

Citation: *MacDonald v. 37086 Yukon Inc.*, 2016 YKSM 7

Date: 20161123
Docket: 15-S0063
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Lilles

PAUL ANDREW MACDONALD

Plaintiff

v.

37086 YUKON INC. doing business as
YUKON YAMAHA

And

YAMAHA MOTOR CANADA LTD.

Defendants

Appearances:

Paul MacDonald
Grant Macdonald

Kevin Connor

Appearing on own behalf
Counsel for 37086 Yukon Inc.
doing business as Yukon Yamaha
Appearing for Yamaha Motor Canada Ltd.

REASONS FOR JUDGMENT

[1] This case involves the purchase of a new snowmobile by the plaintiff, a resident of Inuvik, Northwest Territories, from the defendant, 37086 Yukon Inc. doing business as Yukon Yamaha (hereinafter referred to as Yukon Yamaha), in Whitehorse, Yukon. The plaintiff encountered a series of mechanical problems with the snowmobile that resulted in this proceeding, in which he asserts a fundamental breach of contract, a remedy of rescission, the return of the full purchase price, as well as damages.

[2] In late fall of 2014, Paul MacDonald contacted Yukon Yamaha to see if they had

any 2015 SR Viper snowmobiles in stock. His inquiry was limited to this specific snowmobile model, having conducted prior research, and being satisfied this was the next snowmobile he would like to purchase. He spoke with Gary Lamer, a sales representative for Yukon Yamaha, who informed him that yes, in fact, at least one 2015 SR Viper was in stock at the dealership. Mr. MacDonald had owned and operated Yamaha snow machines before, including another mountain machine, and had positive past experiences with Yamaha machines. He did not seek the advice of Gary Lamer, or other representatives at the Yukon Yamaha dealership with regard to the suitability of this particular model for its intended use, namely, for recreation and as a search and rescue vehicle on the Arctic tundra in the area surrounding Inuvik, NWT. On the other hand, Mr. Lamer would be well aware of the nature of winters in the Yukon and the Northwest Territories, the distance between communities, and that a breakdown of the snowmobile far from the nearest community could be dangerous and even fatal.

[3] On November 23, 2014, Mr. MacDonald ordered one model 2015 SR Viper Yamaha snow machine from Yukon Yamaha, over the phone, and sight unseen. He made an online payment for the full cost of the snow machine on December 5, 2015 in the amount of \$18,688.95. At Mr. MacDonald's request, the snowmobile was shipped, uncrated, to Inuvik. The snowmobile arrived at its destination on January 6, 2015, and was promptly collected by Mr. MacDonald.

Mechanical Problems

Loose Track

[4] On January 6, 2015, Mr. MacDonald took his brand new SR Viper snowmobile

for his first ride. Shortly into his first ride, he noticed that the track was extremely loose and was slipping against the underside of the seat, there was loss of power and he experienced severe vibration. In fact, the track had enough slack that it would accommodate his arm. Mr. MacDonald was surprised because he had paid for a PDI, meaning pre-delivery inspection.

[5] Mr. MacDonald immediately contacted Yukon Yamaha and was told to tighten the track and check the “cogs” for wear. He did not notice any wear on the front cogs, but did notice that the “H-Arm” had two gouges where the track was cutting into the metal. With the assistance of his friend, Rick Lindsay, a former Yamaha mechanic, they tightened the track as instructed using a fish scale to ensure proper tension.

Oil Leakage

[6] On February 9, 2015, with less than 100 km on the SR Viper, and while on a ride some distance from Inuvik, Mr. MacDonald ran the snowmobile up a snow bank where it became stuck. The snowmobile was canted on an angle to the side. As he attempted to free the snowmobile from the bank, Mr. MacDonald noticed oil leaking from the engine and clutch area. Upon application of the throttle, the track would not spin. With the help of a friend, Mr. MacDonald cleaned up enough oil to partially alleviate the problem to a point where he could operate the snowmobile, albeit at a very limited speed.

[7] It is worthwhile noting that the temperature was -40 degrees Celsius with the wind chill taken into account. It took Mr. MacDonald 30 minutes to clean off the oil using his socks. It took four hours to travel 60 km back to his home. As the snowmobile was losing grip, it was not a smooth ride and the snowmobile tended to

lurch. He could also smell burning rubber.

[8] Upon arriving home, he inspected the interior of the primary and secondary clutch assemblies and observed scarring of the interior of the primary assembly and damage to the secondary helix. He found a small piece of loose metal within the assembly. Coincidentally, Mr. MacDonald was contacted the next day, February 10, 2015, by Doug Caldwell, the Service Manager for Yukon Yamaha, with information that there had been a special bulletin issued by M.P.I – the manufacturer of the aftermarket turbo installed on Mr. MacDonald's snowmobile - in relation to a known issue with oil leakage. Mr. Caldwell informed Mr. MacDonald that Yukon Yamaha would be shipping him a refitting kit that should remedy the issue. Mr. MacDonald inquired further about the loose track, and Mr. Caldwell recommended that he look at the front cogs.

[9] On February 18, 2015 Mr. MacDonald drove to Whitehorse and was advised by Doug Caldwell that the “oil direct” kit which would remedy the leakage problem had not arrived yet. Mr. Caldwell also advised him to check the cogs and track system.

Front Sprocket Wear; Multitrack Clips; H-Arm Wear; Oil Leakage

[10] On February 26, 2015, Mr. MacDonald inspected the snowmobile's front cog and track system. He observed damage to the front cog, damage to the multitrack clips on the track, and oil leaking from the loose turbo hose. Mr. MacDonald also found gouge marks on the front suspension H-arm. These gouges were later determined by Yamaha Yukon to be the result of a product design defect whereby the track would occasionally make unwanted contact with the front suspension arm. At this point, Mr. MacDonald had driven the snowmobile for a little more than 100 km. The above problems were

communicated to Mr. Caldwell on or prior to March 3, 2015.

[11] Neither Yukon Yamaha nor Yamaha Motor Canada Ltd. (hereinafter referred to as Yamaha Canada) would accept responsibility for the gouge marks on the front suspension H-Arm until two weeks prior to the beginning of this trial, on October 23, 2016, some 20 months after Mr. MacDonald purchased the snowmobile.

“Ratcheting” at High Speeds

[12] On March 3, 2015 while out for a ride on the snowmobile, Mr. MacDonald experienced what he referred to as “ratcheting” at high speeds. He sent an email to Yukon Yamaha describing the problem. In response to his inquiry, Mr. Caldwell recommended that Mr. MacDonald purchase and install an aftermarket suspension part referred to as the High Gear suspension bracket. Mr. MacDonald followed this advice and purchased the part at a cost of \$329.56.

[13] Mr. MacDonald took the snowmobile to the authorized Yamaha dealer in Inuvik (Yamaha Inuvik) to fix the clutch, install the oil redirect component and deal with the suspension issues. The High Gear Suspension bracket arrived on March 17, 2015 and Mr. MacDonald delivered it to the Inuvik dealer that same day. He was able to pick up the machine on March 19, 2015. The front clutch had not been replaced as this part had not yet arrived. As an interim temporary fix, the clutch was sanded and re-installed until the new clutch arrived. The High Gear suspension component was installed by a Yamaha Inuvik technician. It was later observed by Yukon Yamaha technicians that the High Gear part had been installed upside down.

Steering Problems

[14] On March 21, 2015, Mr. MacDonald and Rick Lindsay set out for a snowmobile ride. As they headed out, Mr. MacDonald found the steering to be very difficult. It was so difficult that Mr. Lindsay was not able to steer it at all. Mr. MacDonald found out later that Yamaha Inuvik had tightened the track too tight.

[15] Mr. MacDonald returned the snowmobile to the Yamaha Inuvik on March 23, 2015 and picked it up on March 30, 2015. He was advised that the front clutch had been ordered but had not arrived yet.

Steering Column Collapse

[16] On April 1, 2015 while riding the snowmobile during the Inuvik Poker Run, Mr. MacDonald observed the track slapping against his seat. Some distance into the ride, the steering column collapsed and injured Mr. MacDonald's hand. Mr. MacDonald inspected the steering column fasteners and observed two of the four fixing bolts to be missing, and the remaining bolts to be partially undone, or as he stated "loose". The function of the brake and throttle systems was temporarily disadvantaged by the steering column collapse.

[17] On April 14, 2015 Mr. MacDonald discovered that the Yamaha dealer in Inuvik had not yet ordered the replacement clutches because he needed to talk to his "rep". Mr. MacDonald had understood they had been ordered three to four weeks earlier. This was, as the expression goes, "the straw that broke the camel's back". Mr. MacDonald decided to return the snowmobile to Yukon Yamaha and shipped the machine back. He

advised Mr. Caldwell of Yukon Yamaha by email of his decision. In a phone call, which I understood took place the same day, he advised Mr. Caldwell that "I am shipping the machine back to you." On April 20, 2015, he wrote a lengthy letter to Mr. Caldwell outlining the problems he encountered (Exhibit 20). He concluded the letter as follows:

Therefore, given the severity of the issues, the lack of professional mechanics as advertised locally, I want to return it for a full refund. I reiterate that I am a loyal Yamaha customer, however, this is by far the worst purchase and most frustrating purchase I have ever made. There is still well over a month of snowmobiling left and I am yet to enjoy the season on the SR Viper.

[18] In June of 2015, Mr. MacDonald received a telephone call from Mr. Caldwell that advised that he was still waiting for a replacement track. Mr. MacDonald again told Mr. Caldwell that he was looking for a full refund. On September 8, 2015 Mr. MacDonald filed this legal claim.

Relevant Legislation

[19] The *Sale of Goods Act*, RSY 2002, c. 198 states:

Implied conditions as to quality or fitness

15 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. S.Y. 2002, c.198, s.15

[20] The *Consumers Protection Act*, RSY 2002, c. 40 states:

Warranties on Sale

58(1) Despite any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every retail sale of goods and in every retail hire purchase of goods

...

(e) a condition that the goods are of merchantable quality, except for any defects that are described;

The Law

Merchantable Quality

[21] On the facts of this case, s. 15(a) of the *Sale of Goods Act* does not apply because Mr. MacDonald conducted his own research and ordered the 2015 SR Viper snowmobile. He did not rely on the seller's skill or judgment or recommendation.

[22] As the snowmobile was bought by description from a seller who deals in goods of the description (Yukon Yamaha), s. 15(b) of the *Sale of Goods Act* does apply. There is an implied condition that the goods shall be of merchantable quality, except for defects that an examination would have revealed.

[23] The *Consumers Protection Act* in s. 58(1)(e) imposes a similar obligation of merchantable quality on a seller of retail goods, although for the purpose of this decision I will refer primarily to the *Sale of Goods Act*.

[24] Depending on context, in a particular case, there may be little difference between the implied warranties in s. 15(a) and s. 15(b) of the *Sale of Goods Act*. These sections apply in different circumstances and provide differing degrees of protection. But there is often considerable overlap between the protection provided by each section.

[25] Although the *Sale of Goods Act* does not define “merchantable quality,” the thrust of the caselaw requires the goods to perform to the reasonable expectations of the buyer. In the matter at hand, it means that the snowmobile must be suitable as a high end, high performance snowmobile, commensurate with its purchase price, to be used in northern Canada.

[26] The decision in *Villeseche (c.o.b. Green Apples Graphics) v. Total North Communication Ltd.*, [1997] Y.J. No. 51 (C.A.) is illustrative of the meaning of “merchantable quality.” In that case, the plaintiffs purchased a specific piece of computer equipment and software from the respondent. It was installed in November 1991. From the beginning, the program would not start automatically and, at some inconvenience to the plaintiff, had to be started manually. The respondent was unable to fix the problem because it was software-related. The system crashed in April 1992 and the plaintiff was unable to access three years of data stored on the system’s cartridges.

[27] The Court found that the plaintiff ordered a specific piece of computer equipment

from the respondent. The plaintiff did not rely on the respondent's skill and judgment, but rather ordered the equipment by its name, "Top Drive." As a result, the plaintiff could not rely on s. 15(a) of the Act that creates an implied condition that "the goods be reasonably fit for the purpose."

[28] But, as the goods were bought by description, namely by its brand and trade name from a seller that dealt in goods of that description, the Court found that s. 15(b) applied. That section implies a warranty that the goods are of a merchantable quality.

[29] The Yukon Court of Appeal adopted the trial judge's decision as follows in paragraph 8:

The exact meaning of the term "merchantable quality" has been the subject of considerable debate in the previous litigation. It is understood to mean that if goods are unsuitable for their only proper use, they will not be merchantable. The implied condition will not be breached by computer products that are saleable in the market and fit for the general purposes that such products serve. If products are unfit for any purpose for which they would ordinarily be used, or for the special purpose for which the supplier knows they are intended, they will be merchantable. "Unmerchantable" has been frequently taken to mean "unsaleable" but in other circumstances has been taken to mean "defective" or "useless."

[30] On the facts of the case, the Court of Appeal found the immediate or early defect in the equipment preventing automatic loading of the program to be related to "merchantable quality." The possibilities of operator abuse or other factors caused by the plaintiff could be negated because the problem appeared immediately upon use.

[31] It is also apparent that rather minor defects can prevent the purchased item from being of merchantable quality. The Court of Appeal quoted from Fridman in the *Sale of Goods* 4th ed. (Toronto, Carswell, 1995) at page 210:

Goods which need something done to them in order to render them usable in accordance with the intention of the buyer, even if what needs to be done is trivial, will not be of merchantable quality. A defect which can easily be cured is as serious as a defect that will not yield to treatment. So in *International Business Machines Co. v. Scherban*, [1925] 1 W.W.R. 405 (Sask. C.A.) the fact that the only thing wrong with a \$294 article, namely, a computing scale, was a 25 cent piece of glass, did not prevent the goods from being of unmerchantable quality.

[32] If the goods are not of merchantable quality the plaintiff is entitled to sue for damages, which could include some or all of the original purchase price as well as for other losses incurred. In some circumstances, the purchaser is entitled to repudiate the agreement entirely, return the defective goods and sue for return of the purchase price and other damages. The breach in these circumstances is referred to as a fundamental breach.

Fundamental Breach

[33] The decision in *Beldessi et al. v. Island Equipment Ltd.* (1973), 4 D.L.R. (3d) 147 (B.C.C.A.) involved the purchase of a log skidder. Due to the difficulties they had with the skidder after purchase, the plaintiffs elected to treat the contract as at an end. The Court found that:

... the machine displayed a series of various mechanical defects that caused it to be “down” for approximately two-thirds of its available working time either for repairs or for modification or for both. In the result and for those reasons, it never performed as it, or as any similar such machine acquired for the purposes for which it was acquired, should have performed.

... its suitability for the work it was designed and intended to do was a fundamental term of both agreements whose breach went to the root of the contract between the parties and entitled the plaintiffs to treat it as they did, namely, as a repudiation of the agreement to provide for their use a machine which was suitable for the purpose for which it was intended ...

[34] The case of *Foley v. Pica Contracting Ltd.* 2005 BCSC 651 involved a tractor that had multiple breakdowns and repairs. Over a period of 18 months, the owner was able to use it for only 700 hours. It was not useless, but it was unreliable. The owner could not count on it working when he needed it. It was described as having significant operational and safety issues. It was not what a buyer would expect from a new tractor. The court concluded that given all the difficulties and problems, this amounted to a fundamental breach of the contract and the purchaser was entitled to the remedy of rescission and the return of his purchase price.

[35] In *Farnworth Finance Facilities Ltd. v. Attryde et al*, [1970] 2 All E.R. 774, 1 WLR 1053, the plaintiff purchased a motor vehicle. Lord Denning, M.R., stated at p. 777:

Surely one of the hidden characteristics of a new car or truck, and one that both parties to a contract would contemplate it as enjoying, is that it be free from such defects as to make it unsuitable for the performance of its obvious or know purpose, and which cannot be readily corrected. The buyer should expect that there has been some reasonable system of inspection during manufacture and before delivery, and that it is not fitted with defective parts which a reasonable inspection would have shown up. If the result is that the car or truck is wholly unsuitable for its obvious or known purpose, it does not matter that the defect is later discovered to be small and easily corrected. The seller's delivery of a vehicle which is "totally different from what the parties had in contemplation" is a repudiation of the contract, and the buyer is entitled to accept that repudiation, or to affirm the contract if he wishes to do so. The buyer must make his decision at the right time. If he moves too quickly, he will be told that the defect was soon discovered and easily remedied; if he delays too long he will be held to have affirmed the contract.

[36] Whether a breach is fundamental or not must be decided be reference to the contract and the circumstances in each particular case.

Exclusion Clause

[37] The sales agreement with Yukon Yamaha (Exhibit #2) does not contain any exclusion clauses that would operate to limit the operation of s. 15(b) of the *Sale of Goods Act* or s. 58(1) of the *Consumers Protection Act*.

[38] The warranty offered by Yamaha Canada contains the following exclusion clause:

Section F

This warranty is in addition to and not a modification of any warranty required by the laws of any province of Canada.

Subject to any applicable sales or consumer legislation, the above warranty is in lieu of any warranty or representation, express or implied, including any warranty of performance, merchantability or fitness for a particular purpose on the part of YAMAHA, and any other obligation or liability on behalf of YAMAHA, and the above warranty constitutes your sole remedy and the full liability of YAMAHA. In no event shall YAMAHA be liable for special, incidental or consequential damages howsoever caused, whether by negligence or otherwise resulting directly or indirectly from the use of the SNOWMOBILE, or the SNOWMOBILE'S having replacement parts or the unavailability of replacement parts. YAMAHA does not assume or authorize any person to create or assume for YAMAHA any obligation or liability in connection with the SNOWMOBILE or any part thereof distributed by YAMAHA.

[39] There are several reasons why this exclusion clause does not operate on the facts of this case. Firstly, it only operates while the warranty is in force. A fundamental breach triggers a rescission of the contract and the warranty, including Section F above, and therefore it is no longer in effect. Secondly, such exculpatory clauses generally have been held not to apply to breaches which go to the root of the contract, namely fundamental breaches. Further, the clause specifically states that it is in addition to and not a modification of any warranty required by the law of any province of Canada. Therefore, it does not derogate from the warranty of merchantability provided in s. 15(b)

of the *Sale of Goods Act* or s. 58(1) of the *Consumers Protection Act*.

[40] Moreover, on the facts of this case, even if given full effect, it would only protect Yamaha Canada. The plaintiff's action is to rescind the contract between himself as purchaser and Yukon Yamaha as vendor, not Yamaha Canada.

Conclusion

[41] On the facts of this case, I need not make any findings with respect to the liability of Yamaha Canada. My decision is based on the impact of s. 15(b) of the *Sale of Goods Act* and s. 58(1)(e) of the *Consumers Protection Act*.

[42] The case law holds that manufacturers are generally held responsible for manufacturing defects in tort law, usually negligence. In some instances, liability has been found based on contract law. I am of the view that when Mr. MacDonald purchased the 2015 SR Viper snowmobile from Yukon Yamaha, he also purchased the warranty provided by Yamaha Canada.

[43] The warranty required Mr. MacDonald to bring the snowmobile to an authorized Yamaha dealer for repairs by a Yamaha Canada appointed, trained, and evaluated technician. Mr. MacDonald complied with this requirement by taking the snowmobile to Yukon Yamaha and Inuvik Yamaha for repairs. Both are Yamaha Canada authorized dealers.

[44] Mr. MacDonald had a legal right to expect that the warranty repairs would be done to a professional standard. If they were not done to a professional standard, for example the improper installation of the High Gear suspension by Inuvik Yamaha, this

constituted a breach of the purchase agreement with Yukon Yamaha as the warranty was part of the purchase price.

[45] In any event, and quite independent of Yamaha Canada warranty considerations, the snowmobile purchased by Mr. MacDonald was not of merchantable quality as required by s. 15(b) of the *Sale of Goods Act* and s. 58(1)(e) of the *Consumers Protection Act*.

[46] As a result of the numerous breakdowns, Mr. MacDonald was able to ride the snowmobile for approximately 300 km. But even that figure is misleading, because on almost every ride, he encountered problems and had to “limp” back to home base. He had expected to ride more than 1500 km that season.

[47] Mr. MacDonald experienced problems with the snowmobile on his first ride and on almost every subsequent ride. I am satisfied that he did not cause or contribute by act or omission, to the defects that were later identified. Moreover, even if Mr. MacDonald or the Inuvik Yamaha had contributed in some small way to the mechanical problems experienced, this would not have excused the latent defects that were clearly present. I am also satisfied that these were latent defects that an examination of the snow machine by Mr. MacDonald would not have discovered.

[48] I do not accept the defendants’ submissions that the snowmobile is now fixed, all the repairs have been done and he should now take possession of it. This position ignores the number of defects, the delays in effecting the repairs to the snowmobile and the fact that Mr. MacDonald lost a whole season of snowmobiling. I note as well that the responsibility for repairing the H-Arm under warranty was only recently accepted,

one year after Mr. MacDonald initiated this legal proceeding.

[49] Based on his experience with the 2015 SR Viper he purchased, Mr. MacDonald would have every reason to be concerned that the repaired snowmobile would break down again. In winter, in northern Canada, such a breakdown can have dire, even fatal consequences.

[50] Reference was made by Mr. MacDonald to the unexplained 35 km on the odometer of the snowmobile when it arrived in Inuvik. I am unable to make any findings or otherwise explain how or what caused this odometer reading. In any event, it is a very small number, and I am satisfied that it is not material or relevant to the conclusion I have reached in this case.

[51] The facts in this case are similar to those described in the *Beldessi, Foley and Farnworth Finance Ltd.* cases described earlier. The defects and delays necessitated by the repairs resulted in Mr. MacDonald losing out on more than 80% of his snowmobiling season.

[52] In the result, I find that there has been a breach of s. 15(b) of the *Sale of Goods Act*, as well as s. 58(1)(e) of the *Consumers Protection Act*. I also find that the nature and degree of the breaches of the implied warranty of merchantability constitute a fundamental breach of the contract between Yukon Yamaha and Mr. MacDonald

[53] I confirm that the contract of purchase and sale between Mr. MacDonald and Yukon Yamaha was rescinded on April 20, 2015 when he wrote a lengthy letter to Yukon Yamaha detailing the problems he had encountered and advising that he was

returning the machine for a full refund of his purchase price: \$18,688.95. He is also entitled to claim the cost of the High Gear suspension bracket recommended by Yukon Yamaha in the amount of \$329.56, for a total of \$19,018.51.

[54] Mr. MacDonald is also entitled to his costs in this proceeding as follows: filing and service fees in the amount of \$202.50; prejudgment interest from April 20, 2015 and post judgment interest at the rate prescribed by the *Judicature Act*, RSY 2002, c. 128. If necessary, I can be spoken to if the parties are unable to agree on these costs.

[55] I am not acceding to Mr. MacDonald's claim for additional damages. The shipping costs were incurred because Mr. MacDonald chose to deal with the Whitehorse dealer instead of the one located in Inuvik. He is out of pocket for some of the "after-market fixes", but I note that he had some use, albeit limited use, of the snowmobile.

LILLES, T.C.J.