

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA
(Previously known as the Motor Dealer Council of B.C.)

**IN THE MATTER OF THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 AND
THE *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 c. 2**

RE:

JOHN SLATER

COMPLAINANT

AND:

CANEM INVESTMENTS LTD.
dba CANEM AUTO SALES/CANEM AUTO GROUP (BURNABY)
DL# 10781

MOTOR DEALER

AND:

PRADEEP "PAUL" SINGH
SP# 12861

SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS

1. On June 18, 2008, a hearing was held before me whereby it was alleged that Canem Investments Ltd. dba Canem Auto Sales/Canem Auto Group (Burnaby), Dealer Number 10781, and Pradeep "Paul" Singh Saleperson Number 12861, committed a deceptive act or practice on or about June 24, 2006 in Burnaby, British Columbia, by failing to declare a material fact to John Slater that a 2003 Mazda Protégé Speed with VIN JM1BJ227930646119 (the "Mazda") had been in a prior accident with approximately \$17,500.00 worth of damage; contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the "BPCPA").
2. Present at the hearing was Canem's dealer principal Francois Fiset, along with Lauri Grath and Inderjit Brar. Mr. Singh did not attend as he had just started a new job. Canem entered a statement sworn before a Notary Public on June 17, 2008 by Mr. Singh which was entered as Exhibit 3. Mr. Slater did not attend the hearing.

3. Prior to the hearing, Canem was served with a Notice of Hearing which was entered as Exhibit 1. The Affidavit of Ross Cote, a Compliance Officer with the Motor Vehicle Sales Authority (the "VSA"), and sworn on May 12, 2008 was entered as Exhibit 2. Canem acknowledged receiving the Affidavit prior to the hearing. Attached as exhibits to the Affidavit is the complaint and written statements of Mr. Slater, along with supporting documents regarding the allegations before me.

4. While I may not comment on all the evidence and oral and written testimony provided during this hearing, I have reviewed all that evidence and oral and written testimony and given it all the appropriate consideration and weight.

FACTS

5. On June 24, 2006, Mr. Slater purchased the Mazda from Canem for \$14,850.00 before taxes. Slater states in his claim application: "Canem Auto told me this car had never been in an accident. I got a carfax report that states there has been no major or minor accidents, It also states no frame damage". The purchase agreement shows that there is a declaration of damage over \$2,000.00 and a notation "no frame damage per Carfax": Exhibit A, page 11 of the Affidavit.

6. In 2007, Mr. Slater stated he wanted to trade the Mazda in on a Mitsubishi Eclipse and was told by Victoria Mitsubishi they would only give him \$6,500 for the Mazda as it had been in an accident. Mr. Slater said he was disgusted by this and because Canem had never told him about the accident. Mr. Slater obtained a detailed ICBC report (Exhibit A, pages 18 to 25) which is in fact an estimate of repairs based on ICBC's initial inspection of the vehicle. He notes there is an estimate of 10 hours for frame repair. Compliance Officer Cote was able to obtain another copy of that estimate from ICBC with less information blacked out and it is Exhibit H to the Affidavit.

7. Canem states that they did declare the damage to Slater. They note that the negotiations for the purchase of this car went on for some time. They entered as Exhibit 4 a void purchase agreement dated June 12, 2008 to show this was the case (see also page 51 of the Affidavit Exhibits). Canem states that as Mr. Slater was under age at the time of the purchase, they required a parent be present during this purchase, especially as the Mazda is a performance version of the standard Protégé model. Mr. Slater's mother, Suzanne Slater, provided a letter to explain that her name is on the purchase agreement because her son was 18 at the time of purchase.

8. Canem notes in their response to Slater's claim application (Exhibit F) of February 14, 2008 that they did declare car damage and emphasized the notation of "no frame damage per Carfax". Canem states that they showed Slater an ICBC printout showing the reported damage claim amounts. Canem stated that because the ICBC report they had obtained did not provide all the details, such as frame damage, Slater's mother specifically asked for assurances that there was no frame damage. This was an assurance Canem says they could not give, but could only say that there was "no frame damage per Carfax", which is correct when reviewing that report: Exhibit A pages 13-15.

9. Mr. Slater provided a further statement in response to Canem's February 14 response. In part Mr. Slater states:

...My family and I were stunned to read false under declaration #2 on the Motor Vehicle Purchase Agreement on June 17, 2006. This indication of 'false' was inconsistent with what we had been informed about the car, and defied the perfect condition of the car's history report in the Car Fax Report. Paul explained that there was a minor fender bender and repair since the Car Fax Report. I was satisfied with this explanation because fender benders involving car body repairs that require new parts, lights, installation, and paint can reasonably surpass the two thousand mark. My mother informed Paul he would have to write something on the form to explain 'false'. Paul left the office and allegedly spoke to someone and when he returned he wrote "no frame damage per Carfax"...

10. Mr. Slater claims for reimbursement of his car and "the amount of pain and suffering that was caused due to this unlawful act". No dollar amount or evidence was provided to substantiate what that pain and suffering was.

THE LAW

(i) Deceptive Act or Practice

11. Section 5(1) of the BPCPA prohibits a supplier of goods conducting a consumer transaction from committing a deceptive act or practice. This section would apply to Canem. Under Section 4(3) of the BPCPA, the B.C. Legislature has deemed certain conduct to be deceptive acts or practices. The Notice of Hearing identifies three such sections (one incorrectly noting s. 4(3)(a)(iv)) in issue here which state:

4(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(a) a representation by a supplier that goods or services

(ii) are of a particular standard, quality, grade, style or model if they are not,

(iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(b) a representation by a supplier

(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

12. The case law provides guidance in the application of these provisions. In *Rushak v. Henneken Auto Sales & Service* (1991), 59 B.C.L.R. (2d) 250, (C.A.), (BC Court of Appeal) the following principles emerge:

- a. a deceptive act or practice need not be intentional, may be inadvertent and may arise even if the supplier has an honest belief in the accuracy of the information it relays;
- b. a deceptive act is one “that tends to lead a person astray into making an error of judgment;”
- c. the Act must be construed so as to protect not only alert potential customers, but also those who are not alert, are unsuspecting and are credulous; and
- d. the Act imposes a high standard of candour on a supplier of goods.

13. In *The Consumers' Association of Canada et al. v. Coca-Cola Bottling Company et al* 2006 BCSC 863; additional reasons 2006 BCSC 1233 (B.C. Supreme Court); affirmed by 2007 BCCA 356 (B.C. Court of Appeal); leave to appeal to the Supreme Court of Canada refused (December 20, 2007, S.C.C. File No. 32248, 2007 CanLII 66731), Russell J. treated the deceptive act provisions of the *Trade Practices Act* and the BPCPA as the same and applied *Rushak* to her ladyship's consideration of a deceptive act or practice under the BPCPA. Thus the principles in *Rushak* have application under the BPCPA.

14. In *Consumers* Madam Justice Russell stated that the misrepresentation must have led the consumers into making an error of judgment before they would be captured by section 5(1) of the BPCPA. Simply said, if the representations were not believed or not acted upon, there has been no deception:

In oral submissions, plaintiffs' counsel argued that "capability" is all that is required for a successful claim under the Act. While I agree that the statutes impose a "high standard of candour" on suppliers (*Rushak v. Henneken* (1991), 84 D.L.R. (4th) 87, 59 B.C.L.R. (2d) 250 (C.A.) at para. 17), it defies common sense to suppose suppliers will always be found liable for any consumer misapprehension. In my view, such a literal interpretation of the provision would permit a deceptive act or practice claim to arise from nearly any representation, given the potential for imperfect understanding whatever words are used.

The cases provided by the plaintiffs themselves, as well as those provided by the defendants, establish that a deceptive act or practice "is one that tends to lead [a] person astray into making an error of judgment": *British Columbia (Director of Trade Practices) v. Household Finance Corp.*, [1976] 3 W.W.R. 731 at 736, 29 C.P.R. (2d) 232 (B.C.S.C.); *aff'd*, [1977] 3 W.W.R. 390, 33 C.P.R. (2d) 284 (B.C.C.A.). Here, there is no evidence that any consumer has been or may have been led into making an error of judgment because of any representation regarding the CRF.

(ii) Onus of proof

15. Under Section 5(2) of the BPCPA, the onus is placed on the dealer to show that the alleged deceptive act or practice did not occur:

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

16. This is a reverse onus provision, but that reverse onus only applies to the deceptive act or practice. As for any damages suffered by Mr. Slater, the "[o]rdinary principles of litigation put the burden of proof on the party making the assertion": *WIC Radio Ltd. v. Simpson* 2008 SCC 40 at paragraph 30 (Supreme Court of Canada). This means that Mr. Slater must substantiate any damage claims with some acceptable and credible evidence.

(iii) Assessing the evidence

17. This case revolves on its facts. It is therefore important to review the evidence and consider both the internal and external consistencies in the evidence. Internal consistency means the consistency of a witness's evidence over time and under cross examination. External consistency means that the witness's evidence is consistent with other evidence from other witnesses and/or documents. Also, all the evidence must be considered as a whole and applying common sense. This was recently stated by Judge Woods in *R v. MSB* 2008 BCPC 181:

[34] While it comes from a civil decision, I find that a passage in a venerable case called *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) provides helpful guidance for assessing the credibility and internal and external consistency of witness testimony. In that case, O'Halloran J.A. said this at p. 357:

...the real test of the truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable.

DISCUSSION

18. In assessing the evidence, I have found Canem's evidence to be consistent throughout and it is also consistent with the documentary evidence. I have problems with the evidence of Mr. Slater.

19. First, Mr. Slater initially claimed he was never told the Mazda was in an accident. Later confronted with the damage declaration and notation on the purchase agreement, Mr. Slater then states he was told that there was only a minor "fender bender". This is an important internal inconsistency.

20. Second, Mr. Slater states that he accepted Canem's explanation of the Mazda being in a minor "fender bender" and he understands that such accidents can cost over \$2,000.00 without there being structural damage. After being told this by Canem, he then states that his mother demanded an explanation of the "false" declaration regarding the damage over \$2,000.00. Why would Mrs. Slater demand an explanation, after one had been given and accepted?

21. Mr. Slater's evidence would be that they accepted the notation of "no frame damage per Carfax" as a reasonable explanation of the damage over \$2,000.00. However, applying common sense, that notation does not explain anything about the damage over \$2,000.00 but is merely an assurance about frame damage. If Mr. Slater was satisfied with this notation, I find that it is because he was aware that there was damage to the Mazda sufficient enough to seek assurances that there was no frame damage. Seeking such an assurance would be consistent with a belief in significant damage to the Mazda, but inconsistent with a belief that the Mazda had only suffered a minor "fender bender".

22. Third, Mr. Slater's own evidence is that on June 17, 2008 they were made aware of damage over \$2,000.00 and sought assurances regarding the Mazda's frame. Also on Mr. Slater's own

evidence, the Mazda was not purchased until June 24, 2008. This means that Mr. Slater spent some seven days considering this purchase before making a final decision.

23. In assessing the evidence on a whole and applying common sense, I find it more likely than not that Mr. Slater was aware that the Mazda had sustained damage over \$2,000.00 and that he was aware that the damage was significant enough to seek assurances that there was no frame damage. I also find that he was aware of these facts prior to purchasing the Mazda. Applying the deceptive act provisions of the BPCPA and the case law, I find Canem and Mr. Singh have not committed a deceptive act or practice as alleged.

24. This complaint was triggered when Mr. Slater obtain an estimated value for the Mazda of \$6,500.00 from the Mitsubishi dealer and obtained a detailed damage estimate from ICBC. There are problems in relying on these to conclude the vehicles worth and that there was frame damage. The ICBC estimate is just that, and a dealer quoting on a trade-in quotes the wholesale value of a car based on the market in which the dealer is located and not the vehicles retail value.

25. In *Parsons v. Zagrodzki* 2005 BCPC 384 Judge Tweedsdale was considering the expert evidence from a professional car evaluator in a case where the dealer had failed to declare damage to the consumer. Judge Parsons noted the following problems with that experts report:

- (i) There must be evidence of damage and a reduction in value of the vehicle – the expert relied on assumptions;
- (ii) The expert relied on estimates of repairs and did not review the Strutral Assessment Integrity Report of ICBC which confirms whether there has been “structural damage”, such as frame damage;
- (iii) The expert relied too heavily on the notion of a “stigma” attached to vehicles damaged in car accidents; and
- (iv) The expert relied too heavily on a survey of dealers who provided a mere opinion on the value of the car. This is not evidence. In the words of Judge Tweedsdale: “Many people sharing an opinion, which is wrong in fact and law, does not make the opinion accurate.”

26. Exhibit H is the ICBC damage estimate report for the Mazda. It is very much the same as the one obtained by Mr. Slater. One important exception is that the Adjuster’s notes are not blacked out on Exhibit H. Some of those notes are:

- Rewrote estimate as a 2002 MazdaSpeed/Almost same vehicle
- ****No Penrpro parts pricing and labor times in Penpro Database*****


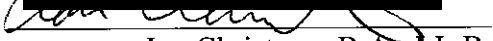
- ****Paint time are Judgement [sic] Time****

27. It is clear from the adjusters notes that the estimate is just that and that there has been no concrete determination as to the total damage to the vehicle. If the adjuster is making a judgment call on the time to paint the vehicle, common sense would say he is also making a judgment call about frame damage. The Adjuster allowed time for frame repair in case it was later determined there was frame damage. It is for this reason that Judge Tweedsdale in *Parsons* stated the need to see the Structural Assessment Integrity Report of ICBC. The fact is, the current evidence does not say anything about whether the Mazda in fact has suffered frame damage.

28. Mr. Slater's claim against Canem and Mr. Singh is dismissed.

29. Pursuant to sections 155(7), 166(2) and 181 of the BPCPA, an application for reconsideration of this determination may be made within 30 days of receiving a copy. Such an application must be in writing and provide new previously unavailable evidence, and/or identifying an error or other grounds for the reconsideration. The application is to be directed to Denis Savidan, Manager of Compliance and Investigations, Motor Vehicle Sales Authority of B.C., #150 – 6400 Roberts Street, Burnaby, B.C., V5G 4C9.

Date: August 1, 2008



Ian Christman B.A., LL.B.