Investigation File No. 19-07-134
Hearing File No. 20-10-003

IN THE MATTER OF THE
***MOTOR DEALER ACT*, RSBC 1996, c 316 and the**
***BUSINESS PRACTICES AND CONSUMER PROTECTION ACT,* SBC 2004, c 2.**

VEHICLE SALES AUTHORITY OF BC (VSA)

Complainant

And

COLWOOD CAR MART LTD.
(Dealer Licence #31034)

Respondent Dealer

And

DEBORAH ENGLAND
(Salesperson Licence #102298)

Respondent Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

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[1] This proceeding arises out of a consumer complaint by Ashley Ralphs ("Ms. Ralphs") and Matthew Ralphs ("Mr. Ralphs") (collectively, the "Ralphs") concerning the purchase of 2013 Ford E-350 Econoline Passenger Van (the "Vehicle") from Colwood Car Mart Ltd. ("Colwood" or the "Dealer") on July 25, 2018 (the "Transaction").

[2] The most significant of the alleged contraventions set out in the Amended Hearing Notice dated May 28, 2021, is that the Vehicle was in a condition not suitable for transportation at the time of the Transaction, "due to among other things, extensive rust and corrosion throughout the body of the Vehicle including the electrical components".

[3] I heard a preliminary application in writing on the issue of whether the Transaction was a consumer or a commercial transaction. The VSA must establish as a threshold issue that the purchase was a consumer transaction as the Registrar is without jurisdiction to order a remedy in a commercial transaction.

[4] On the application in writing the VSA sought a determination based on affidavits that the Transaction was a consumer transaction, relying primarily on the evidence of Ms. Ralphs that she had intended to use the 12-seat vehicle for purely personal use.

[5] The Respondent Dealer argued that Ms. Ralphs' evidence was not credible on this point, particularly in light of a text message she had sent to the Dealer referring to her "daycare kids" and that the issue could not be properly determined without cross-examination.

[6] I deferred the question of whether the Transaction was a consumer or commercial transaction to the hearing of the complaint, commenting in my decision on jurisdiction dated June 22, 2022:

> 21. It does appear to me that there are some conflicts in the evidence as well as some evidence not responded to by the complainant that may be material to the question of the intended use. In particular, Ms. Ralphs comments in her reply submission that the text message in which she refers to her "daycare kids" is taken out of context but she does not provide any further context that could explain what was meant by that reference other than what is inferred by the respondents. It also does not appear that Ms. Ralphs has responded to the evidence of the respondents' employees to the effect that she attended the test drive with five children.
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> 22. There is also a direct conflict on the evidence as to what Ms. Ralphs said to the respondents' employees about her intended use at the time of the purchase which seems like a material point for cross examination by both parties. I agree with the respondents that the evidence raises a number of questions that are difficult to resolve on the evidence on this application without the benefit of cross-examination.

[7] The evidence at the main hearing was by affidavit. Parties were permitted to call affiants for cross-examination and those cross-examinations proceeded in December 2022. Written submissions were exchanged in January and February 2023. Not all affiants were cross-examined and the Respondents subpoenaed two witnesses who had not given affidavits (Matthew Ralphs and John MacDonald).

[8] The VSA was represented by counsel, Robert Hrabinsky ("Mr. Hrabinsky"), throughout. While the Respondent Dealer was initially represented by counsel

on the preliminary application, Deborah England ("Ms. England"), the principal of the Respondent Dealer, conducted the hearing and provided written submissions on her own behalf and on behalf of the Respondent Dealer.

[9] Ms. Ralphs participated in the hearing as a witness and sought at various times to provide interjections in the nature of submissions. She also offered to provide certain additional further evidence after the commencement of the hearing. Mr. Hrabinsky for the VSA submitted, and I agree, that Ms. Ralphs, as the complainant in the hearing process, was not a party entitled to cross-examine witnesses, make submissions, or decide what evidence should be put into the record. The framing of the case for the VSA was the purview of Mr. Hrabinsky as counsel for the VSA.

[10] Over the course of the hearing, the factual matter of who Ms. Ralphs was referring to as her "daycare kids" in her text message to Ms. England remained unresolved, in part because Ms. Ralphs was not prepared to provide information about the identity of the children without their parents' consent in response to questions during cross-examination. I requested that Mr. Hrabinsky make further inquiries on this subject given the centrality of the matter to the determination of whether the Transaction was a consumer transaction, a precondition to jurisdiction.

[11] On January 5, 2023, Mr. Hrabinsky provided the following information by email:

> At the conclusion of the hearing, I indicated that I would make inquiries of Ms. Ralphs regarding the names of the parent(s) of the children referred to as her "daycare kids" in the attached text message. I also indicated that I would report back on January 25, 2023.
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> On December 21, 2022, I wrote to Ms. Ralphs as set out below. As of this writing, I have not received a response from Ms. Ralphs.

[12] Mr. Hrabinsky's December 21, 2022 email to Ms. Ralphs read as follows:

> I have attached a copy of page JB-0524 from the Joint Book.
>
> Are you able to tell me the names of the parent(s) of the children referred to as your "daycare kids" in the attached?

[13] I will address the importance of Ms. Ralphs' failure to provide this information in my discussion of the jurisdiction question.

[14] I agree with the VSA that the main contentious issues before me are as set out by VSA at para. 8 of their written submission dated January 18, 2023:

> (a) At the time of the Transaction, was the vehicle purchased by Ms. Ralphs primarily for personal family or household use?
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> (b) Was the vehicle not suitable for transportation at the time of purchase?

[15] The answer to the first question will determine whether I have jurisdiction to address the second.

Was the Vehicle purchased by Ms. Ralphs primarily for personal, family or household use?

[16] The answer to the question of whether the Vehicle was purchased by Ms. Ralphs for personal, family or household use will determine whether I have jurisdiction to determine the substantive issue of whether the Vehicle was suitable for transportation at the time of purchase.

[17] In my preliminary ruling on jurisdiction (at para. 15), I summarized the affidavit evidence on this point:

> [15] The evidence on the application on the question of Ms. Ralphs' intended use at the time she purchased the motor vehicle in question on July 25, 2018 is as follows:
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> • Financing documents signed by the dealer and Ms. Ralphs at the time of purchase record that the intended us was "personal, family or household use"
> • The vehicle was insured at the time of purchase in the "pleasure use" category which permits no more than 8 days in a calendar month for business use
> • Ms. Ralphs described herself on credit and dealertrack.ca applications at the time of purchase as a "daycare owner". There is conflicting evidence on the question of whether an employee of the dealer suggested to Ms. Ralphs that describing herself in this way would

assist her application. Land title documents from 2013 located by the respondents similarly show that Ms. Ralphs described herself as a daycare operator.

- Ms. Ralphs stated in a text message to the respondent Ms. England "I get my daycare kids at 8:30 to 9 so I can get everybody ready and then head up there" and the evidence of the respondent's employee Jamie Evans was that Ms. Ralphs came to test drive the vehicle accompanied by five children and that she told him on two occasions that she was using the vehicle to transport her daycare children. Similarly, the respondent's finance manager Bradley Evans deposed that he witnessed at least five children at the office when Ms. Ralphs was purchasing the vehicle and that she told him she would be using the vehicle to drive her daycare children.
- The motor vehicle that Ms. Ralphs purchased is a 12-seater van.
- On July 9, 2019, Ms. Ralphs submitted a consumer complaint to the VSA which declared her intended use of the vehicle at the time of the transaction as "100% intended for personal use"
- In its August 2019 response to the consumer complaint, the respondents asserted that Ms. Ralphs was intending to use this vehicle for business purposes for her daycare.
- In an October 2019 email to the VSA investigation officer, the respondent Ms. England stated that she was of the understanding that the vehicle was purchased for business purposes.
- In an October 25, 2019 email to the VSA investigation officer, Ms. Ralphs stated "I purchased my van for the purpose of transporting my 3 children, two dogs and husband". In the same email Ms. Ralphs comments that "My secondary reason for buying this van was that I was hoping to some day in the future take the child care course and upgrade my driver license to meet the requirements . . .to have a daycare facility and have safe transportation for the children in this business".
- At the time Ms. Ralphs purchased the vehicle, she owned and operated a 2008 Dodge Grand Caravan [which the respondents point out has seating for seven people]. The respondents rely on an affidavit of Bradley Evans who deposes that Ms. Ralphs initially communicated to him that she intended to keep the Dodge Grand Caravan upon purchasing the subject vehicle.
- Shortly after purchasing the subject vehicle, Ms. Ralphs insured in her own name a 2013 Toyota Tacoma.
- Ms. Ralphs' bookkeeper and taxation information supported her assertion that she had not deducted vehicle expenses from her 2018 taxes

- In November 2019, Jamie Evans, an employee of the respondent provided a statement in which he said that Ms. Ralphs "came to the lot looking for a vehicle larger than the Grand Caravan because she stated she was looking after other people's children"
- In her affidavit filed in support of this application Ms. Ralphs deposed that she "purchased the vehicle primarily for personal use", that she had "ambitions to become a licensed daycare operator" at which point "it would have been [her] intention to transfer the vehicle to the business and use it to some extent for business or commercial purposes" but that "until that occurred, it was [her] intention to use the vehicle primarily for personal use."

[18] Cross-examinations were conducted on this issue of Ms. Ralphs, Mr. Ralphs, and Jamie Evans ("Mr. J. Evans"). The VSA elected not to cross-examine Ms. England or Bradley Evans ("Mr. B. Evans"), who had also given evidence on this issue as summarized above.

[19] The VSA's written submission fairly summarizes Ms. Ralphs' evidence on the question of whether Ms. Ralphs was operating a daycare in the May - October 2018 period surrounding the time of the Transaction. While Ms. Ralphs admits to babysitting children at her home, she denies ever using the Vehicle to transport children. While she says that "[c]hildren were dropped at my home by parents and picked up at days end by parents", she denies that she was operating a daycare business at any time. She says that while she aspired to establish a daycare business in the future, her intention in purchasing the Vehicle was that it would be used 100% for personal use.

[20] The Respondent Dealer says the weight of the evidence is not consistent with Ms. Ralphs' assertion that she purchased the vehicle primarily for personal, family or household use. The Respondent Dealer relies primarily on the following evidence:

- documents, including financing documents in connection with the Transaction, in which Ms. Ralphs was described as a daycare owner or operator;
- Ms. Ralphs' text message to Ms. England in which she referred to her "daycare kids" arriving between 8:30 and 9am;
- the evidence of both Bradley Evans and Jamie Evans that Ms. Ralphs attended the dealership with five children; and
- the nature of the vehicle, which seats 12.

[21] The Respondent Dealer argues that Ms. Ralphs' evidence that she purchased the Vehicle for personal use is not credible in light of the evidence of the surrounding circumstances.

[22] The VSA submits that "to the extent that there are conflicts in the evidence… those conflicts should be resolved in favour of Ms. Ralphs". They point to evidence of Ms. Ralphs' tax filings, which show no significant income from daycare operations and no deduction of a vehicle against business expenses, and that she insured the Vehicle for pleasure use. Moreover, the VSA argues that the evidence of the Respondent Dealer, particularly as to the number of children who were in attendance with the Ralphs at the dealership, should be considered in the context of the passage of time between the Transaction and the filing of the complaint and the preparation of affidavits. The VSA also notes that the Dealer's initial response did not specifically mention that the Ralphs attended the dealership with five children.

[23] I am unable to accept the position of the VSA as to the resolution of conflicts in the evidence on this issue. Ultimately, in order to find that the Transaction was a consumer transaction, I must accept Ms. Ralphs' evidence that she intended at the time of the Transaction to use the Vehicle primarily for personal, household, or family use. I do not accept Ms. Ralphs' evidence in that regard.

[24] First, while Ms. Ralphs has deposed that she was not running a daycare at the time of the Transaction (or ever), she provides no plausible explanation for her reference to her "daycare kids" in her text message to Ms. England. Despite having previously described the text message as being taken "out of context", Ms. Ralphs did not provide any context for the text message in her evidence. She was argumentative when asked who - if not children to whom she was providing daycare services - "daycare kids" referred to and said at various times in her evidence both that she did not recall the specific children and that she considered it inappropriate to provide information about the children in the context of the hearing. As set out above, following the conclusion of the hearing, counsel for VSA made a further request to Ms. Ralphs for information about the reference to "daycare kids" and Ms. Ralphs did not respond.

[25] Second, there is a direct conflict in the evidence as to whether Ms. Ralphs attended at the dealership with five children - as Mr. J. Evans and Mr. B. Evans both deposed -- or whether, as Ms. Ralphs and her husband both testified, -- she was in attendance only with her husband and their own three children. I find myself unable to accept the evidence of the Ralphs on this point in light of

the text message which indicates that Ms. Ralphs would attend the dealership in the morning *after* her "daycare kids" were dropped off.

[26] The evidence of Mr. J. Evans and Mr. B. Evans that the Ralphs attended with five children makes more sense when considered in the context of the contemporaneous text message. The VSA cross-examined Mr. J. Evans and sought to establish through cross-examination that he did not accurately recall the circumstances of the Transaction. Mr. J. Evans responded that the circumstances of the Ralphs' attendance at the dealership were memorable because of the attendance with them of five children. I found Mr. J. Evans' evidence to be credible. He testified in a straightforward, non-argumentative manner and made appropriate concessions to the lack of perfection in his recollection. His evidence that he recalled the Transaction specifically because of the attendance of five children, which was notable in his experience, had the ring of truth.

[27] In written submissions, VSA argued that, Mr. J. Evans' evidence that it was notable to him that five children attended with the Ralphs should be rejected because it "was evidently not notable enough to be recorded in the dealer's original response to the consumer complaint." The VSA notes that the Respondent Dealer's initial response to the complaint did not specifically mention the attendance of five children, but rather merely states "July 25th, 2018 Ashley and Matthew attended our office and purchased a 2013 Ford E350 econoline passenger van…" (emphasis added).

[28] I do not consider that this passage from the Respondent Dealer's response undermines Mr. J. Evans' evidence. The quoted portion immediately follows a statement by the Dealer that "Ashley Ralphs was intending to use this vehicle for business purposes for her daycare." Moreover, it is uncontroversial on the evidence of all witnesses that the Ralphs attended with a number of children. Ms. Ralphs and Mr. Ralphs both gave evidence that their three children were in attendance. Accordingly, the Respondent Dealer's statement that "Ashley and Matthew attended our office" without reference to any children does not assist in resolving the question of whether they attended with three or five children.

[29] The VSA chose not to cross-examine Mr. B. Evans who also deposed that the Ralphs attended with five children. At my request, the VSA addressed in their submission the application of the rule in *Browne v. Dunn* in the circumstances. VSA argues that the rule has no application because "Bradley Evans was not deprived of the ability to comment on the Complainant's version of events. On the contrary, at the time that Bradley Evans swore his affidavit, he had at his

disposal the entirety of the materials relied on by the VSA." The VSA also argued that the rule of *Browne v. Dunn* does not apply strictly in hearings before the Registrar and is of questionable utility in proceedings where evidence is given by affidavit.

[30] I agree with VSA that the rule of *Browne v. Dunn* is more difficult to apply where evidence is by affidavit. On the specific issue of the number of children in attendance with the Ralphs -- a point on which the VSA asks that I prefer the evidence of Ms. Ralphs over Mr. B. Evans -- the application of the rules is perhaps more complicated because Mr. Ralphs, whose evidence was compelled by the Dealer although he had not sworn an affidavit, also testified that only the Ralphs' own three children attended. This evidence was not part of the record available to Mr. B. Evans to comment on when he made his affidavit.

[31] Ultimately, it is not necessary to apply the rule in *Browne v. Dunn* as VSA does not argue that I should reject the evidence of Mr. B. Evans on this point. I do not see how, in the absence of cross-examination or overwhelming contradictory evidence not present here, I could reject Mr. B. Evans' evidence of his recollection that there were five children present during his interactions with Ms. Ralphs in the context of the Transaction.

[32] I accept the evidence of Mr. J. Evans and Mr. B. Evans that Ms. Ralphs attended the dealership with five children. Together with the text message, the evidence drives to the inference that Ms. Ralphs attended the dealership with five children of whom at least two were "daycare kids" who had been dropped off at her home between 8:30 am and 9:00 am that morning.

[33] That conclusion requires a rejection of Ms. Ralphs' evidence on the core points of whether she was running a daycare at the time of the Transaction and whether she was in attendance at the dealership with one or more "daycare kids". I do not consider that I can rely on Ms. Ralphs' evidence that she intended to use the Vehicle primarily for personal, family, or household use and accordingly, I cannot find that this is a consumer transaction that can ground the jurisdiction of the Registrar.

[34] Accordingly, I agree with the Respondent Dealer that the complaint is not within the VSA's jurisdiction and must be dismissed.

[35] While in the circumstances it is not necessary for me to consider the substance of the complaint, in the event my analysis on jurisdiction is wrong, I would in any event have dismissed the complaint for the reasons set out below.

Was the Vehicle not suitable for transportation at the time of purchase?

[36] The VSA's contention that the Vehicle was not suitable for transportation at the time of purchase is predicated on the assertion that the "evidence shows that the vehicle had sustained extensive water and corrosion damage prior to the sale to Ms. Ralphs and that the damage compromised the structural integrity of the vehicle in the event of a crash, rendering it unsuitable for transportation."

[37] The Respondent Dealer points out in its submissions that the evidence shows that when it purchased the Vehicle through Adesa Auctions ("Adesa") in June 2018 (the month prior to the Transaction), it obtained a post-sale inspection by Adesa's mechanical shop which included an inspection of the frame for rust. John MacDonald, General Manager of Adesa, who was subpoenaed by the Respondent Dealer, confirmed in his evidence that the Vehicle passed the inspection and that no water damage to the frame or corrosion was noted on the inspection report.

[38] The Respondent Dealer also points out that the Vehicle was examined by Eagle Eye Automotive after the purchase from Adesa once it was transported to, and landed in Victoria and that Eagle Eye Automotive did not mention any water damage or corrosion observed on the Vehicle.

[39] The VSA relies on evidence of the condition of the Vehicle in September 2017 and evidence of Steve Slee ("Mr. Slee") and Eugene Heany ("Mr. Heaney"), who observed water damage during inspections of the Vehicle that took place in January 2019 and June 2019, respectively.

[40] Mr. Heaney swore a brief (1.5-page) affidavit in which he opined that the damage he observed in June 2019 was not new and "happened long before Ashley Ralphs purchased the [V]ehicle in July 2018". His affidavit appended two exhibits: Exhibit A was a letter dated June 7, 2019 which he swore in his affidavit "truthfully and accurately records my observations with respect to the Vehicle", and Exhibit B was a photograph which he swore in his affidavit "I took to document the condition of the vehicle at the time of my inspection".

[41] On cross-examination, Mr. Heaney admitted that there were inaccuracies in his affidavit with respect to each of the two exhibits he appended. The letter appended as Exhibit A states that the Vehicle was sent to him for inspection by Colwood Car Mart. This was not accurate. In fact, the Vehicle was sent to him by Alex Johnston, a long-time client of Mr. Heaney's, and the father of Ms. Ralphs. With respect to Exhibit B, Mr. Heaney admitted on cross-

examination that in fact, he did not take the photograph, as he had deposed in his affidavit.

[42] Mr. Slee also opined that the water damage and corrosion he observed "had not occurred recently or even in the preceding year". However, Mr. Slee also deposed that he had previously inspected the Vehicle in October 2018 and appended a copy of his inspection report to his affidavit. Mr. Slee admitted in cross-examination (and it is evident on the face of the inspection report) that the part of the October 2018 inspection report produced does not identify water damage or corrosion and in fact, for "frame damage", the report indicates the Vehicle, on inspection, "checked out OK". Mr. Slee also admitted on cross-examination that the rate of corrosion is a matter of science and an area in which he has no experience. He also had no knowledge as to where the Vehicle was stored between the first inspection in October 2018 and the inspection where he observed water damage in January 2019.

[43] The evidence shows that in the three inspections closest to the July 2018 Transaction date (the Adesa post-sale inspection, the Eagle Eye Automotive inspection, and Mr. Slee's October 2018 inspection for Island Ford), no water damage or corrosion of the nature that is said to have made the Vehicle not suitable for transportation was observed.

[44] It was not until Mr. Slee's January 2019 inspection that water damage and corrosion were observed. While Mr. Slee and Mr. Heaney (who inspected five months later, in June 2019) both believed that the corrosion they observed in 2019 was not new, neither of them was qualified as an expert on the rate of corrosion.

[45] The Dealer led expert evidence of Dr. Edouard Asselin ("Dr. Asselin"), a professor of materials engineering at the University of British Columbia. Dr. Asselin appended his CV to his affidavit. He is clearly qualified to opine on matters relating to the impact of various factors on corrosion. Dr. Asselin's affidavit makes clear that the nature and rate of corrosion varies depending on a number of factors including climactic conditions, metal wetness, pollutant concentration, and the condition of coatings. He opines that visual inspection or touch examinations of rust or corrosion are "qualitative at best" and that it "is not possible to accurately calculate the rate of corrosion using these methods".

[46] I accept Dr. Asselin's opinion evidence that it is not possible to determine the age of water damage and corrosion to metal based on a visual inspection or touch examination of the metal. I give no weight to the opinions expressed by

Mr. Slee and Mr. Heaney, neither of whom have expertise in the science of corrosion, that the corrosion they later observed had occurred prior to July 2018. The best evidence of the condition of the Vehicle in July 2018 are the inspections that took place in June and October 2018, none of which indicated there was water damage or corrosion.

[47] Accordingly, the evidence does not establish that in July 2018 when it was sold to Ms. Ralphs, that the Vehicle had sustained water and corrosion damage of the nature alleged by the VSA.

[48] Had I found jurisdiction to consider this proceeding on its merits, I would have dismissed it for the reasons set out above.

Conclusion

[49] This proceeding is dismissed for lack of jurisdiction. Had I found jurisdiction to consider alleged contraventions on their merits, I would have dismissed the proceeding for failure to establish the contraventions.

[50] This decision may also be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. The time to file such a petition is within 60 days of receiving this decision as per section 7.1(t) of the *Motor Dealer Act*.

Dated: September 6, 2023

Claire E. Hunter, K.C.
Deputy Registrar of Motor Dealers