer, given he is not in default and the strict proof of fraud requirement, and because he was not the car's driver. There is simply no evidence before me that Mr. Dusange was personally responsible for the vehicle after his daughter bought it from Ms. Ottoson (apart from his paying for it).
29. What about the claim for repairs? As noted above, the applicants say the car ultimately needed a replacement computer, after it was stalling intermittently.
30. Mr. Dusange says Ms. Dusange drove the car for 5 months every day with no issues and all she did was put a stereo in and change the oil. Mr. Dusange's text message to Mr. Nawrot shows the car was advertised at \$3,595 and a description of "everything works and has 194 kms, all power options".
31. However, again, there is no evidence before me from Ms. Dusange and no explanation for its absence. Again, as noted, Ms. Dusange is in default. For this reason, I find I do not need to detail the facts and the SGA requirements. I find that as the car's owner and driver, and because she is in default, Ms. Dusange is liable for misrepresentation about the car's condition and function.
32. However, I find the applicants have not proved Mr. Dusange is responsible for the repairs, as the evidence shows he advertised the car on his daughter's behalf. There is no evidence before me that he made any warranty about the car's condition or that he knew and hid that it had problems. I note the applicants say

they were told it was not likely the car's problems would not have been evidence when it was sold in April 2018 but provided no mechanic's statement to that effect.

33. The applicants pursued various investigations and repairs, including a computer replacement, at a cost of \$1,013.60 on May 15, 2018. Mr. Nawrot has other mechanic's invoices for \$141.12 and \$204.11 for investigations done on April 27, 2018 and May 7, 2018. This totals \$1,358.83, which I find reasonable. I order Ms. Dusange to reimburse this amount.
34. Kyle Nawrot paid \$10.00 to ICBC to obtain a copy of a transfer/tax form copy for this dispute. I find this was reasonable and order Ms. Dusange to reimburse it.
35. The applicants are entitled to pre-judgment interest on the \$1,368.83 total for repairs and the ICBC form, under the *Court Order Interest Act* (COIA), from May 15, 2018. This totals \$18.85. There is no pre-judgment interest payable on the \$800 damages award I have granted for the odometer issue.
36. Mr. Nawrot was substantially successful in this dispute. In accordance with the Act and the tribunal's rules, I find he is entitled to reimbursement of his \$125 in tribunal fees from Ms. Dusange. Mr. Dusange and Ms. Ottoson did not pay any tribunal fees and no dispute-related expenses were claimed.

## **ORDERS**

37. Within 14 days of this decision, I order the respondent Sydney Dusange to pay the applicant Kyle Nawrot a total of \$2,302.68, broken down as follows:
  - a. \$2,158.83 in damages,
  - b. \$18.85 in pre-judgment interest under the COIA, and
  - c. \$125 in tribunal fees.



38. Robert Nawrot's claims are dismissed. Mr. Nawrot's claims against the respondent Paul Dusange and the respondent Dorothy Ottoson are dismissed. Mr. Nawrot is entitled to post-judgment interest, as applicable.
39. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
40. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Shelley Lopez, Vice Chair