



Civil Resolution Tribunal

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File: SC-2020-006618

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fraser v. Sensible Auto Sales Ltd.*, 2021 BCCRT 541

B E T W E E N :

DYLAN FRASER

APPLICANT

A N D :

SENSIBLE AUTO SALES LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This dispute is about the sale of a used 2007 Subaru Tribeca. The applicant, Dylan Fraser, purchased the vehicle from the respondent, Sensible Auto Sales Ltd. (Sensible). Mr. Fraser says that the vehicle had problems that Sensible did not

disclose to him, including issues with the brake pads and head gasket. Mr. Fraser initially asked that Sensible pay him \$5,000 in damages. However, he reduced his claim to \$3,700 to take into account the fact that he has since resold the vehicle for \$1,300. Sensible says that there were no issues with the vehicle at the time of the sale, and denies that it is responsible for the damages Mr. Fraser claims.

2. Mr. Fraser is self-represented. Sensible is represented by its owner, Gary Loski.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
4. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
5. Section 42 of the CRTA says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Mr. Fraser submitted evidence after the deadline and after the parties had provided their submissions. Sensible had the opportunity to respond to this late evidence, but chose not to provide any additional submissions. In the circumstances, I find that

there is no prejudice in or procedural fairness issue arising from accepting this late evidence. However, I will mention the late evidence, and the other evidence provided by the parties, only to the extent that it is relevant and necessary to provide context to my decision.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

8. The issues in this dispute are:
 - a. Whether Sensible sold Mr. Fraser a defective vehicle or breached the implied warranties in section 18 of the *Sale of Goods Act (SGA)*,
 - b. Whether Sensible misrepresented the vehicle's condition, and
 - c. Whether Sensible must pay Mr. Fraser the \$3,700 he claims.

EVIDENCE AND ANALYSIS

9. In the spring of 2020, Sensible advertised the 2007 Subaru Tribeca for sale at an asking price of \$5,890. The advertisement stated that the vehicle had undergone a comprehensive safety inspection and came with a powertrain warranty.
10. Mr. Fraser took the vehicle for a test drive, but did not take it for a mechanical inspection. The safety inspection by Sensible's mechanic identified the vehicle's inspected areas of the vehicle as being in satisfactory condition. In particular, the inspection stated that there were 30% of the brake pads remaining in the front and 100% in the back.
11. Mr. Fraser bought the vehicle from Sensible on June 9, 2020. He says the purchase price was \$5,376, while Sensible says the purchase price was \$5,470. I find that

nothing turns on this discrepancy. At the time of purchase, the vehicle had approximately 230,000 kilometres on the odometer. The purchase agreement stated that the vehicle “complies with the requirements of the *Motor Vehicle Act*” and that the only warranty was the powertrain warranty.

12. Approximately one month after buying the vehicle, Mr. Fraser says a mechanic told him the front brakes were in poor condition and the vehicle was unsafe to drive. Mr. Fraser paid \$1,330.81 for the front brake pads to be replaced.
13. About two months after he purchased the vehicle, Mr. Fraser says that he noticed that the vehicle was overheating. A mechanic suggested that he replace the thermostat, but that failed to resolve the issue. On August 18, 2020, a mechanic at OK Tire assessed the vehicle and stated that the head gasket, cylinder and timing belt needed to be replaced.
14. Mr. Fraser advised Sensible that the vehicle’s head gasket needed replacement and asked for a refund of the vehicle’s purchase price. Sensible declined to give him a refund. Sensible’s position is that Mr. Fraser was not entitled to a refund, and that he should have pursued repairs under the terms of the powertrain warranty.
15. Mr. Fraser obtained estimates for repair costs ranging from between \$3,036 and \$7,075. Rather than proceed with the repairs, Mr. Fraser sold the vehicle in December 2020 for \$1,300. According to documents in evidence, the amount that Mr. Fraser spent on the purchase price of the vehicle and repair costs was \$6,331.61. He has waived the portion of his claim over the CRT’s \$5,000 small claims limit. As noted above, Mr. Fraser decided to deduct the \$1,300 selling price to arrive at his claim for \$3,700 in damages.

Was the vehicle defective or durable for a reasonable period of time?

16. There is no dispute that Sensible is in the business of selling vehicles. Therefore, unlike vehicle sales by private individuals, the transaction between Sensible and Mr. Fraser was not “buyer beware”. Under section 18 of the SGA, there is an implied warranty that the vehicle was in the condition described, was of saleable quality, and

would be durable for a reasonable period of time having regard to the use to which it would normally be put and to all the surrounding circumstances of the sale.

17. Based on the inspection results, Sensible presented the vehicle as being in satisfactory condition. The parties disagree about whether the vehicle was in satisfactory condition at the time of purchase, whether it was durable for a reasonable period of time after purchase, and whether there was a breach of the implied warranty under section 18 of the SGA.
18. A used vehicle is considered merchantable if it is in usable, even if not perfect, condition (see *Clayton v. North Shore Driving School et al*, 2017 BCPC 198 at paragraphs 99 – 110).
19. Mr. Fraser's position is that the fact that the brake pads needed replacement about a month after he bought the vehicle shows they were not in satisfactory condition as Sensible described or of saleable quality. Mr. Fraser says that, based on the inspection results, the brake pads should have lasted longer than they did. Sensible says the manner in which the vehicle was driven could account for wear on the brake pads, but also suggests that Mr. Fraser could have been "sold" on unnecessary repair work.
20. Mr. Fraser says the brake pads were replaced after he drove the vehicle for about 1,000 kilometers. He submitted a website article titled "How Long Do Brake Pads Last?", and says this article shows that, if 30% of the brake pads were left, they should have lasted for 21,600 kilometres. I also note that this article says that brake pad wear is "different for every driver and driving style", which is consistent with Sensible's submission.
21. I find that the questions about the condition of the brake pads when the vehicle was purchased and their durability given the length of time and manner in which the vehicle was driven are outside ordinary knowledge, and must be answered with expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283).

22. The evidence contains an August 31, 2020 email from Frank Le from Everbloom Auto Repair. Mr. Le said he worked on vehicle on July 14, 2020 and noted that the “front brake pads was uneven worn, the top parts of the pads was thicker than the bottom parts. that means the bottom parts of the pads was less than 1mm. plus the rotors was rusty” (reproduced as written).
23. As Mr. Le did not provide his qualifications, I am unable to determine whether he would meet the requirements for expert evidence as set out in CRT rule 8.3. In any event, although the email sets out Mr. Le’s findings and the work that was done on the brakes, it does not contain an opinion about the brake pads’ condition when Mr. Fraser bought the vehicle or their expected durability. There is no other expert evidence before me that comments on these issues.
24. In a civil proceeding like this one, an applicant must prove their claims on a balance of probabilities. In the circumstances, I find that Mr. Fraser has not established that the brake pads were in unsatisfactory condition at the time of purchase or not durable for a reasonable period of time bearing in mind that they were disclosed to be at only 30%. Based on the evidence before me, I find that there was no breach of the implied warranty under section 18 of the SGA.
25. Turning to the head gasket, Sensible admits that some Subaru models have issues with the head gasket, but it says that these issues are much less common in the type of engine in Mr. Fraser’s vehicle. Whether or not head gasket issues are common, this is not determinative of the vehicle’s condition at the time of purchase or whether it was durable for a reasonable period of time.
26. Mr. Fraser submits that the problem with the head gasket already existed when he bought the vehicle. He submitted a December 28, 2020 email from MS, a previous owner of the vehicle, who stated that a Subaru dealership and Destination Toyota, the dealership she sold the vehicle to, both told her that the head gasket needed to be replaced. MS advised that she sold the vehicle for less than she would have otherwise as it would need “a major repair soon”.

27. There is no documentation from the Subaru dealership, Destination Toyota or any other automotive professional about the head gasket's condition when MS owned the vehicle or why she was told that it would need to be replaced. I find that MS's report about what she was told does not amount to expert evidence (see *Bergen* above).
28. I do have expert evidence before me about the head gasket. Mr. Fraser provided a September 2, 2020 email from Sterling Arndt, the owner and head technician from OK Tire. Mr. Arndt says he diagnosed a head gasket failure, but that "[n]ot knowing any history of the car, or seeing it before you purchased it, it is impossible to pinpoint the exact time of failure". Mr. Fraser says that Mr. Arndt told him verbally that a head gasket problem developed over a period of time and likely pre-dated the purchase, but would not put this in writing.
29. I accept that Mr. Arndt is qualified as an automotive expert as contemplated by CRT rule 8.3. I give no significant weight to Mr. Fraser's report of his conversation with Mr. Arndt, and instead prefer the contents of his written statement, which suggest that it is not possible to tell when the head gasket failed. Therefore, there is no expert evidence before me that establishes the timing of this event.
30. Without knowing when the head gasket failure occurred, I cannot conclude that the vehicle was not in satisfactory, saleable condition when Mr. Fraser bought it. So, I cannot find that there was a breach of the implied warranty.
31. The next consideration is whether the vehicle was durable for a reasonable period of time after Mr. Fraser bought it. When assessing this, factors such as the vehicle's age and mileage, the nature of use before and after purchase, the price paid, the reasons for any defects, and the parties' expectations as determined by express warranties are considered (see *Sugiyama v. Pilsen*, 2006 BCPC 265).
32. As noted, there were no express warranties in the parties' agreement other than the powertrain warranty. I find that the presence of a warranty was an acknowledgement by the parties to the purchase agreement that the vehicle might require repairs in the

future. So, the fact that the vehicle needed repairs does not lead to the conclusion that it was not reasonably durable.

33. In *Sugiyama*, the court found that a serious engine failure after 32 days of driving did not mean that the vehicle was not roadworthy or safe to drive when it was sold. I make a similar finding here in the absence of specific evidence about how long the vehicle might reasonably have been expected to last given its make, model, age, odometer reading of approximately 230,000 kilometres and without evidence about how the vehicle was maintained or driven in the past.

34. I find that Mr. Fraser has not established that the vehicle was not durable for a reasonable period of time. Keeping in mind that he bears the burden of proof, I find that there was no breach of the implied warranty in the SGA.

Did Sensible misrepresent the vehicle's condition?

35. Mr. Fraser argues, and Sensible denies, that Sensible misrepresented the condition of the front brake pads and did not disclose the problem with the head gasket. Although he did not say so specifically, I find that Mr. Fraser is arguing that Sensible fraudulently misrepresented the condition of the vehicle.

36. As set out in *Ban v. Keleher*, 2017 BCSC 1132, in order to succeed in a claim for fraudulent misrepresentation, an applicant must prove:

- a. That a respondent made a representation of fact to the applicant,
- b. The representation was false,
- c. The respondent knew the representation was false or made the representation recklessly, not knowing if it was true or false,
- d. The respondent intended for the applicant to act on the representation, and
- e. The applicant was induced to enter into a contract relying on the false representation and suffered a detriment.

37. The thrust of Mr. Fraser's argument is that Sensible knew about the head gasket issue and the "true state of wear" on the brake pads but hid the problems and induced him to purchase a vehicle that was not in the satisfactory condition it claimed.
38. Mr. Fraser suggests that Sensible would have been aware of the head gasket issue because of what MS stated about her interactions with the Subaru dealership and Destination Toyota. However, there is no indication that Sensible had any contact with a Subaru dealership about this vehicle. Further, although Sensible bought the vehicle from Destination Toyota, according to the March 10, 2020 bill of sale, the purchase was on an "as is" basis and Destination Toyota did not provide any information about parts that may require repair. I find that the evidence does not establish that Sensible would or ought to have been aware of any issues MS had with the vehicle.
39. As noted above, the mechanic who performed the safety inspection for Sensible did not identify any issues with the head gasket. I find that the evidence does not support the conclusion that Sensible was reckless in relying on the results of the mechanic's inspection.
40. Sensible disclosed the fact that only 30% of the front brake pads remained. Further, I have already determined that the available evidence does not establish that the brake pads were in poor condition or that the head gasket issue was present at the time of the vehicle purchase. I find that Sensible did not knowingly or recklessly make a false representation to Mr. Fraser. Without this element of the test, fraudulent misrepresentation is not established.
41. I acknowledge Mr. Fraser's dissatisfaction with the vehicle. However, given my conclusions that Sensible did not breach the implied warranty in the SGA or fraudulently misrepresent the vehicle, I find that Sensible is not responsible for Mr. Fraser's damages. Accordingly, I dismiss the claim.
42. Under section 49 of the CRTA and CRT rules, the CRT generally will order an unsuccessful party to reimburse a successful party for CRT fees and reasonable

dispute-related expenses. As Mr. Fraser was not successful, I dismiss his claim for reimbursement of CRT fees. Sensible did not make a claim for reimbursement of fees or expenses.

ORDER

43. I dismiss Mr. Fraser's claims and this dispute.

Lynn Scrivener, Tribunal Member