Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *D.B. v. Shlyakhovskyy,* 2019 BCCRT 1444

B E T W E E N :

D.B. by her litigation guardian C.T.

APPLICANT

A N D :

DENYS SHLYAKHOVSKYY

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a private used car sale. On August 10, 2019, the applicant, D.B. by her litigation guardian C.T., bought a 27-year-old BMW from the respondent, Denys Shlyakhovskyy, for $1,750. Two days later, on August 12, the

applicant took the car to a mechanic because the engine shuddered and cut out on the highway. The applicant says she was told the car was unsafe. The applicant argues the respondent misrepresented the car's condition, and wrongfully sold her a car that is not roadworthy. The applicant claims a $1,750 refund, plus $125 for diagnostic testing and $108.62 for a fluid change.

2. The respondent denies liability and says he never misrepresented the car. While the applicant's mother and litigation guardian, C.T., test drove the car with the respondent, the applicant chose not to have a mechanical pre-inspection done. Therefore, the respondent says he is not responsible for any refund. The parties are each self-represented.

3. In the published version of this decision, I have anonymized the applicant's name and her mother's, given the applicant is a minor.

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* (CRTA). 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 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. The issue is whether the respondent seller misrepresented the car's condition or is otherwise responsible for its unsafe diagnosis, 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. I note that while the respondent provided submissions, he provided no evidence despite the opportunity to do so. Next, I have no placed any weight on the parties' efforts to settle the matter, given the dispute proceeded for adjudication and this decision.

10. The car at issue is a 1992 BMW that at the time of sale had 295,000 kilometers on it. The respondent had bought it for $400 in April 2019, had work done on it and used it as his daily vehicle until he sold it to the applicant.

11. As noted, on August 10, 2019 the respondent sold it to the applicant for $1,750. This was a private car sale, as the respondent is not in the business of selling cars.

The evidence shows the applicant and her mother C.T. test drove the car but chose not to obtain a pre-purchase mechanical inspection.

12. It appears the respondent sold the car through a Facebook ad. The respondent wrote the car "shows its age" and "has some rust (not too bad, seen on pictures)". He said the car "handles very good" but the "steering wheel wobbles slightly from 50-60 km/h which I suspect is due to a balancing issue". He said that overall the car "drives GOOD" and identified the body as "6/10" and the interior as "5/10" (capitals in original). He wrote that "everything works", and despite the high mileage "don't let the figure worry you, as mechanically the car has been serviced adequately". The respondent wrote, "THIS CAR IS VERY DRIVABLE AND GOOD ON GAS" (capitals in original). His list price was $2,000 without "HRES", which I infer refers to wheels. The respondent also listed the work the car had had done since 2016, including the clutch, window motors, ignition coils, alternator, door moulding, and exhaust work.

13. It is undisputed that within a couple of days after purchase, the applicant noticed problems driving the car. The respondent says he had driven the car immediately before he sold it to the applicant and did not notice any issues. Based on the evidence before me, I accept the respondent had driven the car to Calgary in the days before he sold it to the applicant. As discussed further below, I find the applicant has not proved the respondent was aware of any problems making the car undriveable.

14. The parties' texts pre-purchase also show the respondent told the applicant the car's condenser needed fluid. He also texted the respondent that while the car functions "just as any daily driver" he was selling it more as a "weekend toy" for someone to make perfect again. He also texted that "at the end of the day it's a 27 y/o BMW, that being said most things that went wrong were replaced/dealt with … I have done a lot of work to the car … however it's not perfect … ding scratches, wear and tear are the biggest problems this car has". He texted that the clutch was done 10,000 km ago, and that while he could not guarantee the luxury features

would continue working, he could "definitely guarantee that it will keep driving for a long time".

15. The applicant relies on an August 13, 2019 invoice from Penticton Auto Service. It says the car has: mismatched tires with some bald and cracked tires, a "wobble at 100km", engine shudder at 3000 RPM and "cuts out badly", "unibody is unsafe due to severe corrosion at rockers behind front wheels", "passenger side has mono foam sprayed to hide the damage", multiple oil leaks and other fluid leaks, hood will not open from the release and has a broken handle, and missing fan shroud. The quote for repairs is $4,435.20.

Fraudulent misrepresentation claim

16. While the applicant alleges the respondent fraudulently misrepresented the car, I find she has not proved this. The case law is clear that due to the associated stigma, an allegation of fraud requires "clear and convincing proof".

17. If a seller misrepresents a vehicle's condition, the buyer may be entitled to compensation for losses arising from that misrepresentation. A "misrepresentation" is a false statement of fact made during negotiations or in an advertisement that has the effect of inducing a reasonable person to enter into the contract.

18. Fraudulent misrepresentation occurs when a seller makes a false representation of fact and the seller knew it was false or recklessly made it without knowing whether it was true or false. Negligent misrepresentation occurs when a seller fails to exercise reasonable care to ensure representations are accurate and not misleading. The misrepresentation must reasonably induce the purchaser to buy the item.

19. The respondent's ad and the parties' text messages are fairly detailed about what the respondent knew about the car. He disclosed a number of problems, and did not describe it as being in "excellent" condition. For this reason, I distinguish this case from the facts in the case cited by the applicant, *Budney v. Schwartz*, 2018 BCCRT 129. Here, the respondent disclosed the "wobble" issue in the ad, noting it arose at around 50 km/hour. Contrary to the applicant's submission, I find given this

disclosure nothing turns on where the test drive took place, although I find the applicant has not proved the respondent purposefully avoided the highway to hide problems.

20. The applicant also argues that there was monofoam sprayed on the door to "try and hide damage". I find the applicant has not proved the respondent did this or knew it was there, and he denies he knew. Had the applicant had a pre-inspection done this would likely have been identified, since it was identified in the inspection she had done shortly after the purchase. The tires' wear and the fluid levels would have likely also been detected on a pre-purchase mechanical inspection, and in any event, there is no evidence the respondent misrepresented these issues to the applicant.

21. The respondent repeatedly said the car was a good daily driver for him, and there is no evidence to show otherwise. I have found he drove the car to Calgary just before he sold it, which I find despite the disclosed 'wobble' shows the car was driveable for long highway distances.

22. On balance, I find the applicant has not proved the respondent misrepresented the car's condition, fraudulently or otherwise.

Warranties under the Sale of Goods Act *(SGA)*

23. In a private used car sale, where there has been no misrepresentation, the principle of "buyer beware" largely applies. This means that the implied warranties of fitness for purpose and saleability under section 18 of the SGA do not apply.

24. However, the implied warranty for durability in section 18(c) does apply to private car sales. In particular, the car must be durable for a reasonable period of time having regard to the use to which it would normally be put and considering all the surrounding circumstances of the sale.

25. There are several decisions about private used car sales. Prior tribunal decisions (cited as "BCCRT") are not binding but I find provide useful guidance. Court

decisions are binding to the extent the facts are sufficiently similar. For instance, see *Singh v. Janzen*, 2019 BCCRT 335, *Sugiyama v. Pilsen*, 2006 BCPC 265 as well as several prior tribunal decisions, such as *Samzadeh v. Bain*, 2018 BCCRT 475. In *Sugiyama*, the court considered the implied warranties in section 18 of the SGA and found there are a number of factors to consider when determining whether a vehicle is durable for a reasonable period of time, including the age, mileage, price, the use of the vehicle, and the reason for the breakdown.

26. As in *Singh*, the facts in *Sugiyama* are somewhat similar to the facts of this dispute. In *Sugiyama*, the claimant bought an 8-year-old car with over 140,000 kilometers on the odometer. After driving it for only 616 kilometers, the car broke down. The court determined that the car was roadworthy and could be safely driven when it was purchased. There were no apparent defects in the car. Therefore, even though the car broke down after very little driving, the court found that it was durable for a reasonable time.

27. I find that the same reasoning applies to this dispute. The 1992 car, almost 27 years old, had very high mileage at almost 300,000 kilometers and no significant functional issues at the time of purchase. There were no concerns noted at the time of the test drive. The applicant chose not to have a professional inspection done, which as noted would likely have disclosed the problems the applicant later discovered.

28. Here, the car did not break down. Rather, the applicant found the car shuddered and cut out at higher speeds. This ‘wobble’ issue was disclosed in the car’s ad. Further, it is undisputed the applicant was satisfied with the car after the test drive. There is simply no evidence car’s issues are anything other than the result of normal aging. There is no evidence the respondent knew the car’s body was corroded. In all of these circumstances, I find that the respondent did not breach the implied warranty of durability. This conclusion is consistent with the court’s decision in *Wanless v. Graham*, 2009 BCSC 578, which as noted by the respondent, endorsed the statement that people who buy old used cars with high mileage “must

expect defects in such cars will come to light at any time". That quote came from a 2004 New Brunswick decision *Dunham v. Lewis*, [2004] N.B.J. No. 310, where a 1996 car bought for $4,200 broke down within 2 days of purchase and would not start.

29. What about the respondent's text that he could "definitely guarantee" the car would be driveable for a long time? In the context of the parties' overall text messages summarized above, I find this is not an enforceable warranty. The car is repairable and the respondent identified various issues as he knew them. I find the respondent's comment was reasonably understood as his explaining that he felt the car was a reliable daily driver, as it had been for him.

30. In summary, the applicant has failed to prove a misrepresentation or a breach of an implied warranty and is therefore not entitled to a refund of the car's purchase price, or the diagnostic testing or fluid change. I dismiss the applicant's claims.

31. The applicant was unsuccessful. In accordance with the CRTA and the tribunal's rules, I find the applicant is not entitled to reimbursement of tribunal fees.

ORDER

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

Shelley Lopez, Vice Chair