



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:

JONATHON THOMPSON

COMPLAINANT

AND:

APPLEWOOD MOTORS INC.
dba APPLEWOOD KIA
Dealer Registration No. 10659

DEALER

DECISION OF THE REGISTRAR OF MOTOR DEALERS
ON THE INTERPRETATION OF THE REGISTRAR'S COMPLIANCE ORDER
DATED JULY 28, 2008, in VSA FILE NO. 08-70070

INTRODUCTION

1. Applewood Motors Inc. and Jonathon Thompson seek my interpretation of my Compliance Order dated July 28, 2008, in VSA File No. 08-70070 ("Compliance Order").

2. The parties were invited to provide written submissions for my consideration. Applewood provided their initial submissions to counsel for the Motor Vehicle Sales Authority of B.C. on June 17, 2010. Mr. Thompson provided a response in the same fashion on June 23, 2010, and Applewood provided a reply by way of email to the Authority's legal counsel on July 5, 2010. Finally, Mr. Thompson provided a rebuttal by way of email on July 6, 2010, to the Authority's legal counsel. I have reviewed these documents.

PROCEDURAL HISTORY

3. After conducting a hearing on June 18, 2008, I rendered a decision in this matter on July 23, 2008, finding that Applewood committed a deceptive act or practice during the consumer transaction involving Mr. Thompson. A deceptive act or practice is contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c.2 ("BPCPA"). Part of my decision was to issue the Compliance Order under section 155 of the BPCPA to provide a remedy to Mr. Thompson. That order was issued on July 28, 2008. The portion of the Compliance Order which the parties seek an interpretation of stated:

(d) Applewood is to take back the Dodge and refund all monies paid by Thompson for the purchase of the Dodge ensuring Thompson has no more legal obligations to the Dodge. There will be no deduction for the kilometers used by Thompson, as the use of the Dodge is directly related to the conduct of Applewood. Thompson will be required to sign-over ownership of the Dodge to Applewood upon receiving his refund.

4. Subsequent to my decision, Applewood Petitioned the B.C. Supreme Court for judicial review of my decision in this matter and that of Registrar Smith in *Ratte v. Applewood Kia* (April 16, 2008: Registrar of Motor Dealers). Similar legal issues were advanced by Applewood in both judicial reviews and the *Ratte* matter was heard first. On April 13, 2010, Justice Willcock dismissed Applewood's judicial review in *Applewood Motors Inc. dba Applewood Kia v. Paul Ratte and The Registrar of the Motor Dealer Council of British Columbia dba The Motor Vehicle Sales Authority of British Columbia* (S.C.B.C. Action No. S094126; Vancouver Registry). It appears that Applewood is abandoning its judicial review in this matter and, along with Mr. Thompson, seeks an interpretation of my Compliance Order so that it may discharge its responsibilities under that Order.

ISSUES

5. A review of the submissions of both parties identifies the following three issues for resolution:

- (1) Does the Compliance Order contemplate Mr. Thompson obtaining a refund for the insurance policies he purchased in conjunction with his purchase of the Dodge?
- (2) Does the Compliance Order contemplate Applewood reimbursing Mr. Thompson for his storage, insurance and related costs in having the Dodge stored?
- (3) Does the Compliance Order contemplate Applewood bearing the cost of transporting the Dodge back to Applewood's dealership?

POSITIONS OF THE PARTIES

(a) Applewood

6. Applewood makes three distinct submissions on each of the above issues.

(i) Life and Disability Insurance

7. Applewood notes the insurance purchased by Mr. Thompson was optional and that Applewood was acting as an agent for the insurer. This, they say, makes the insurer responsible for any cancellation or refund. Applewood also says Mr. Thompson has had the benefit of these insurance products. Applewood finally notes that the Compliance Order

speaks only about the Dodge and Applewood's responsibility towards the Dodge and not these insurance policies.

(ii) Insurance, Storage and related costs

8. Applewood says the Compliance Order also did not contemplate the insurance, storage and related costs that Mr. Thompson feels he is entitled to. Applewood says Mr. Thompson did have use and enjoyment of the Dodge for some 16-20,000 kilometers. In reply, Applewood noted that it exercised its right to seek review of my decision as it was entitled to do and did not drag on the settlement of this matter.

(iii) Transportation costs to deliver the Dodge to Applewood

9. Applewood's position on its responsibility to incur the costs to return the Dodge to its dealership is based on a technical reading of the Compliance Order. The Compliance Order notes that Applewood is to "take back" the Dodge. This, Applewood says, envisions that Mr. Thompson would have to deliver the Dodge to Applewood in order that it could "take it back."

10. In reply to Mr. Thompson's allegation against Darren Graham, it denies Mr. Graham ever made the statement alleged, as noted below. It says Mr. Graham never spoke with Mr. Thompson at the settlement discussions. Applewood states that the Registrar found the misrepresentation attributed to Applewood in this case was an innocent one.

(b) Mr. Thompson

11. Mr. Thompson's position is straightforward. He states that as Applewood was found to have acted deceptively, it should bear all the above noted costs. Mr. Thompson indicates that Darren Graham, owner of Applewood, was effectively gloating about not having yet paid Mr. Thompson anything during a settlement discussion. Mr. Thompson also notes that Applewood dragged these proceeds on and delayed settlement.

12. In his June 23 letter, Mr. Thomson states:

Applewood is relying on the strict wording of the Compliance Order to not take into account those expenses I incurred, that they believe were not the intention of the Registrar when the order was made. However, I recall the Registrar making the statement that Applewood was to "unwind the transaction" with the net effect that I would not be penalized for their actions.

13. Mr. Thompson believes that even if the Registrar's Compliance Order did not contemplate Applewood being responsible for having the Dodge towed back to their dealership, doing so would be the decent thing for them to do in the circumstances. Mr.

Thompson also highlights that he has not had quiet use and enjoyment of the Dodge and explains the consistent mechanical problems with the Dodge since purchase.

DISCUSSION

(a) Characterization of the deceptive act

14. First, the proper characterization of the deceptive act I found was that it was a negligent misrepresentation. A review of paragraphs 9 and 17 of my reasons notes:

9. After purchasing the Dodge, Pietraroia had been experiencing oil loss problems with the vehicle and excessive blue smoke from the exhaust. Blue smoke from the exhaust is well understood in the automotive industry as indicating the engine is burning oil, which it should not be doing. Pietraroia took the vehicle to Langley Chrysler who determined that there were H/P [High Performance] injectors in the vehicle and after conducting a cylinder balance test and other tests, it determined that the number 6 cylinder had blow-by and the piston itself was damaged. The notation on the inspection sheet [p. 68 of the Affidavit exhibits] says engine damage. Langley Chrysler provided an estimate of \$6,000.00 for overhauling the engine and replacing one piston [p. 66 of the Affidavit Exhibits]. There is no indication that this would be covered by warranty. It is to be noted that this inspection was conducted on March 13, 2007, and that there is a cover sheet showing this information was faxed to Applewood Kia's service department at about the same time. Applewood had this information one month prior to selling the Dodge to Thompson.

17. Applewood also warranted the manufacturer's warranty on the Dodge. This meant it represented to Thompson that he had certain rights in relation to future repairs, including the engine. Applewood also knew the Dodge had high performance injectors which could potentially void the manufacturer's warranty. It would be reasonable to conclude that Thompson would be led to believe there were no issues with the manufacturer's warranty and that it would be honoured. I find this conduct is captured by section 4(3)(b)(iv) and (vi) of the BPCPA and is a deceptive act. I also find the failure to inform Thompson that the Dodge was modified from its factory specifications, potentially voiding the manufacturer's warranty, and that it had engine damage, would also be captured by Section 4(3)(a)(ii) of the BPCPA and is a deceptive act or practice.

15. In essence I found Applewood had information at hand to advise it that the Dodge had engine damage. It had failed to communicate that fact to Mr. Thompson. I did not find the necessary elements for a fraudulent misrepresentation were satisfied on the evidence. This was not a case of an innocent misrepresentation as Applewood did have information at hand contradicting what it represented to Mr. Thompson. Regardless of whether a misrepresentation is innocent (an "honest mistake" to use Mr. Thompson's language in his rebuttal), negligent or fraudulent, the BPCPA regards it as a deceptive act.

(b) The three issues for interpretation

(i) Life and Disability insurance

16. Exhibit 1 at the June 18, 2008, hearing was the Notice of Hearing to Applewood and described the issues and the deceptive act that was alleged. The issue brought before me for adjudication was the misrepresentation about the Dodge. Exhibit 2 at that hearing was an Affidavit of Holly Childs, the Authority's investigator for this matter. Attached as an exhibit to that Affidavit was Mr. Thompson's complaint which centered on the damaged state of the Dodge, and did not mention the insurance premiums. Mr. Thompson was not at the hearing before me on June 18, 2008.

17. At no time during the hearing in this matter was the issue of the life and disability insurance brought forth for my consideration. I cannot now re-litigate this matter for what really amounts to a secondary claim by Mr. Thompson for the insurance premiums. I find that the principle of *functus officio* would apply in this regard: *Chandler v. Assn. of Architects (Alberta)* [1989] 2 S.C.R. 848 (Supreme Court of Canada). I would also note that this could also be viewed as an inappropriate bifurcation of Mr. Thompson's claims. If Mr. Thompson wished to have the insurance premiums considered by me, they should have formed a part of his complaint; which they did not.

18. My Compliance Order of July 28, 2008, did not contemplate Mr. Thompson obtaining a refund of the life and disability insurance. Mr. Thompson has had the benefit of these policies and had he needed to make a claim against them, I am sure he would have availed himself of these policies.

19. Mr. Thompson is not entitled to a refund of the life and disability insurance premiums based on my Compliance Order of July 28, 2008.

(ii) Insurance, storage and related costs

20. The need to bring the Dodge in for repair due to engine problems was how Mr. Thompson became aware of the misrepresentation by Applewood. After that discovery, and because the engine was not working, Mr. Thompson had to store the Dodge with an associated towing fee to move the Dodge to the storage facility. In a letter to Applewood dated June 4, 2010, but signed June 7, 2010, and attached to Applewood's submission, Mr. Thompson is seeking the storage and towing cost that were incurred after my decision of July 28, 2008. During this period Applewood was availing itself of the right to have my decision reviewed. The decision to seek judicial review was Applewood's right, but it exercised that right in full contemplation that if it was not successful, it may incur additional

costs. Mr. Thompson should not bear the storage costs or related towing cost due to Applewood's decision to pursue its right of review. The decision to have storage insurance was Mr. Thompson's, and he is to bear that cost.

(iii) Cost to Transport the Dodge to Applewood

21. As stated, my Compliance Order required Applewood to "take back" the Dodge. I did not find a fraudulent misrepresentation in this matter. In other cases where I have found the equivalent of a fraudulent misrepresentation, I have specifically ordered a dealer to be responsible for transportation costs in taking back a motor vehicle from a consumer. For instance, in my decision in *Hurtubise v. Massive Truck & Sidhu & Sidhu* (VSA File No. 08-70288, August 18, 2008: Registrar of Motor Dealers) and rendered a month after the decision in this matter, I made the following order at paragraph 29(c):

(c) Within 45 days of this decision, Massive Truck, Gurtej Sidhu and Jastej Singh Sidhu are to take back the Dodge and refund the entire purchase price of \$4780.00 to Ms. Hurtubise. **Massive Truck, Gurtej Sidhu and Jastej Singh Sidhu will be responsible for the cost of retrieving the Dodge from Ms. Hurtubise.** Ms. Hurtubise will be required to sign over ownership of the Dodge at the time she receives the refund;

22. I clearly did not make the same order as I did in *Hurtubise* and my Compliance Order in this matter did not contemplate Applewood being responsible for the costs to transport the Dodge back to its dealership. Where rescission is granted at common law, apart from cases of fraudulent misrepresentation, each party is generally required to take steps to undo the transaction. This will require each to bear some of the costs in order to do so. I saw no reason to depart from that general principle of law in this particular case.

SUMMARY

23. In summary and for clarity on these issues, my Compliance Order of July 28, 2008, shall be interpreted as:

- (a) Not allowing Mr. Thompson to recover any award for the optional life and disability insurance he purchased.
- (b) Allowing Mr. Thompson to recover the costs to have the Dodge towed and stored as indicated in his letter dated June 4, 2010, but signed June 7, 2010, of \$557.50 for storage and \$173.09 for towing. Mr. Thompson is not entitled to recover the cost of storage insurance.
- (c) Requiring Mr. Thompson to return the Dodge to Applewood at his expense.

24. I should make a comment on one aspect of Mr. Thompson's submissions. At paragraph 12 noted above I quoted from Mr. Thompson's letter of June 23, a portion of which stated: *However, I recall the Registrar making the statement that Applewood was to "unwind the transaction" with the net effect that I would not be penalized for their actions.*

25. I have considered that statement. I note Mr. Thompson was not at the hearing before me in this matter. My reasons for decision dated July 23, 2008, do not use the language "unwind the transaction," and a review of the transcript of the hearing does not have me saying anything about unwinding the transaction. At the conclusion of the hearing I clearly reserved my decision to provide a written decision at a later date without any comment on its disposition. Finally, I have not been in communication with Mr. Thompson. His attribution to me of a statement that *Applewood was to "unwind the transaction"* is simply misplaced. I made no such statement.

Dated July 12, 2010

A large black rectangular redaction box covers the signature area of the document.

Ian Christman B.A., LL.B