



**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**

MIKE BUNYAK

Consumer

AND:

**DARRYL'S BEST BUYS AUTO SALES LTD.
(Dealer #11019)**

Motor Dealer

AND:

**DARRIN JOSEPH COTNAM
(Salesperson #119247)**

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

ON RECONSIDERATION

Introduction

- [1] On October 5, 2015, I rendered a decision in this matter where I found:
- (a) Darrin Cotnam and the Motor Dealer misrepresented the ex-lease status of the Ford pick-up, being a material fact, on the purchase agreement and they created an ambiguity about the ex-lease history of the Ford by making a contradictory declaration on the APV9T Transfer/Tax Form. There was no evidence that the consumer suffered a loss due to this misrepresentation.
 - (b) Darrin Cotnam and the Dealer represented that the Ford would have a full tank of gas if purchased by the consumer when that was not the case. The proven loss to the consumer was \$110.
 - (c) Darrin Cotnam and the Dealer misrepresented the mileage of the Ford on the purchase agreement and the APV9T Transfer/Tax Form. There is no evidence that the consumer relied on this misrepresentation in

deciding to purchase the Ford or that he has suffered any damages as a result.

The rest of the allegations were dismissed as unproven.

[2] Based on the evidence, I did not find there was reliance on the part of the consumer, Mr. Bunyak, regarding the ex-lease declaration or the issue regarding mileage. I also found no evidence was produced of any damages requiring compensation regarding the ex-lease declaration or mileage.

[3] I issued a compliance order on the following terms:

(a) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are to abide by the *Business Practices and Consumer Protection Act*,

(b) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are to refrain from making misrepresentations to consumers during a consumer transaction,

(c) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are to disclose all material facts to consumers, and not try and hide materials facts,

(d) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are joint and severally to pay to the consumer the sum of \$110 for the tank of gas for the Ford,

(e) Darryl's Best Buys Auto Sales Ltd. is to ensure it has two years of complete business records regarding the sale of motor vehicles at its business premises as required by section 11 of the *Motor Dealer Act* and section 20 of the *Motor Dealer Act Regulation*, and to produce those records to the Registrar or his delegate when directed and within the time directed,

(f) Darrin Joseph Cotnam is to retake and successfully complete the Salesperson Certification Course at his own cost within 90 days of the compliance order being issued, or before any renewal of his salesperson licence, and

(g) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are joint and severally liable to pay the VSA's investigation and hearing costs in the

amount of \$3167.68. The full amount of \$4,252.35 was reduced by the Registrar by 30% to reflect that some of the consumer's claims were unproven.

[4] I also issued administrative penalties against the Motor Dealer and Darin Cotnam.

[5] By email dated November 12, 2015, Mr. Bunyak applied for reconsideration pursuant to Part 12, Division 1 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA"). While the request is outside the 30 day requirement set by the legislation, exercising my discretion under sub-section 181(1)(b) of the BPCPA, I am extending the time to apply for reconsideration as (a) Mr. Bunyak was confused about the process until, he says, he obtained the assistance of a lawyer, (b) Mr. Bunyak was expecting further communication from the Authority, even though he received the October 5 decision by email, (c) the request is only seven days out of time, (d) there was a holiday on November 11, (e) there is no prejudice to any party in extending the time, and (f) it is preferable to deal with a request for reconsideration on its merits to ensure justice is being done.

Reconsiderations and *functus officio*

[6] Once an administrative tribunal has rendered a decision, it is *functus officio* (its jurisdiction has been spent) and it may only revisit its decision:

- (a) To correct a slip in drawing up the order (such as typographical errors);
- (b) To correct an error in expressing the manifest intention of the court or tribunal (clarifying the decision but not changing the decision);
- (c) Where a tribunal is empowered by their enabling statute to reconsider their decisions, and to the extent allowed by that statute;
- (d) Where the tribunal has failed to dispose of a matter properly before it; and
- (e) To rehear a matter afresh where the tribunal has not provided procedural fairness.

Harris v. Windmill Auto Sales & Detailing Ltd. et al (Registrar, August 20, 2013, File 12-030) at paragraph 12¹ denying reconsideration of *Harris v. Windmill Auto Sales & Detailing Ltd. et al* (Registrar, April 10, 2013, File 12-030)² and affirmed

¹ <http://mvsabc.com/v1/wp-content/uploads/2015/01/Harris-v-Windmill-August-2013-Registrar-reconsideration-decision-Aug-20-2013-2.pdf>

² <http://mvsabc.com/v1/wp-content/uploads/2015/01/Harris-v-Windmill-April-10-2013-Registrar-Decision1.pdf>

by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903³ (BC Supreme Court).

Applying *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 (Supreme Court of Canada)⁴.

[7] In this particular case, the authority to revisit my October 5, 2015, decision must be found in Part 12, Division 1 of the BPCPA. As noted in the *Windmill* decision, a review of the evidence presented on the request for reconsideration is conducted as a gate keeping function to see if a determination could be varied or cancelled if the reconsideration was to proceed. In order to cancel or vary a determination (compliance order here), the requirements of sub-section 182(2) of the BPCPA must be satisfied, which says:

(2) The director [registrar] may vary or cancel a determination referred to in paragraphs (a), (c) and (e) of the definition of "determination", **only if** the director [registrar] is satisfied that **new evidence** has become available or has been discovered that

(a) is substantial and material to the determination, **and**

(b) did not exist at the time of the review or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

[8] The purpose of the reconsideration provisions of the BPCPA is to allow a regulator to revisit a determination where there has been a change in circumstances, as shown in the new evidence. Unlike a court, regulators are in a constant state of oversight of the industry they regulate and their orders may need to be varied from time-to-time in order to carry on that oversight. As contemplated by the BPCPA itself, regulators may make interim orders (adding conditions on a licence), protective orders (property freeze orders), or orders extending the duration of an existing order to ensure or monitor compliance such as in *Cash Store Financial Services v. Consumer Protection British Columbia* 2014 BCSC 149 (BC Supreme Court). Of course, a complete change of circumstances (based on new evidence) indicating a protective or other order is no longer needed means the regulator should cancel that order. Further, an administrative penalty (a determination) must be cancelled if the person the penalty is against can show

³ <https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc903/2014bcsc903.html?resultIndex=1>

⁴ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/524/index.do?r=AAAAAQIY2hhbmRsZXIB>

(based on new or newly discovered evidence) they acted with due diligence: section 10 of the *Business Practices and Consumer Protection Act Regulation*. What the reconsideration provisions do not allow is for a person to re-argue their case because the original decision was not in their favour.

Discussion

[9] In Mr. Bunyak's email requesting reconsideration, he states:

All the "new" evidence I am presenting comes mainly from the actual transcripts of the hearings for my Consumer Complaint. I will reference the pages I am using whenever I directly or indirectly am using information from that portion of the transcript. I will, of course, add new material to, hopefully, more clearly explain the relevance of the material I am using.

[10] The transcripts of the hearing are not new evidence. The transcripts document the evidence that was presented at the hearing.

[11] The new material Mr. Bunyak has provided is an elaboration on the evidence that was presented at the hearing. For instance, Mr. Bunyak:

- (a) Elaborated on the circumstances of his motor vehicle accidents and his concussive symptoms.
- (b) Elaborated on his loss of employment and how he lost the backing of his union and his intended purchase of a truck was for future use.
- (c) Says the salesman knew Mr. Bunyak's brother was assisting him in the purchase of the vehicle (by test driving it) as Mr. Bunyak was not in shape to drive.
- (d) Says the salesman deliberately waited until Mr. Bunyak's brother was not present to arrange for the truck's inspection and to finalize the sale, knowing Mr. Bunyak's state.
- (e) Overall, believes that his weakened state of mind was taken advantage of by the dealer and the salesperson. Mr. Bunyak says he was in a "buzz" when he purchased the truck.
- (f) Invited me to re-evaluate the weight I placed on Mr. Bunyak stopping at the bank to obtain a bank draft prior to finalizing the paperwork. [I would note for Mr. Bunyak's benefit that this was but one piece of evidence among others considered and as noted in my decision of October 5, 2015.]

[12] None of the above is new evidence or newly discovered evidence that could not have been discovered by exercising reasonable diligence. It is merely a

restatement and elaboration on the evidence presented at the hearing, and inviting me to re-evaluate and re-weigh that evidence. I have detailed in my October 5, 2015, decision the applicable law and my findings of fact based on the evidence at the hearing.

Comments

[13] Without expressly stating it, Mr. Bunyak's submissions are inviting me to find the transaction was unconscionable based on the elaboration of evidence. However, the evidence at the hearing and in Mr. Bunyak's email in support of this reconsideration shows that Mr. Bunyak was capable of protecting his own interests even with his apparent concussion symptoms. For instance, in his email Mr. Bunyak says: he was not "inept" despite his physical and psychological state; that he was well aware of his error in his past transaction and indicates how that experience assisted him in this transaction; that obtaining a bank draft prior to finalizing the paperwork is "just common business practice;" and that if after he reviewed the declarations on the purchase agreement he found them unsuitable, he would have cancelled the deal. I would note, the only evidence of concussion symptoms came from Mr. Bunyak and I did not have the benefit of an expert to explain what those symptoms can be, how they can be triggered, and their impact on a person's decision making.

[14] There is also no evidence of a substantially unfair bargain in favour of the Dealer as defined in the case law. An example would be that Mr. Bunyak paid a significantly higher price for the pick-up than its market value at the time of the sale.

- Section 8 of the *Business Practices and Consumer Protection Act*
- *Bain v. The Empire Life Insurance Company* 2004 BCSC 1577 (BC Supreme Court)⁵
- *The Estate of George Mann Sr. v. Ocean Park Ford* (Registrar, May 18, 2009, File 07-70255)⁶ setting aside the "determinations" made by the Registrar on July 14, 2008, that the dealer acted unconscionably.

⁵ <https://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1577/2004bcsc1577.html?autocompleteStr=bain%20emp&autocompletePos=1>

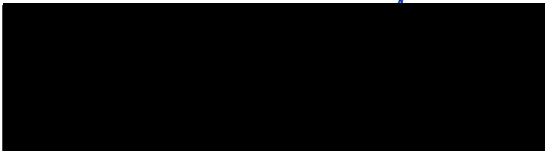
⁶ <http://mvsabc.com/v1/wp-content/uploads/2015/01/File07-70255Mann-v-OceanParkDecisionReconsiderationMay192009.pdf>

Conclusion

[15] Mr. Bunyak’s “new” evidence is not new as defined in sub-section 182(2) of the BPCPA. As such, the pre-conditions necessary to allow me to cancel or vary the “determination” (compliance order) under the BPCPA do not exist, even if I were inclined to proceed with a reconsideration. The principal of “*functus officio*” applies to my October 5, 2015, decision. The request for reconsideration is denied.

[16] In accordance with sub-section 182(6) of the BPCPA, this decision may not be reconsidered.

Date: November 13, 2015



Ian Christman, J.D.
Registrar of Motor Dealers

