



# Civil Resolution Tribunal

Date Issued: May 8, 2019

File: SC-2018-005659

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Scoretz et al v. KOLENBERG MOTORS LTD.*, 2019 BCCRT 549

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

Andrea Scoretz and Kenneth Scoretz

**APPLICANTS**

**A N D :**

KOLENBERG MOTORS LTD.

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Julie K. Gibson

### **INTRODUCTION**

1. This dispute is about a used car sale.
2. The applicants, Andrea and Kenneth Scoretz, bought a 2008 Acura MDX (car) from the respondent KOLENBERG MOTORS LTD.

3. The applicants say the respondent misrepresented the car as being in “good condition.” They say it needed an engine replacement within 2 months of purchase. The applicants claim \$5,000 for the engine replacement and other repairs.
4. The respondent says the applicants thoroughly inspected the car before buying it, including taking it for a test drive. The respondent does not contest saying the car was in “good condition” but says the parties do not agree about what that means.
5. The respondent denies responsibility for the claimed repairs, for reasons detailed below. It asks that the dispute be dismissed.
6. The applicants are represented by primary applicant Andrea Scoretz. The respondent is represented by principal Rob Kolenberg.

## **JURISDICTION AND PROCEDURE**

7. 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*. 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.
8. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. 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.

9. 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.
10. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

11. The issues in this dispute are whether the respondent breached its contract with the applicants about the car it sold her and, if so, what remedies are appropriate.

## **EVIDENCE AND ANALYSIS**

12. 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.
13. On February 5, 2018, Andrea Scoretz bought the car from the respondent for a purchase price of \$16,000. The car had 102,280 kilometres on the odometer.
14. Because Ms. Scoretz was the only purchaser under the sales agreement, I find Kenneth Scoretz is not entitled to any remedies in this dispute. I dismiss Mr.

Scoretz' dispute against the respondent. I will address the claims between Ms. Scoretz and the respondent only.

15. Because the respondent did not contest that it represented to Ms. Scoretz that the car was in good condition and had passed pre-purchase inspection, I find that it made those assurances.
16. Ms. Scoretz also bought a Lubrico Limited Superior Protection 36 month/36,000-kilometer warranty, with a \$100 deductible per repair visit, and a \$2,500/claim limit (warranty). The warranty does not cover repairs made to covered components when the repairs are not pre-authorized.
17. On the drive home the day Ms. Scoretz bought the car, the check oil light came on. The light kept coming on and off intermittently after this point.
18. Ms. Scoretz began having other problems with the vehicle within 10 days of buying it. In mid-February, she had a new power steering pump installed, under the warranty.
19. On February 10, 2018, the applicants took the car to the respondent for inspection. A mechanic, E, who inspected it at that time, put in a new oil pressure sensor. The applicants also asked about the car's steering, which was getting difficult. The mechanic told them that the steering was not an issue, but just the way "the Acura MDX drove".
20. On March 22, 2018, the car was inspected at Frank Laird Automotive. The inspection noted that the car needed timing belts and spark plugs replaced, and that the rear brakes were close to needing replacement. The car's tires were noted to be "good".
21. In April 2018, Ms. Scoretz found that the car's oil light was on. She took the car to three different mechanics who provided temporary fixes. Unfortunately, the oil light came on again on April 23, 2018.

22. Ms. Scoretz took the car to Campus Acura. JC, the service manager, provided a letter explaining that diagnostics showed the car's oil pressure was low, and the problem had caused wear in the main engine bearings. JC recommended that Ms. Scoretz rebuild or replace the engine.
23. On April 24, 2018, Ms. Scoretz wrote to the respondent asking for a refund of the car's purchase price, because of the many problems with it.
24. Mr. Scoretz says that, on April 28, 2018, he went to the respondent's premises and spoke with Mr. Rob Kolenberg. Because the respondent did not provide an alternative version of their conversation, I accept Mr. Scoretz' evidence about what was said.
25. During their conversation, Mr. Kolenberg said that he would not reimburse the applicants for the car, but that he might be able to source a used engine. He also said it would take time because he was busy. Mr. Kolenberg described a time that he had sold a car with a "blown engine" and told Mr. Scoretz that he had paid for that engine to be replaced. Mr. Scoretz left hopeful that Mr. Kolenberg would pay for an engine replacement for the car.
26. On May 14, 2018, the check oil level alert came on in the car again. On the advice of Campus Acura, Ms. Scoretz had the car towed there.
27. Mr. Scoretz called Mr. Kolenberg to try to obtain a commitment about the cost of the engine replacement. Mr. Kolenberg said he would have to speak to his business partner.
28. When Mr. Scoretz phoned to follow up a few days later, Mr. Kolenberg suggested Mr. Scoretz ask again once he had the paid invoice for engine installation.
29. Ms. Scoretz decided to replace the engine with a used one, as this was the most cost-effective option.

30. On May 17, 2018, Campus Acura installed a used engine in the car. It is uncontested, and I find, that the oil light has not come on since the engine was replaced.
31. The total service cost \$6,917.07, of which the applicants explain they are “out of pocket” \$2,900.
32. The parties agree that Mr. Kolenberg paid \$1,500 towards the engine replacement, on May 17, 2018.
33. I find that the used engine installation cost \$6,917.07, of which \$2,500 was covered under the warranty, and \$1,500 was paid by the respondent, leaving \$2,917.07.
34. On May 14, 2018, the applicants bought new tires for the car, for \$716.58.
35. On May 24, 2018, Campus Acura replaced the car’s hood struts, which were no longer holding, for \$153.48.
36. On June 8, 2018, Campus Acura replaced the car’s front strut assemblies, serpentine belt and oil pump seals, for a total cost of \$1,413.18.
37. On June 23, 2018, the car had an inspection for an engine noise complaint, that was resolved for \$117.78.
38. On June 27, 2018, Frank Laird Automotive replaced the car’s rear pads and rotors and the front disc rotors for a total of \$832.52.
39. The applicant’s filed photographs of the car’s tires at the time of sale, in evidence. The tires appear to be in poor condition. This is confirmed by BW, of Cedar Tire, who provided a letter explaining that the tires on the car showed evidence of having been repaired in a manner below industry standards, which could lead to “serious tire failure”.
40. I accept the uncontested evidence of BW that the tires on the car at the time of sale were unsafe because they had been improperly repaired.

***Is the respondent required to pay the applicants for the cost of replacing the engine?***

41. The respondent in this case is in the business of selling cars, and therefore the sale was not subject to the principle of “buyer beware.” Rather, under section 18 of the *Sale of Goods Act* (SGA) there were 3 implied warranties on the sale. It was implied that the car was in the condition described and was of saleable quality, and that the car would be durable for a reasonable period when put to normal use and considering all the surrounding circumstances of the sale (see *Sosa v. Reg Midgley Motors Ltd.* 2019 BCCRT 487).
42. The respondent says the extended warranty could have covered the cost of necessary repairs, had Ms. Scoretz obtained a reasonable quote rather than relying on advice from an Acura dealership alone. I find that the fact that Ms. Scoretz bought an extended warranty with the car does not automatically relieve the respondent of its responsibilities under section 18 of the SGA.
43. The respondent said it provided a mechanical inspection and Carproof report to the applicants before the purchase but did not file these in evidence.
44. Because the sale agreement specifies that the car is suitable for transportation, I find that the SGA warranties apply to the sale. I find that the respondent not only warranted that the car was in “good condition”, but that it was implied to be of saleable quality, and durable for a reasonable period when put to normal use.
45. I have considered SGA section 18(b) which says that if the buyer has examined the goods there is no implied condition about defects the examination ought to have revealed. On the evidence, I find that the defects that arose were durability problems that were not apparent at the time of the test drive.
46. Given that the car was 10 years old and said to be in good condition and with around 102,000 kilometres on it, I find that it was not durable for a reasonable period. The problems with the engine, power steering, oil pump seals, belts, spark plugs, strut assemblies and rear brakes, all occurring within two months after the

sale, prove that the car was not durable. I find that the respondent breached this implied warranty to the applicant Ms. Scoretz.

47. Turning to the question of remedy, the respondent says that it already paid \$1,500 toward the engine replacement cost. While the respondent did not explicitly argue that the payment settled the claim about engine replacement, I infer this argument from its Dispute Response.
48. There is no evidence that either party said that the \$1,500 payment settled any aspect of Ms. Scoretz' claims. The memorandum on the cheque itself only says "Re: Repairs 2008 Acura MDX". I find there was no agreement to resolve the repairs claim through this payment alone.
49. Given my findings above, I find the respondent must pay the applicant Ms. Scoretz the \$2,917.07 paid for the portion of the engine replacement that was not covered by either the warranty or the respondent's \$1,500 payment.

***Is the respondent required to pay Ms. Scoretz for the cost of replacement tires?***

50. The respondent says the applicants chose to buy two sets of new tires.
51. I have found that the set of tires on the car at the time of sale was unsafe. Because the tires on the car were included in the representation that it was in "good condition" and durable for a reasonable period of time, I find Ms. Scoretz is entitled to reimbursement for replacing this one set of car tires, which cost \$716.58.
52. I dismiss the claim for winter tires, as there was no evidence that good winter tires were included in the car sale.



***Is the respondent required to pay Ms. Scoretz for other repairs to the car?***

53. I have found that the timing belts, spark plugs, and oil sensor investigation issues are all aspects of the car's operation that ought to have remained in good working order for more than 2 months after purchase.
54. I also find that the front strut assemblies, serpentine belt and oil pump seals, at \$1,413.58 paid on June 8, 2018, are expenses paid by the applicant Ms. Scoretz that must be reimbursed by the respondent, as they go beyond routine maintenance issues and were part of the implied warranty of durability.
55. The applicants limited their claims to the tribunal's \$5,000 monetary jurisdiction limit in small claims disputes. Having found that Ms. Scoretz is entitled to at least that amount in damages, it is not necessary for me to consider the further vehicle expense costs. Ms. Scoretz has proven her claim to at least \$5,047.23, and so I award the \$5,000 maximum in damages.
56. The respondent suggested that Ms. Scoretz' proceedings before the Vehicle Sales Authority of British Columbia (VSABC) was an attempt to obtain double recovery for her losses. Based on the correspondence filed in evidence, I find only that the VSABC said it would defer further consideration of this matter until the tribunal issued a decision. There is no evidence that Ms. Scoretz recovered any money through the VSABC process.
57. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicant Ms. Scoretz is entitled to reimbursement of \$175 in tribunal fees and \$10.50 in dispute-related expenses for registered mail delivery of the Dispute Notice, which I find to be reasonable.

## ORDERS

58. Within 30 days of the date of this order, I order the respondent to pay the applicant Ms. Scoretz a total of \$5,256.80, broken down as follows:
- a. \$5,000 for engine replacement and other repair costs,
  - b. \$80.30 in pre-judgment interest under the *Court Order Interest Act* calculated from June 8, 2018, the date of the latest repairs awarded to the date of this decision, and
  - c. \$185.50 for \$175 in tribunal fees and \$10.50 for dispute-related expenses.
59. The applicant Ms. Scoretz is entitled to post-judgment interest, as applicable.
60. I dismiss the claims by Mr. Kenneth Scoretz against the respondent.
61. 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.
62. 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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Julie K. Gibson, Tribunal Member