



Neutral Citation: 2013-BCRMD-049

**RE: 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**

BETWEEN:

GLENN HELD

Complainant

AND:

**SPARTAN AUTO GROUP LTD.
(Dealer #30953)**

Motor Dealer

AND:

**ROGER MUSHALUK
(Salesperson# 111314)**

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: January 22, 2014, at Kelowna, British Columbia

Appearances for:

The Complainant	Glenn Held
The Motor Dealer	Roger Mushaluk
Roger Mushaluk	In person
Motor Vehicle Sales Authority of BC	Daryl Dunn, Manager of Compliance and Investigations
	Chris Hoy, Compliance Officer

Introduction

[1] This hearing involves an allegation that Spartan Auto Group Ltd. ("Spartan") and Roger Mushaluk breached the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 ("BPCPA") by representing to Mr. Glenn Held that a 2009 Porsche Carrera S (the "Porsche") had \$2,650 of prior repaired damage when in fact the Porsche had more damage than was declared. There was also an allegation that Spartan and Mr. Mushaluk failed to disclose known repairs and damage at the time of sale.

Basic Facts

[2] The following facts are not contested.

[3] Mr. Held decided to fulfill a long-time dream of owning a Porsche 911. Through friends and acquaintances, he was referred to Roger Mushaluk and Spartan. Spartan went to work trying to find the Porsche. While attending the ADESA auto auction, Spartan and Mr. Mushaluk noted a Porsche was going to be auctioned. Mr. Mushaluk did some research on the Porsche, determined it had prior damage declared in the amount of \$2,650, and spoke to Mr. Held. They agreed on a price for the Porsche and Mr. Mushaluk's bid was successful. Mr. Held admits to knowing the Porsche had a \$2,650 damage declaration before he agreed to even bid on the Porsche at the auction: *Transcript of Proceedings*, page 10.

[4] Mr. Mushaluk had the auction do an inspection on the Porsche. Mr. Mushaluk now realizes this inspection is a very basic inspection for the auction's buyer's protection program. Mr. Mushaluk then drove the Porsche back to Kelowna, had it prepared for delivery and presentation to Mr. Held. Mr. Held went to the dealership, had an opportunity to inspect the Porsche and agreed to finalize the sale.

[5] Mr. Held drove the Porsche a short-time and then stored it for the winter. Some months later he insured the Porsche and replaced the tires. Mr. Held received a recall notice for the fuel pump and drove the Porsche to Vancouver to have the warranty work done at MCL Motors. As Mr. Held relays, he drove into MCL Motors as a proud Porsche owner. Mr. Held was astonished to hear that the Porsche clearly had been repaired, which he already knew, but the repairs were not to a standard for a vehicle like a Porsche. Mr. Held says he was advised that the Porsche had approximately \$15,000 to \$20,000 worth of damage repaired and the mechanic noted a noise from the year of the Porsche, inconsistent with that vehicle: Statement and Complaint Form of Glenn Held (Exhibits A and B to the Affidavit of Chris Hoy which was entered as Exhibit 2 at the hearing (the "Affidavit").

[6] Mr. Held was asked by Compliance Officer Chris Hoy to get an estimate from an accredited facility as to the extent of the damage on the Porsche: Exhibit P attached to the Affidavit. Mr. Held provided an estimate done by Kelowna Performance Collision showing \$3,918.00 including taxes: Exhibit Q attached to the Affidavit.

[7] Mr. Held is claiming that the damage to the Porsche was misrepresented as was the quality of the Porsche. He is seeking to have the transaction unwound and a refund of the purchase price and certain other costs such as the tires on the Porsche, the second purchased key, a car cover and incidental hotel costs, including two spa treatments on the same day, for taking the Porsche to Vancouver for the warranty work: See Exhibits B and G attached to the Affidavit.

The Law

[8] In previous cases I have stated in detail the legal principles applicable in cases such as this. In summary:

- (a) A dealer has a positive duty to research and declare if a used motor vehicle has damage over \$2,000.

- (b) The damage declaration is a representation and therefore must also conform to the BPCPA which prohibits deceptive acts or practices (misrepresentations).
- (c) If there has been a misrepresentation, contrary to the BPCPA, then I may issue a compliance order with an appropriate remedy ranging from nothing, to damages, to the unwinding of a transaction and a total refund. What is appropriate is dependent on the facts and assessed on a case-by-case basis.
- (d) A deceptive act or practice can be innocent, negligent or deliberate and the consumer may still be entitled to a remedy.
- (e) The onus is on the supplier, motor dealer here, to show there have been no misrepresentations.

See for example:

- *MacDougall v. Auto/One Leasing LLP* (February 4, 2014) Registrar of Motor Dealers, File 13-11-001.
- *Sovereign v. Nanaimo Chrysler et al* (June 12, 2013) Registrar of Motor Dealers, File: 12-029.
- *Connell v. Joe Cunningham Ford Ltd.* (January 21, 2010) Registrar of Motor Dealers, File 09-70581
- *Pirvulescu v. Parkwood Auto Sales Ltd. et al* (August 6, 2010) Registrar of Motor Dealers, File 07-70285

Analysis

Noise from the rear of the Porsche

[9] The evidence presented by Mr. Held was that there is a noise from the rear of the Porsche that was inconsistent with this type of a Porsche. Mr. Held says he was told this by the mechanic or service advisor at MCL Motors. There is no direct evidence before me about the cause of the noise at the rear of the Porsche. Is it due to an accident? Is it due to a mechanical failure? Is it due to a manufacturer's defect? Is it due to wear-and-tear? Is it in fact an unusual noise for this type of Porsche? Mr. Held's evidence is hearsay and coming from an interested party. There is no way for Mr. Mushaluk to challenge that evidence. As already noted, there are further questions to probe about the noise. These concerns, and given Mr. Held has shown a willingness to hide important facts, to be discussed below regarding his accident with the Porsche, I do not find the hearsay evidence reliable and of enough probative value to accept and base a decision on this point: *British Columbia (Securities Commission) v. Alexander* 2013 BCCA 111 (BC Court of Appeal).

Brake work

[10] Mr. Held is also now concerned that the Porsche needed brake work sometime shortly after he purchased the Porsche. There is no evidence that the Porsche's brakes were unsafe or did not meet the requirements of the *Motor Vehicle Act* at the time of sale. In fact, the repair invoice from 900 Werks Ltd. who did some service work on March 26, 2013, shows the brakes at 30% front and 45% rear: Exhibit B (page 26) attached to the Affidavit. The next day, the Porsche's tires were replaced at Kal Tire and the odometer reading was declared as 32,571 km:

Exhibit B (page 27) attached to the Affidavit. The Porsche was purchased on November 30, 2012, with an odometer reading of 29,600 km. The Porsche has been driven for over a year (on and off) and, according to Mr. Held, at least 12,000 to 13,000 km with this apparent need for brake work: *Transcript of Proceedings*, pages 33 to 35. I find no substance to this complaint.

Damage Declaration

[11] Spartan and Mr. Mushaluk declared the Porsche had \$2,650 worth of prior repaired damage. This is shown on the purchase agreement and on the CarProof vehicle history report of which Mr. Held agrees he received copies. Mr. Held also agreed he knew the Porsche had damage before he agreed to Mr. Mushaluk bidding on the Porsche at the auction and before his purchase of the Porsche: *Transcript of Proceedings* pages 10-11 and 13-14. The second allegation in this matter was not pursued and I find no misrepresentation regarding failure to disclose known repairs and painting of the Porsche.

(a) Evidence of Peter Facinek

[12] During his direct evidence, Mr. Held represented that the estimate by Kelowna Performance Collision was an estimate to properly repair the Porsche. Mr. Held noted he thought the estimate was low and he had called Burrard Collision and obtained a significantly higher quote to repaint the Porsche than obtained from Kelowna Performance Collision: *Transcript of Proceedings*, pages 22-24. Mr. Held also noted that Kelowna Performance Collision looked at the Porsche quite "thoroughly": *Transcript of Proceedings*, page 21.

[13] At the hearing Peter Facinek, President and Owner at Kelowna Performance Collision, gave evidence about his estimate for the Porsche which is Exhibit Q attached to the Affidavit. Mr. Facinek advised that the estimate Mr. Held asked him to prepare was for an estimate of what he thought the existing repairs to the Porsche would have cost. He was not asked to examine the Porsche and provide an opinion about previous damage or prepare an estimate of how much it would cost to repair the Porsche to a standard fitting to a Porsche. The estimate he provided was \$3,918.66 after taxes and is not materially different than the \$2,650 noted on the CarProof vehicle history report and as declared by Spartan.

[14] Mr. Facinek opined that to repaint the Porsche, assuming no further body work was necessary, would cost in the \$7,000 to \$8,000 range: *Transcript of Proceedings*, page 45.

[15] Finally, the evidence of Mr. Facinek indicates that he did not examine the Porsche thoroughly as indicated by Mr. Held. It appears Mr. Facinek opined on the quality of the existing repairs on the Porsche. He could not comment on the underlying body work. When asked if the Porsche was in an accident he said yes but did not comment on the extent of the damage: *Transcript of Proceedings*, pages 42-48.

(b) Evidence of Lorne Freeman

[16] Mr. Freeman was a salesperson at MCL Motors who spoke with Mr. Held when he took the Porsche in for the recall warranty work. Mr. Freeman apprenticed and is qualified as an auto parts professional. By his own testimony, he is by no means an expert on auto body work or mechanical work.

[17] Under direct examination, Mr. Freeman gave evidence that Mr. Held told him twice that the Porsche had never been in an accident. Mr. Freeman said that was highly unlikely as he could tell right away some work had been done to the Porsche. For instance, each of the rear fenders was missing their protective decals, which he said was an obvious first sign. There was a suggestion that both rear fenders of the Porsche had been repaired. He also noted the rear window looked as if it had been removed and reinstalled. The paint quality was not up to the standards for a Porsche as there was overspray in various places and you could see the rock guard did not properly match.

[18] Mr. Held questioned Mr. Freeman and suggested he did advise Mr. Freeman that the Porsche was in an accident. Mr. Freeman did not disagree. Throughout his evidence Mr. Freeman stated he never placed a value on the Porsche. Mr. Freeman was adamant that such an assessment would require a test drive and placing it on the hoist for a proper appraisal. Mr. Freeman stated he never told Mr. Held that the Porsche had \$15,000 to \$20,000 worth of damage. No other witness from MCL Motors was provided at the hearing to substantiate this estimate.

(c) Evidence of Glenn Held

[19] Apart from the evidence already noted elsewhere, Mr. Held also produced two sets of pictures at the hearing: Exhibits 3 and 4. Mr. Held went over the pictures to show where the paint repairs and other repairs to the Porsche were not to standards. He said the overspray issues were obvious and could be easily seen in the pictures: *Transcript of Proceedings*, page 22. Most of the pictures were of the exterior with a few under the hood to show overspray. One picture shows a line where the door meets the window caused when the masking tape was removed pulling away the paint. Mr. Held says he does not know what damage occurred and does not know what will be involved to repair that damage to Porsche standards. He is also unsure of the noise coming from the rear of the Porsche.

(d) Subsequent Damage

[20] At the hearing, Mr. Held revealed for the first time that the Porsche had sustained damage while in his possession around November 2013. Mr. Held had not advised the Authority, Spartan or Mr. Mushaluk of this fact. Mr. Held had the Porsche's driver's rear fender replaced at Octavio Auto Body in Vernon at a cost of \$800. I would note Mr. Held did not make this revelation until he was being questioned by Mr. Dunn about the pictures he submitted. The revelation came after a break and after Mr. Dunn advised Mr. Held he wanted to know if all the damage depicted in the pictures occurred before or after Mr. Held purchased the Porsche. The pictures were apparently taken before the November 2013 accident.

Discussion on the Damage Evidence

[21] Spartan and Mr. Mushaluk declared damage of \$2,650 on the Porsche. This is supported by the CarProof vehicle history report and by the direct evidence of Mr. Facinek, President and owner of Kelowna Performance Collision and his estimate: Exhibit Q attached to the Affidavit.

[22] The claim by Mr. Held that the Porsche suffered \$15,000-\$20,000 of damage is based on hearsay. There is no direct evidence to support Mr. Held's claim. There is direct evidence to support Spartan's damage declaration. I cannot accept the hearsay evidence of Mr. Held over contrary direct evidence, especially on this crucial and central point. Mr. Justice Parrett's comments in *Motley v. Regency Plymouth Chrysler Inc.*, 2002 BCSC 1885 (BC Supreme Court) are helpful:

[14] The plaintiff also asserts in his pleadings that this vehicle was involved in an accident in which it suffered damage in excess of \$2,000. He concedes in his submissions that the evidence before the court falls far short of that necessary to establish that factual conclusion.

[15] At the least it would be necessary to call evidence of experts who had examined the vehicle and found evidence of such damage. No such evidence was called by the plaintiff and, indeed, the evidence called by the defendant establishes that the vehicle was examined by a qualified mechanic who specifically checked for evidence of damage and found none.

[16] I am wholly unable on the evidence before the court to find that the declaration number 4 [damage over \$2,000] was untrue.

[23] I also find Mr. Held's failure to disclose the November 2013 accident and subsequent repairs by Octavio Auto Body, except mid-way through the hearing, was prejudicial to Spartan and Mr. Mushaluk's ability to defend the case against them: *Naples v. River City Auto Sales et al.* (February 18, 2013) Registrar of Motor Dealers, File 12-022. Mr. Held deprived Spartan and Mr. Mushaluk of an opportunity to question representatives of Octavio Auto Body about the prior damage and/or repairs they may have seen.

[24] I also find it very odd that Mr. Held would not want to bring someone from Octavio Auto Body to the hearing and testify on his behalf. It would make common sense that Mr. Held would ask Octavio Auto Body to look at the condition of the Porsche and ascertain the extent of any prior damage while it was in their possession. At a minimum, Octavio Auto Body could have given evidence of the repairs they did see when replacing the driver's rear fender on the Porsche. In this regard, I find Mr. Held purposively withheld this information and did not produce witnesses from Octavio Auto Body as their evidence would not have shone favourably on Mr. Held's case: *Gatzke v. Sidhu* 2013 BCCA 261 (BC Court of Appeal).

[25] The direct evidence before me is that the Porsche has suffered damages requiring repairs costing \$2,650 to \$3,918. Spartan and Mr. Mushaluk declared this damage as required by the *Motor Dealer Act Regulation*. Mr. Held's claim must fail: *Motley v. Regency Plymouth Chrysler Inc.* 2002 BCSC 1885 (BC Supreme Court).

Spartan and Mr. Mushaluk have met the burden of proof placed upon them by the BPCPA.

[26] At the hearing, Mr. Held appeared to be complaining about the quality of the repair on the Porsche. Absent a finding of a misrepresentation, I have no jurisdiction over a claim that the Porsche was not to a quality that Mr. Held had hoped. I note Mr. Held had an opportunity to look at the Porsche before completing the transaction and by his own evidence, the quality of the repairs are apparent even in pictures.

Conclusion

[27] Mr. Held's claim is dismissed.

Dated February 20, 2014



Ian Christman J.D.
Registrar of Motor Dealers