Citation: *Whitehorse Wholesale Auto Centre Limited v. Pye*, 2023 YKSM 7

Date: 20231004
Docket: 22-S0034
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Judge K.L. McLeod

WHITEHORSE WHOLESALE AUTO CENTRE LIMITED

Plaintiff

v.

TYNISHA PYE

Defendant

Appearances:
Edwin Woloshyn — Appearing on behalf of the Plaintiff
Tynisha Pye — Appearing on her own behalf

REASONS FOR JUDGMENT

[1] The Plaintiff (through its corporate name, whose proprietor is Mr. Woloshyn) has brought an action against the Defendant for $21,242.14, plus interest and costs. The trial proceeded in Small Claims Court.

[2] The Plaintiff operates as a car dealership which buys and sells second-hand cars. The company allows conditional sales agreements for purchasers of vehicles. This allows purchasers to pay down the cost of the car by instalments, with interest.

[3] The Defendant, who is the mother of two small children, has bought a number of vehicles from the Plaintiff utilizing this method. In May 2022, she bought a used 2020 Ford F-150 truck (the “F-150”) for $45,995. The truck’s odometer registered 7,000 km.

[4] Two months later, the front seatbelt of the F-150 failed. The Defendant's mother took it to the Ford Dealership (the "Dealership") to attempt to get the seatbelt repaired/replaced. It was assumed, given the low odometer reading, that it was still under warranty. The F-150 did not have a VIN number on the door. However, the insurance documents did have a VIN number so that was provided to the dealership.

[5] The Dealership provided the Defendant with a copy of a document entitled "Connected Vehicle Data" (Exhibit C of Affidavit No. 1 of Tynisha Pye affirmed November 21, 2022). Under the heading, "Warning Messages", there is the following: "!!Warning !! Warning !! Warning !! Warning!! ALL WARRANTY CANCELLED TOTAL LOSS PER FORD CREDIT CANADA".

[6] The Defendant subsequently paid for and obtained a "Vehicle History Report & Lien Check" (known as a Carfax Report) which revealed the following:

- On September 5, 2020, at New Westminster, British Columbia, the F-150 was involved in a collision, at that time the odometer reading was 4,516 km. Under the "Details" there is the following entry: "Estimate: Total loss Estimate Date 2020 Sept. 16 and the amount $29,551.25." The next detail provided is: "Claim: Collision $34,775."

- There is a second entry dated November 2, 2021, at Calgary, Alberta. Those details are: "Police Reported Accident: Accident reported Damage to Left Side."

- Under the “Estimate” heading there is the following: “Not Available Estimate Date 2021 Nov $13,880.83”. There is also a second entry: “Estimate: Not available Estimate Date 2022 Jan 14 $16,138.10.”

[7] Thus, it appears the F-150 had been in two accidents prior to it being sold to the Defendant, in one of which it was deemed “A Total Loss” i.e., an insurance write off.

[8] The Defendant was never informed of this by the Plaintiff. The Plaintiff says he did not know of this. He testified that he bought the F-150 in a car auction in Alberta and had never checked the vehicle's history.

[9] As a result of the Dealership information, the Defendant went to the Plaintiff. Two days later, after spending two days considering what she concluded were unacceptable options given to her by the Plaintiff, (they are contained in her Affidavit), she returned the F-150 to the Plaintiff with the keys and made no further payments on the contract.

The Details of the Contract

[10] When the Defendant first took possession of the F-150, she returned two vehicles that she had on a conditional sales agreement from the Plaintiff. One was a 2020 BMW X1 (the “BMW”) for which the purchase price on June 21, 2021, was listed at $37,000. That conditional sales agreement was for 96 months at 7% interest. As of May 11, 2022, when she returned the vehicle, there was $33,610.71 outstanding. The Defendant had made 12 payments, each of which was for $477.18 which included approximately $206 in interest per payment.

[11] The second vehicle was a 2020 Ram 1500 Bighorn (the "Bighorn"), for which the purchase price on March 2, 2020, was $66,995, for which there was a fleet discount deducted of $12,000 leaving a net of $54,995. The Defendant had returned a Jeep for which she received a credit of approximately $2,084.15 (the trade in minus any loan outstanding on that earlier vehicle). Thus, the remaining balance on the Bighorn was $52,920.85 which was sold as a conditional sale with 7% interest. The Defendant made 29 payments on the Bighorn each between $550 and $1,000, but the majority of which were in excess of $700 of which approximately $250 per month constituted the interest calculated thus, when this was traded in, there was a balance outstanding of $41,180.96.

[12] When the Defendant traded these two vehicles for the F-150, she received a trade-in value as follows:

> For the BMW: $30,000 and for the Bighorn $35,000. Thus, there was left a balance outstanding on those liens which were incorporated in the contract on the purchase of the F150.

The Plaintiff's Claim

[13] The Plaintiff now seeks the following:

1. The amount outstanding on the earlier 7% loans which is the difference between the trade-in value and the amount outstanding: on the BMW that is $3,610.71 and on the Bighorn: $6,180.96. Total for this:

$9,791.67 plus two months' interest at 7% during which time the Defendant had the F-150: which was calculated as $159.72;

2. The cost of what the Plaintiff terms as "one month truck usage of the F-150" which was charged on July 8, 2022, and presumably not received by the time the vehicle was returned. According to the Plaintiff, it is in the amount of $1,198.63 calculated at a daily rate;

3. The cost of cleaning the F-150 upon receiving it back from the Plaintiff to prepare it for resale; The cleaning was charged for the hours it took Mr. Woloshyn and his life partner, Ms. Joy Agus, with whom he lives, to clean the F-150. The Plaintiff's labour costs are listed as follows: Mr. Woloshyn at an hourly rate of $100 for 4.5 hours, and Ms. Agus for the same amount of time at $60 per hour, making it a total of $720;

4. Cost of repairs to the Bighorn upon its return. The Plaintiff's Statement of Claim is apparently an accounting for the "repairs" of that vehicle amounting to $4,830. The Defendant replies that she agreed to pay for a broken slider window, for which she has provided a copy of two estimates she received, one for $3,370, the other for $2,480 plus GST;

5. Excess mileage on the F-150, which the Plaintiff posits is calculated in the following way: When the F-150 was sold it had 7,000 km on it, when it was returned it had 19,108.4 km. The Plaintiff suggests that the "allowable yearly normal usage is 20,000 km" and therefore claims

> a fee for 8,775 km as excess mileage which is calculated at a rate per kilometre of $0.59 cents. The amount claimed is $5,177.25. For support of this claim, the Plaintiff has relied on a document found apparently as a result of a Yahoo search responding to the search question: "What is the average mileage per year in Canada? What are the automobile allowance rates in Canada". This speaks to an automobile allowance rate on a per kilometre basis. The contract with the Defendant is silent as to the allowance number of kilometres per year and as to any possibility of excess odometer charges. I will dispense with this part of the claim by denying this outright;

6. Pre-judgment and post-judgment interest; and

7. Costs.

The Legal Principles and their applicability to this Case

[14] The *Sale of Goods Act*, RSY 2002, c. 198 (the "*Act*") deems certain implied conditions which apply to the contract between the Plaintiff and the Defendant. Section 15 states:

> Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:
>
> (a) when the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business

> to supply, whether the seller is the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for that purpose;
>
> (b) when goods are bought by description from a seller who deals in goods of that description, whether the seller is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality; except that if the buyer has examined the goods there is no implied condition as regards defects that the examination ought to have revealed;
>
> (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
>
> (d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[15] This section is a duplicate of an equivalent section in many of the territories and provinces and indeed, Commonwealth countries. As a result, I now turn to some of the cases that have guided me in this decision.

[16] In *Amiri v. General Motors of Canada Ltd.*, 2010 BCPC 282*,* Ms. Amiri had purchased a Saab from a car sales company, Morrey Sales. She purchased the car, and while she ultimately lost her case on other grounds, the Court's dictum on where the *Sale of Goods Act*, RSBC 1996, Chapter 410, of British Columbia, (which in the most part mirrors the Yukon *Act*), applies to this sale is helpful.

[17] Firstly, relating to the implied conditions of fitness of a sale, the Court stated:

> 80 In accordance with s. 18 (a) of the *Sale of Goods Act*, as a precondition to there being an implied warranty or condition of reasonable fitness, it must first be shown that Ms. Amiri, expressly or by implication, made known to Morrey Sales the particular purpose for which she required the vehicle, so as to show that she relied on Morrey Sales' skill or judgment. Ms. Amiri has fulfilled this requirement. She indicated that she spoke with

> the dealership representatives about the vehicle and informed them of her profession and her intended required purpose for the vehicle.
>
> 81 Master of the Rolls Colin in *Priest v. Last*, [1903] 2 K.B. 148 (C.A.), as cited at paragraph 81 of *Chabot v. Ford Motor Co. of Canada Ltd. et al.* (1982), 39 O.R. (2d) 162, a judgment of Eberle J. of the Ontario High Court of Justice, discussed the manner in which this requirement affects goods that are sold with only one particular purpose:
>
> > ... in a case where the discussion begins with the fact that the description of the goods, by which they were sold, points to one particular purpose only, it seems to me that the first requirement of the sub-section is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller. The fact that, by the very terms of the sale itself, the article sold purports to be for use for a particular purpose cannot possibly exclude the case from the rule that, where goods are sold for a particular purpose, there is an implied warranty that they are reasonably fit for that purpose.
>
> 82 Although this passage is from an English case and the discussion concerns a different Act, it provides some assistance in determining how s. 18(a) of our *Act* should be interpreted. Even absent Ms. Amiri's discussion with Morrey Sales staff concerning her intended use of the vehicle, it can be concluded that Morrey Sales had knowledge of the particular purpose for which a car is used, namely to drive on the road carrying people and things and for her use as a realtor. I find that Ms. Amiri made known, expressly or impliedly, the particular purpose for which she required the vehicle and it is Morrey Sales' business to supply such vehicles. On this basis Ms. Amiri could establish that there is an implied condition that the vehicle she leased from Morrey Sales be reasonably fit for her purposes.

[18] Additionally, I would refer to *Marshall v. Ryan Motors Ltd* (1922)*.,* 65 D.L.R. 742 (Sask. Ct.), where the Court held, applying *Priest v. Last,* [1903] 2 K.B. 148 (C.A.), that merely asking for an automobile was sufficient to make known to the seller the particular purpose for which it was required, the ordinary use of conveying persons from place to place.

[19] Clearly, the dicta of these cases applies to the case at bar. The Plaintiff knew the vehicle was to be used for driving in the Yukon. The Plaintiff knew where the Defendant lived and no doubt knew of her family circumstances, i.e., that she was pregnant and had a young child at home. Clearly, what the Plaintiff sold to the Defendant was not "reasonably fit for her purposes" – i.e. – safe driving in the territory. Thus, the Plaintiff is in breach of s. 15(a) of the *Act*.

[20] I will now turn to s. 15(b). Again, I quote from *Amiri,* at para. 83:

> Ms. Amiri indicated that the particular vehicle that she leased from Morrey Sales is not the same vehicle that she test drove prior to signing the lease. Her allegation that this was a sale by description has not been refuted. In reference to a similarly worded statute, the South Australia Sale of Goods Act, 1895, the decision in *Grant v. Australian Knitting Mills, Ltd. et al.,* [1936] A.C. 85 (P.C.), cited in *Chabot v. Ford Motor Co. of Canada Ltd. et al.* (1982), 39 O.R. (2d) 162 at paragraph 79, indicates that this is not a difficult test to meet:
>
> > It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen undergarments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations."
>
> The precondition for the creation of an implied condition that the vehicle be of merchantable quality has been fulfilled and this lease constitutes a sale by description.

[21] Clearly, the fact that this vehicle was far from its description, a two-year old low-odometer reading truck with obviously a history of catastrophic damage incurred, which could not be ascertained by a purchaser such as the Defendant, mandates a finding that the Plaintiff breached s. 15(b) of the *Act*.

[22] Finally with respect to s. 15(c), the Plaintiff is in the business of selling cars. Furthermore s. 15(d) does not apply. In order to contract out of the implied terms of fitness, there must be clear language. No such exclusion clause exists.

[23] I therefore conclude that the Plaintiff has, by his negligence of not checking the vehicle history and selling the F-150 as he did, breached the three implied conditions. The Defendant was entitled to assume what in law could be termed “a fundamental breach” by the Plaintiff as he failed to perform the obligations of a business in the sale of vehicles of knowing a vehicle’s history and disclosing that history.

[24] The F-150 was totally unsuitable for its obvious purpose. It was an unsafe, twice seriously damaged vehicle, for which the Plaintiff had a duty to advise any purchaser. To say that he did not know is, frankly, astonishing. He owed a duty of care to the Defendant and any other purchaser of a vehicle. To admit that he did not do a vehicle search of the vehicle (known as a "Carfax report") does not excuse him. He testified he bought this vehicle from an auction, obviously for resale. A simple search would have revealed the fact that this vehicle had been written off once and on a second occasion, damaged in an accident. If The Defendant could conduct such a search, after she was made aware of the fact that the warranty had been cancelled because of the damage, so should the Plaintiff, who is in the business of selling vehicles.

[25] Thus, I find the Defendant was entitled to treat the contract at an end, which she did by returning the vehicle (see *Chabot v. Ford Motor Co. of Canada Ltd et al,* (1982), 39 O.R. (2d) 162 (H. Ct. J.), at para. 82). It is clear, from this case, that when a fundamental breach has occurred, and the innocent party has learned of it, they have a

right to accept the repudiation of the contract, evidenced by the acts which constitute the fundamental breach. The innocent party can treat the contract as at an end and sue the other party to the contract for such damages as he may have sustained.

[26] In this case, it is the Plaintiff who brings this action, seeking as set out at para. 13. The Defendant defends this action on the basis that it was the Plaintiff who breached the contract, and she owes nothing.

[27] I will now turn to one more duty that is owed by the Plaintiff. He has a duty to mitigate any damage that he says he suffered.

[28] Mitigation is indeed a well-developed concept in common law. An injured party is not allowed to sit on its hands and do nothing as more damage accumulates over time. In other words, the injured party must do everything reasonable to stop any further damage from occurring (see *Malton v. Attia,* 2015 ABQB 135, at para. 170).

[29] With that framing, I now turn to my findings with respect to the Plaintiff's Claim.

Summary and Conclusion

Claim 1 and 2

[30] The amount outstanding on the earlier 7% loans which is the difference between the trade-in value and the amount outstanding: on the BMW that is $3,610.71 and on the Bighorn, $6,180.96. The total for this is $9,791.67, plus interest of 7% on the balance outstanding on these two vehicles for the two months that the Defendant owned the F-150 is $159.73.

Claim 3

[31] The cost of what is described as "one month truck usage of the F-150" which was charged on July 8, 2022, and presumably not received at the time the F-150 was returned in July. According to the Plaintiff, is the amount of $1,198.63, calculated at a daily rate.

Claim 4: The Cleaning of the F150 - $720 to get it ready for sale.

[32] The Defendant had bought, on a conditional sale, a truck that was so far from what it appeared, a safe relatively new, low mileage, under warranty truck. It was not. Within two days of discovering the fundamental breach of this contract, Ms. Pye rescinded the contract by returning the truck. It is her position that Claims 1 to 4 should fail because the Plaintiff was the author of the breach of her contract.

[33] At trial, the Plaintiff, in response to questioning by me, conceded that all the vehicles that were the subject of the contract dated May 2022 had been sold. The Plaintiff failed to provide any confirmation of the details of those sales. He was vague at best when asked, except with respect to one of those vehicles, the Bighorn, which he said that he "thought" he had sold it for $35,000. He never provided written confirmation of such of either the price received, or the date sold.

[34] As stated in the absence of any documentary proof, I am unable to find that the amount the Plaintiff claims is, in fact what he lost. Frankly, even if he had provided such information, and has suffered a loss; the monies owing on all of these vehicles had

been incorporated into a new contract, for which he is totally responsible for a fundamental breach of its conditions.

[35] Thus, Claims 1 to 4 inclusive are dismissed.

Claim 5: Cost of Repairs to the Bighorn Upon Return

[36] The Plaintiff claims $3,900, but Exhibit C of the Affidavit in support of the Statement of Claim is apparently an accounting for the "repairs" of the vehicle amounting to $4,830. The Defendant, in her Reply Affidavit, replies that she agreed to pay and will honour the cost of a broken slider window, for which she has provided a copy of two estimates she received, one for $3,370 including GST and the other for $2,480 plus GST which would equal $2,604. The difference between these two estimates is $760. I will therefore split the difference and award the Plaintiff the amount of $2,984. Again, I would note that the Plaintiff failed to provide a receipt for the cost of the repair of the broken slider. As the Defendant agrees in her Reply Affidavit to pay for this repair, I will award the Plaintiff the amount of $2,984.

Claim 6: The Claim for Excess Mileage

[37] I have already rendered judgment on that; it is dismissed.

Claim 7: Pre-judgment and Post-judgment Interest.

[38] Any claim for pre-judgment and post-judgment interest is determined by s. 35 and s. 36 of *Judicature Act,* SY 2002 c. 128. I will deal with each of these claims individually.

Pre-judgment Interest

[39] This is governed by s. 35 of the *Judicature Act* which sets the parameters of a discretion vested in the judge. Section 35(7) states:

> The judge may, if considered just to do so in all the circumstances, in respect of the whole or any part of the amount for which judgment is given,
>
> a) disallow interest under this section;
>
> b) set a rate of interest higher or lower than the prime rate; or
>
> c) allow interest under this section for a period other than that provided.

[40] The key to my decision is really based on what is **"just".** Given the findings that I have made in this judgment, it would not be "just" to award the Plaintiff pre-judgment interest. The Plaintiff has, for the most part, had most of the claims dismissed.

Post-judgment Interest

[41] Post-judgment interest is governed by s. 36 of the *Judicature Act*. I have no discretion as to whether interest should be awarded. However, s. 36(2) of the *Judicature Act* states this:

> A judgment for the payment of money shall bear interest at the prime rate from the day the judgment is pronounced or the date money is payable under the judgment.

[42] Post-judgment interest will accrue at the prime rate, commencing 45 days after the date of this judgment.

Claim 8: Costs

[43] Each party will bear its own costs.

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MCLEOD, K.L. T.C.J.