Claim No: SCCH - 461870

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Lloyd v. Nova Truck Centres Dartmouth*, 2017 NSSM 39

BETWEEN:

DEREK LLOYD

Claimant

- and -

NOVA TRUCK CENTRES DARTMOUTH

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on May 9 and June 19, 2017

Decision rendered on July 20, 2017

APPEARANCES

For the Claimant	self-represented
For the Defendant	Rod Mackay, Vice-President and General Manager

BY THE COURT:

[1] The Claimant is a relatively new trucker, having been a driver for about four years and an owner for much less than that.

[2] The Defendant is a large truck dealer and servicing outfit, with several locations in Nova Scotia. It sells both new and used trucks, carrying several brands of new truck including Freightliner, Western Star and Mitsubishi Fuso. It does not sell new trucks made by Peterbilt, but takes them in trades and sells them used.

[3] This case concerns a 2014 Peterbilt 386 which the Claimant bought from the Defendant on November 15, 2016 for the price of $89,000.00 plus HST, for a total of $102,350.00. At the time of the purchase the truck had considerable mileage on it, which is not surprising as these vehicles are designed to be intensively driven.

[4] The Claimant has had a bad experience with this vehicle, virtually from the get go. It has been expensive to maintain and does not deliver the gas mileage that the Claimant says was promised to him by the Defendant's salesman, Gary Neves.

[5] The paperwork for the sale was surprisingly thin. There is an invoice which basically just sets out the price and indicates that the unit is "used." There is no warranty, nor any disclaimer of warranty. In that respect, it looks very unlike the sales contracts that we frequently see in this Court for used cars, where the seller typically sets out (or tries to) the limitations of its warranty obligations.

[6] Even those used automobile contracts, with all of their attempts to disclaim warranty, may be found to be subject to the implied conditions and warranties that are contained in the *Consumer Protection Act,* and in particular those found in s.26(3)(e), (f) and (j):

> 26 (3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale: ...
>
> (e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the purchaser relies on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, a condition that the goods shall be **reasonably fit for such purpose**; provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
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> (f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of **merchantable quality**, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;
>
> .....
>
> (j) a condition that the goods shall be **durable for a reasonable period of time having regard to the use to which they would** normally be put and to all the surrounding circumstances of the sale.

[7] There is no question that the sale of this truck is subject to all of these implied conditions and warranties. In other words, the Defendant implicitly

warranted, and it was a condition of the contract of sale, that the truck would be reasonably fit for the purpose, of merchantable quality and reasonably durable.

[8] The Claimant had not previously owned a truck, but had several years of driving under his belt and understood that trucking is a cost-sensitive business. He planned to have his truck registered with a fleet whose business was trucking cargo along the “triangle” from Eastern Canada to New England and back through Quebec and Ontario. Truckers are paid by the mile driven (U.S. weights and measures apply to cross-border trucking) and the cost of fuel and maintenance has to be reasonable in order to make any money.

[9] The Claimant says that Mr. Neves told him that this truck would “easily do 7 miles per gallon” which was a benchmark that the Claimant hoped to achieve. He says that this was very important to him, and I accept that. At trial Mr. Neves never denied making that statement.

[10] The Defendant’s witnesses pointed out, and the Claimant conceded, that there are many variables that could explain why someone may not get the gas mileage even close to what he was expecting. Factors mentioned include many aspects of driving habits, weather, tire pressure, the weight of loads being hauled, the way the trailer is hitched to the cab etc.

[11] I suppose if one assumes that the Claimant has been carrying heavier-than-usual loads and had poor driving habits, then it could result in the 7 mpg estimate being unrealistic. But all things being equal, if an estimate of 7 mpg is given, it should already adjust for many of these factors. I do not think that Mr.

Neves's estimate meant that it could only be achieved under optimal conditions. It was meant to be an average.

[12] I am prepared to find that the implied warranty or condition of fitness for the purpose was breached, giving rise to a right to damages. How those damages are calculated is quite another matter.

[13] The other branch of the case concerns the various mechanical and electrical problems that have been experienced.

[14] The truck was newly inspected by the Defendant and bore fresh a Motor Vehicle Inspection sticker at the time of sale. The Claimant says he was told that it had very recently been traded in, which implicitly represented that it had not been sitting for long on the Defendant's lot.

[15] On this latter point, the Claimant was either mistaken or misled. It had in fact been on one of the Defendant's lots for about a year. The evidence of Mr. Mackay is that this is not unusual in the business of selling used trucks. He says it is common for them to sit around for that much, or longer. I don't think that much turns on this point, although it could help explain why the wiring inside the cab has apparently suffered water damage.

[16] At the time of sale, the Claimant was told that there were some repairs required, which the Defendant verbally agreed to perform. But even after that the Claimant experienced many problems. On his first trip in December 2016, all of the lights inside the cab suddenly went out and he was forced to improvise a short term solution to be able to complete his trip with some light in the cab.

The next day the check engine light on the dash came on. Soon thereafter there was a coolant leak. Then the ABS system failed. In the first four weeks he burned through four sets of headlights. None of this could be considered normal.

[17] When the Claimant reported these problems the Defendant appeared to be nonchalant about these issues, as if this was not unusual for a used truck, although it seemed prepared to repair whatever issues the Claimant reported, at no charge.

[18] I find it odd that the Defendant never attempted to define the extent of its responsibility for repairs, as it might have been expected to do had a warranty been explicitly provided.

[19] It did not take long for the Claimant to lose faith in the Defendant, and he wanted the truck to be serviced at a Peterbilt dealership. Nonetheless, he gave the Defendant one chance to repair all of the problems beginning on Christmas Day 2016. The Claimant says he lost $3,800.00 in gross pay by having his truck out of service. When he retrieved the truck a few days later, he says that little had been done by the Defendant, and in particular nothing was done to fix the ABS. He then took the truck to Peterbilt in Moncton to have the ABS repaired, and lost ten days of work while it was being repaired.

[20] The Claimant testified that it has been costing him between $3,000.00 and $5,000.00 per month on repair bills, which is way above what would be expected for routine maintenance.

[21] The Claimant seeks damages of approximately $24,000.00, which is almost at the limit of this Court's monetary jurisdiction. This number is derived from several elements:

a. Lost income during downtime.
b. Repair costs.
c. Estimates for improvements that can be made to try to improve the gas mileage.

[22] The Defendant placed a great deal of weight on the Motor Vehicle Inspection that it claims to have done just before the Claimant purchased the truck. While it appears to be the case that some work was done at that time, at least to enable the vehicle to meet minimum standards, it is self-serving in the sense that the Defendant itself did the work and does not in any way disprove the Claimant's contention that the vehicle has been seriously problematic in areas that such inspection does not cover.

[23] As I have already noted, the transaction was subject to implied conditions and warranties, and in addition to being unfit for the purpose intended, I believe the vehicle has not proved to be reasonably durable.

[24] As for the appropriate remedy, it is too late to reverse the transaction, which might have been appropriate given that a "condition" rather than a warranty can form the basis of a claim for a return for refund. Assessing damages is not an exact science, given a number of factors including an element of speculation about the future, the possibility of "betterment" (i.e. the

Claimant ends up with something better than he contracted for) and the imprecise nature of attempting to give the Claimant the benefit of the bargain.

[25] In this case, I believe that the Claimant should receive compensation for some of his downtime, and some of his repair costs and costs to streamline the vehicle to improve the fuel mileage. The down time claim was $13,200.00. I reduce that to $7,500.00 on the basis that, I believe, the Claimant has not properly accounted for the expenses that he would have incurred if he had been able to take the trips he missed.

[26] The repair claim is $10,814.44, which appears to be based on a combination of repairs undertaken as well as estimates for repairs or improvements to be done. I am prepared to allow $7,500.00 for this part of the claim.

[27] In the end, I award the Claimant $15,000.00 in damages for breaches of the implied warranty of fitness and durability. I also find that there was a collateral warranty to the effect that the vehicle would achieve a target mileage of 7 mpg, which proved to be overly optimistic.

[28] The Claimant is also entitled to his costs of $199.35 plus $65.00 for copying expenses, for a total judgment of $15,264.35.

Eric K. Slone, Adjudicator