



# Civil Resolution Tribunal

Date Issued: May 3, 2019

File: SC-2018-007820

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Ebert v. Oatway*, 2019 BCCRT 526

**B E T W E E N :**

Tanya Ebert

**APPLICANT**

**A N D :**

Steven Oatway

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Shelley Lopez, Vice Chair

## **INTRODUCTION**

1. This dispute is about a used van the applicant, Tanya Ebert, bought from the respondent, Steven Oatway, in a private sale. The applicant says the respondent assured her the vehicle was mechanically sound, but there were problems “from the get go”, which she later realized were hidden from her because the instrument

cluster lights were painted over. The applicant alleges fraud, and claims \$1,000 in damages, towards necessary repairs.

2. The respondent denies liability. He says he did not paint over the instrument cluster warning lights and was not aware that that had been done. The respondent says he was honest when he sold her the van, after owning it for only a few months.
3. The parties are each self-represented. For the reasons that follow, I find the applicant's claims must be dismissed.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). 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. Some of the evidence in this dispute amounts to a "she said, he said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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 9.3(2), 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. In this used car sale dispute, the issue is whether the respondent seller is responsible for the van's instrument cluster being painted over, and if so, what is the appropriate remedy.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim such as this, the applicant bears 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. Through the respondent's Kijiji ad, the applicant bought his 2006 Dodge Grand Caravan minivan for \$2,800 on November 17, 2016.
11. The respondent says he bought the van for a family vacation but sold it to the applicant after a few months, because he was spending too much on repair and maintenance and because he had another vehicle. I accept this undisputed evidence, which is consistent with his ad for the van's sale.
12. Among other things, the respondent's ad stated the van had "new Instrument Cluster lights" along with "great brakes". It is undisputed that at the time of the sale,

the respondent told the applicant the van had been parked for a few months (for the bulk of the time he owned it) and the gas in it was old. The parties agree that after the applicant's test drive, the respondent said he thought the car would run less rough once it had fresh gas in it.

13. The applicant says as soon as she bought the van, she had problems. The applicant says due to financial constraints she could not fix the van, which she says continued to run "rough". She says that by February 2017 the car was stalling completely and so she borrowed money to have it repaired. The applicant says it took her 4 months, until March 2017, to discover why none of the problems were showing on the van's instrument cluster in the dash. She says the instrument cluster's trouble lights for "check engine", "ABS Brakes", and "Air Bag" were painted over, as was the dash area where the instrument cluster is positioned. The applicant submits this was intentionally done by the respondent to hide the van's problems, as the paint covered the trouble lights.
14. The respondent says the applicant took it for a test drive and he never pressured her to buy the van. She chose to buy the van after the test drive, without a professional inspection. The respondent denies he painted over the lights, or knew that they were painted, and says he would not have even known how to do that.

### ***Fraud***

15. For the reasons that follow, I find the applicant has not met the burden of proving fraud by the respondent.
16. 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 I will address later. However, buyer beware is set aside where a buyer is induced to buy the car based on the seller's fraud: *Nixon v. MacIver*, 2016 BCCA 8, *Nevmerjitski v Ratinov*, 2018 BCCRT 293.
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. I find the applicant has not proven fraud. I accept that the instrument cluster was painted over by March 20, 2017. However, I find the applicant has not proven that it was the respondent who painted the instrument cluster, or that he knew or ought to have known it had been painted.

19. First, the transfer/tax form for the applicant's purchase of the van shows the respondent disclosed the van was previously registered outside of BC and that it had used vehicle damage over \$2,000. The odometer read 164,085 at the time of sale to the applicant. Contrary to the applicant's submission that the respondent made verbal statements opposite to what was stated in the documents she received from him, I find the weight of the evidence shows the respondent did not hide the van's defects.

20. Second, both parties provided the August 17, 2016 receipt for \$883.82 from the respondent's mechanic Allan Autotech, showing the respondent brought the van in for an oil change and to check an illumination problem with the dash lights. The receipt shows "instrument cluster – remove & replace". The invoice does not mention any paint on the cluster, and also does not mention any instruction to paint it. As discussed below, the applicant says this proves the respondent painted the

cluster, as Allan Autotech's invoice does not note the paint and so it must have been added after.

21. The applicant heavily relies on a January 21, 2019 statement from PM, an employee at Allan Autotech. PM stated that he recalls the applicant coming into the shop on March 20, 2017 to ask why the "check engine" light did not light up, given the shop had replaced "the bulbs" on August 17, 2016. There is no invoice before me from the March 20, 2017 attendance and no explanation from the applicant as to why it was not provided.
22. PM stated that when the mechanic removed the cluster on March 20 they discovered the bulbs were LED, and that in 28 years of work PM had never seen a case where LED bulbs stopped working. PM stated that when the shop did the work on August 17, 2016 to remove the instrument cluster and replace the bulbs, the mechanic would have noticed the paint. PM stated that as there were no notes on the invoice indicating that the mechanic found paint, PM concluded the paint was done after the shop did its work on August 17. PM admits he told the applicant "you didn't hear from me but this guy painted over the lights", which I infer is a reference to the respondent.
23. The difficulty for the applicant is that both parties say that PM is a front desk clerk, and not a mechanic, and PM's statement does not suggest otherwise. I find it is significant that in his statement PM also said that when the applicant brought the van back in on March 20, 2017 they removed the instrument cluster specifically to look at why the check engine light was not lighting up. PM stated that the mechanic removed the instrument cluster and discovered they were LED bulbs, and then "upon further inspection" the mechanic discovered that the trouble lights were painted over. I find this requirement for "further inspection" suggests that when replacing an instrument cluster, it is possible to miss the fact that it was painted over.
24. The further difficulty for the applicant is that there is no statement in evidence before me from a mechanic about the painted instrument cluster, when it would likely have

been noticed or when it was likely painted. The applicant has not explained why she relies on a statement from the front desk clerk PM, rather than the mechanic at Allan Autotech who discovered the painted cluster. Given the “clear and convincing proof” of fraud required, I am not prepared to accept PM’s hearsay statement about what a mechanic would likely have found when the work was done in August 2016.

25. Third, the applicant provided an October 29, 2018 statement from Donald Druet at Druet’s Auto Service. He said that the applicant came to his shop in February 2017 and he explained then that he had not scanned her van during a prior visit as there were no trouble lights lit up on the van. He said that after plugging in the scanner he was shocked at all the codes coming up. However, Mr. Druet makes no mention of the cluster being painted, and there is no explanation before me as to why not, given his shock at the codes but no trouble lights. The applicant’s submission is that the painted cluster was not discovered until March 2017, as set out in PM’s statement. I find Mr. Druet’s statement does not help prove the respondent painted the cluster.
26. Fourth, the applicant also alleges the respondent made fraudulent statements about the van’s brakes. The evidence shows the respondent gave the applicant various receipts for work he had done in the few months he had owned the van, which showed it needed some maintenance, such as a recommendation for new rear brakes in 2,000 kilometers. The applicant alleges the respondent told her the car did not need any work and she relied on that, without reading “the fine print”. I do not accept that assertion, as again I find it unlikely the respondent would provide receipts contrary to any verbal statement. The respondent says his ad said “great brakes” because that was his experience at the time. Contrary to the applicant’s suggestion, I do not find the respondent’s van ad statement to be fraudulent simply because his mechanic, after doing a brake service, had recommended new rear brakes within 2,000 kilometers.
27. As noted, the respondent denies painting over the instrument cluster or hiring anyone to do so, and says he was unaware of the issue. The respondent submits

that if he knew how to remove the dash cluster to get at the lightbulbs to paint them, why would he hire Allan Autotech to replace the instrument cluster in August 2016?

28. On balance, I agree with the respondent that it is not likely the respondent would hire Allan Autotech to specifically install a new instrument cluster, and then re-do the same labour to paint over the trouble lights less than 2 months later, bearing in mind also that he provided the same August 17, 2016 receipt to the applicant at the time of sale.
29. For all the above reasons, I find the applicant has not proved the respondent engaged in fraud when he sold her the van.

### ***Breach of warranty***

30. What about a breach of warranty under the SGA? While this was not expressly argued by the applicant, I will address it.
31. Because this was a private car sale the implied warranties under section 18 of the SGA about fitness for purpose and saleable quality do not apply. However, section 18 (c) of the SGA applies to private sales: the goods must be durable for a reasonable period in all the circumstances of the sale.
32. It is unclear how the applicant arrived at her claimed damages of \$1,000, for repairs she says were only necessary because the instrument cluster lights were painted over. In any event, the applicant provided receipts for repairs totaling \$433.44, with the first repair occurring in February 2017, 4 months after she bought the van:
  - a. \$141.12 from Druet's Auto Service, for February 2017 tune up,
  - b. \$241.92 from Druet's Auto Service, for March 6, 2017 "re & re EGR valve",  
and
  - c. \$50.40 from Car Guys Automotive Ltd., for January 24, 2019 "scanner hook-up".



33. As noted above, the applicant's problem with the van was that it was running rough, and shortly before the February 2017 repairs to the point the van was stalling. However, the van was still functional and the applicant drove it consistently, as noted in her neighbour's witness statement.
34. While I acknowledge the applicant's evidence that she could not immediately afford to have the van repaired, the fact remains that she drove the van through to March 2017 and beyond, with only minimal repairs as set out in the invoices in evidence.
35. Given the age and mileage of the van, I cannot conclude that it was not durable for a reasonable period. I therefore find the applicant has not proved a breach of warranty under the SGA.
36. Given my conclusions above, I find the applicant's claims must be dismissed. As such, I do not need to consider in any detail her requested remedies.
37. The applicant was unsuccessful in this dispute. In accordance with the Act and the tribunal's rules I find she is not entitled to reimbursement of tribunal fees or dispute-related expenses.

## **ORDER**

38. I order the applicant's claims and this dispute dismissed.

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Shelley Lopez, Vice Chair