IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers,* 2014 BCSC 903

Date: 20140523
Docket: S136764
Registry: Vancouver

Between:

Windmill Auto Sales & Detailing Ltd. and Sarmad Jamil a.k.a. Sam Romaya

Petitioners

And

Registrar of Motor Dealers, Motor Vehicle Sales Authority of British Columbia, Ron Harris and Melinda Harris

Respondents

On judicial review from: The decisions of the Registrar of Motor Dealers, dated April 10, 2013 and August 20, 2013 (*Harris v. Windmill Auto Sales & Detailing Ltd.*, Hearing File No. 12-030).

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Petitioners:	D. A. Hunter
Counsel for Respondents, Registrar of Motor Dealers and Motor Vehicle Sales Authority of British Columbia:	R. P. Hrabinsky
Counsel for the Respondents, Ron Harris & Melinda Harris:	W. G. Mazzei
Place and Date of Trial/Hearing:	Vancouver, B.C. March 14, 2014
Place and Date of Judgment:	Vancouver, B.C. May 23, 2014

Introduction

[1] This is an application for judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 of a decision of the Registrar of Motor Dealers (the "Registrar") dated April 10, 2013 (the "decision") and a subsequent reconsideration decision by the Registrar dated August 20, 2013 (the "re-consideration decision").

[2] The decisions concern a complaint brought before the Registrar under the *Motor Dealer Act*, R.S.B.C. 1996, c. 316 (the "*MDA*") by Ron and Melinda Harris (the "complainants") with respect to a used Dodge truck (the "Dodge") purchased from the petitioner Windmill Auto Sales & Detailing Ltd., (the "Windmill") the principal of which is the petitioner Mr. Romaya.

[3] The Registrar found that Windmill breached the *MDA* by failing to disclose to the complainants that the Dodge had previously sustained damage in excess of $2,000.00. The Registrar issued a compliance order pursuant to s. 155 of the *Business Practices and Consumer Protection Act,* S,B.C. 2004, c. 2 (the "*BPCPA*") directing Windmill to refund the entire purchase price of the Dodge to the complainants, subject to the complainants returning the truck, and imposing administrative penalties on both Windmill and Mr. Romaya.

[4] The petitioners now apply to set aside the decisions.

Facts

[5] The central facts are summarized in the decision as follows:

> [1] On August 8, 2011, Ron and Melinda Harris (the "Complainants") purchased a 2009 Dodge Laramie pick-up (the "Dodge") from Windmill Auto Sales & Detailing Ltd. ("Windmill"), motor dealer registration # 30476. The Complainants dealt with Sarmad Jamil a.k.a. Sam Romaya ("Mr. Romaya"), salesperson licence # 102192 who is the dealer principal of Windmill and a co-owner.
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> [2] At the time of the purchase, Windmill, through Mr. Romaya, declared the Dodge had been in an accident and the cost of repairs only $1,800. The Dodge had been imported from the U.S.A. which was also declared.
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> [3] In May of 2012, the Dodge was struck by another motor vehicle while parked in the Complainants' driveway. The Dodge was taken in for

> repair and it was discovered the Dodge still had previous damage that had not been repaired. A visual estimate indicated there was some $6200 in additional repairs to be made from a previous accident.
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> [4] The Complainants confronted Windmill and Mr. Romaya with this discovery. Initially, Windmill seemed reluctant to take responsibility and offered $5,000 in compensation. This was rejected by the Complainants.
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> [5] The Complainants and Windmill agreed to have the Dodge inspected by another third party repair shop. After that inspection confirmed the first estimate, it appears Windmill and Mr. Romaya came up with a plan to provide the Complainants with a trade in credit for the Dodge that would have provided substantially a full refund except for the warranty and documentation fee for which the Complainants had paid. The Complainants also rejected this offer.
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> [6] On July 6, 2012, the Complainants filed their complaint with the Motor Vehicle Sales Authority (the "Authority"). An investigation ensued conducted by Sarah Kilback.
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> [7] A hearing was called on January 10, 2013. That hearing was adjourned. Windmill and Mr. Romaya had not been given two pieces of evidence until the time of the hearing. A CD-ROM of a phone conversation between the Complainant, Ron Harris and Mr. Romaya had not been disclosed. Also, an invoice in the possession of a witness regarding repairs to the Dodge, before the Complainants purchased the Dodge, was not produced by that witness until the day of the hearing. I adjourned the hearing to allow Windmill and Mr. Romaya an opportunity to review that new evidence
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> [8] When the hearing reconvened on March 5, 2013, Windmill and Mr. Romaya did not contest, and admitted to, the facts contained in Sarah Kilback's affidavit with attached exhibits. Windmill and Mr. Romaya also did not contest and admitted the remainder of the exhibits entered at the hearing. Mr. Romaya provided a statement indicating he believes an error occurred, with his bookkeeper not ensuring all the paid invoices were in the deal file at the time of the sale.

[6] Following the hearing, on April 10, 2013 the Registrar issued the decision in which he found that the petitioners had committed a deceptive act or practice contrary to s. 5(1) of the *BPCPA*. Spcifically, the Registrar made the following findings:

> [26] I am satisfied on the evidence, that Windmill and Mr. Romaya committed a deceptive act or practice in the way they represented the Dodge's damage to the Complainants. They have effectively admitted to this fact.

> [27] Based on the evidence, I am also satisfied that Windmill and Mr. Romaya acted with intention in making the damage declaration and representation. …

[7] The Registrar therefore issued the compliance order requiring the petitioners to refund the entire purchase price paid by the complainants for the Dodge. In ordering a full refund, the Registrar declined to permit a deduction to reflect the fact that the Dodge had been driven approximately 16,000 miles since being purchased by the complainants and had been in a subsequent accident.

[8] The Registrar also issued administrative penalties to Windmill and to Mr. Romaya in the amounts of $2,500 and $500 respectively, and ordered that they pay costs of $1,811.97.

[9] On May 10, 2013, the petitioners requested that the Registrar reconsider the decision. The basis for the reconsideration application was alleged misrepresentations made to the petitioners by Daryl Dunn, the Manager of Compliance and Investigations for the respondent Motor Vehicle Sales Authority ("MVSA") which the petitioners say led them to admit the contents of the affidavit of Sarah Kilback at the hearing.

[10] On August 20, 2013, the Registrar denied the reconsideration application.

[11] While the petitioners seek review of both the decision and the reconsideration decision, the parties did not address the reconsideration decision in any meaningful way during the hearing. It was common ground that the existence of the reconsideration decision does not preclude the court from reviewing the initial decision, thus whether or not the Registrar erred in declining to reconsider the decision is effectively a moot point.

[12] These Reasons are therefore limited to addressing the petitioners' attack on the initial decision.

The Parties' Positions

[13] The petitioners submit that the Registrar violated the principles of procedural fairness by effectively denying them the right to be heard. They say that they were misled by Mr. Dunn into believing that if they admitted the contents of the Kilback affidavit, the Registrar would make a deduction in the refund amount to account for the complainants' use of the Dodge and the subsequent accident. They submit further that they were never advised that the Registrar could make a finding of fraud against them.

[14] The petitioners say that the effect of the misrepresentations by Mr. Dunn and the failure to give notice of the possibility of a finding of fraud meant that they were not fully informed of the case they had to meet and were denied the opportunity to present a full and proper response.

[15] The petitioners acknowledge that Mr. Dunn, in his affidavit, denies making the alleged representations. They say however that even if they are mistaken about what Mr. Dunn said, they should be permitted to present their full defence to the Registrar, particularly given the stigma associated with a finding of fraud.

[16] The petitioners submit further that the Registrar erred in granting a remedy that effectively amounted to rescission of the original sales contract when the requisite elements of the doctrine of rescission were not established.

[17] For their part, the Registrar and the MVSA (together the "respondents") deny that Mr. Dunn made the alleged misrepresentations. They say further that the conflict in the affidavits need not be resolved as the petitioners' allegations of procedural unfairness can be determined, and rejected, based on the record of the proceeding before the Registrar.

[18] The complainants support the respondents' position and submit that for this matter to go back for a further hearing would be unfair to them given the passage of time.

The Statutory Regime

[19] The retail motor vehicle sales industry in British Columbia is regulated pursuant to the terms of the *MDA*. On July 21, 2003, the Motor Dealer Council of British Columbia (the "Council") was established as a society for the purpose of receiving delegated authority to administer the *MDA* and all regulations made thereunder. The Council, which operates as the MVSA, is defined as the "authority" in s. 1 of the *MDA*. I will refer to it as the MVSA for the purposes of these Reasons.

[20] As contemplated by ss. 1.1 and 24.1 of the *MDA*, the MVSA entered into an administrative agreement with the provincial Crown dated March 24, 2004 which sets out the scope of the MVSA's authority in carrying out its delegated administrative function in relation to the *MDA* and its accompanying regulations.

[21] Section 2 of the MDA provides for the appointment of the Registrar who functions as the chief administrative officer for the regulatory regime established under the *MDA* and its regulations.

[22] One of the Registrar's central functions is to deal with applications for registration as a motor dealer under the *MDA*, as well as suspensions and terminations of registration. Pursuant to s. 3 of the *MDA*, a person must not carry on business as a motor dealer unless registered under the *MDA*.

[23] Pursuant to s. 8.1 of the *MDA* and s. 29 of the *Motor Dealer Act Regulation,* B.C. Reg. 447/78 (the "*MDA Regulation*"), the Registrar may exercise authority under certain prescribed provisions of the *BPCPA*, including ss. 4 - 6 which deal with deceptive acts or practices and ss. 7 - 10, which deal with unconscionable acts or practices.

[24] Under s. 29 of the *MDA Regulation*, the Registrar is empowered to investigate alleged deceptive or unconscionable acts or practices and, where such acts or practices are established, to issue compliance orders under s. 155 of the *BPCPA* and to impose administrative penalties under s. 164 of the *BPCPA*.

[25] There is no issue in this proceeding that the Registrar was acting within the scope of his authority in conducting a hearing and in issuing the noted compliance order and administrative penalties. Again, the issue is whether, in exercising that authority, the Registrar breached the principles of procedural fairness and natural justice or committed a reviewable error in relation to the remedy granted.

Standing of the Registrar and the MVSA

[26] The petitioners did not challenge the standing of the respondents to participate in this judicial review application, although they submit that such standing does not extend to defending against an allegation of a breach of the principles of procedural fairness and natural justice (*Northwestern Utilities Ltd. v. Edmonton (City),* [1979] 1 S.C.R. 684 at 710; *Henthorne v. British Columbia Ferry Services Inc.,* 2011 BCCA 476).

[27] Numerous authorities decided since *Northwestern Utilities* have softened that case's restrictive interpretation of the proper role of a tribunal on judicial review (see for example, *CAIMAW v. Paccar of Canada Ltd.,* [1989] 2 S.C.R. 983 at 1016, citing with approval *B.C.G.E.U. v. British Columbia (Industrial Relations Council)*, 26 B.C.L.R. (2d) 145, [1988] B.C.J. No. 786 (C.A.); *Barker v. Hayes,* 2007 BCCA 5,1 and *Pacific Newspaper Group Inc., v. Communications, Energy and Paperworkers Union of Canada, Local 2000,* 2009 BCSC 962).

[28] In *Barker,* Smith J.A. described the exceptions to the general principle set out in *Northwest Utilities* as follows at para. 20:

> However, exceptions to this general rule may be made when the tribunal, by reason of its specialized jurisdiction and expertise, may be in a position to draw the attention of the appellate court to relevant considerations that might otherwise escape the court's attention, such as when the question concerns the tribunal's jurisdiction or its procedures or the appropriate standard of review of its decisions: …

[29] I am satisfied that the respondents' participation in this judicial review proceeding fell within the recognized limits, and indeed the petitioners did not argue otherwise.

Did the Registrar Breach the Principles of Procedural Fairness?

[30] As set out above, the petitioners' argument on procedural fairness is largely based on the representations allegedly made by Mr. Dunn about the process before the Registrar and the "likely" remedy.

[31] It is useful to set out in more detail the petitioners' allegations, as well as Mr. Dunn's response.

[32] In his affidavit, Mr. Romaya states as follows:

> I did not agree, and still do not agree with all of the facts set out in the Kilback Affidavit. But, because of advice and directions I received from Daryl Dunn, Manager of Compliance and Investigations for the MVSA, I did not dispute any of the facts or exhibits it contained, or any of the other evidence presented at the hearing. Instead, I relied on Mr. Dunn's advice to admit all the facts presented by the MVSA, with the understanding that if I did so, and if I submitted a written statement outlining all the efforts I had made to settle this dispute, I would not have to refund the Complainants the full purchase price for the Dodge.

[33] He goes on to provide more detail of the alleged representations, which he says were made during a conversation that took place on January 10, 2013, after the initial hearing was adjourned. Paraphrasing his evidence, Mr. Romaya alleges that Mr. Dunn told him:

a) he should admit the facts in the Kilback affidavit;

b) he should submit a written statement setting out the efforts he had made to settle the dispute;

c) if he admitted the contents of the Kilback affidavit, the proceeding would be over quickly, no more than one hour;

d) if he admitted the facts of the Kilback affidavit and submitted a written statement, he likely would not be required to pay the full amount to the Complainants as the Registrar would likely make a deduction for the reduced value of the Dodge resulting from its subsequent use and the later accident; and

e) Mr. Dunn had never seen a situation where the dealer had to refund the full amount of the vehicle.

[34] Mr. Romaya then alleges that he believed that Mr. Dunn was there to represent him and to act in his best interests and that he had no idea that by admitting the contents of the Kilback affidavit, he was risking a finding of fraud or that he could be ordered to refund the entire purchase price of the Dodge.

[35] He says that he admitted the contents of the Kilback affidavit because he thought it would avoid him having to refund the full purchase price of the Dodge. Of note, he also says that he admitted the contents of the affidavit "despite the fact I did not agree with everything in it, and despite the fact I had not even read the whole thing".

[36] Mr. Romaya then goes on in his evidence to outline the portions of the evidence in the Kilback affidavit that he would have challenged and the evidence he would lead in response to the complaint.

[37] In his affidavit, Mr. Dunn denies that he made misleading representations to the petitioners. He specifically denies that he told them not to worry about the process or that he in any way indicated that he was representing them with respect to the dispute.

[38] While Mr. Dunn acknowledges speaking to Mr. Romaya on January 10, 2013, his version of what was said differs significantly. Paraphrasing Mr. Dunn's evidence, he says:

a) he did not give any advice to Mr. Romaya during the conversation;

b) he discussed the sanctions that could be imposed by the Registrar as outlined in the notice of hearing;

c) he told Mr. Romaya that he could represent himself or have counsel at the hearing and that he had the right to question the Kilback affidavit and to call witnesses in support of his position;

d) Mr. Romaya told him that he did not dispute the evidence in the Kilback affidavit, that he was uncomfortable speaking and that he wanted to provide his side of the story in writing;

e) he told Mr. Romaya that he was entitled to submit something in writing but he denies advising Mr. Romaya to proceed in any particular manner; and

f) he specifically denies advising Mr. Romaya abut the expected outcome of the hearing, other than to identify the range of sanctions that could be imposed by the Registrar, again as outlined in the notice of hearing.

[39] There is no dispute that the Registrar owed the petitioners a duty to act fairly when determining the complaint brought by the complainants and in considering appropriate remedies. Nor is there any dispute that the duty encompasses both a right to be heard and a right to an impartial hearing, although the nature and extent of the duty may vary with the specific context and the various fact situations dealt with by an administrative tribunal (*Therrien (Re),* 2001 SCC 35 at para. 82).

[40] Regardless of the extent to which the content of the duty of fairness may vary from case to case, the core principle animating the duty remains the same, namely that the observance of fair procedures is central to the just exercise of power (*Canada (Attorney General) v. Mavi,* 2011 SCC 30 at paras. 38 - 42).

[41] The petitioners submit that the respondents effectively “eradicated” their right to a fair hearing by virtue of Mr. Dunn’s representations, on which they reasonably relied. They say that because they were misled about the likely outcome of the process, and were never told that a finding of fraud was possible, they were prevented from presenting a full answer. Had they known the actual jeopardy that they faced, they would not have admitted the facts in the Killbak affidavit and indeed would have challenged many of the key pieces of evidence relied on by the Registrar.

[42] In response, the respondents point to a number of facts that they say indicate that the petitioners were treated fairly:

a) the petitioners were provided with the Kilback affidavit and the notice of hearing on November 9, 2012, two months before the initial hearing and almost four months before the second and actual hearing;

b) the initial hearing was adjourned to allow the petitioners to review evidence that had just been produced, specifically a recording of a phone call between Ron Harris and Mr. Romaya;

c) when the hearing resumed on March 5, 2013, Mr. Romaya was expressly given the opportunity to provide his position on the evidence in the Kilback affidavit and he confirmed his acceptance of that evidence. In doing so, he did not state that he was relying on any advice from Mr. Dunn;

d) the notice of hearing served on the petitioners on November 9, 2013, again along with the Kilback affidavit, sets out in detail the allegations against the petitioners; and

e) the notice of hearing also sets out the possible orders that may be made by the Registrar at the conclusion of the hearing, including making a compliance order requiring the motor dealer to "reimburse and/or compensate a consumer," and imposing an administrative penalty.

[43] On the basis of this information, clearly transmitted to the petitioners, the respondents submit that the petitioners cannot say that they did not know the case to be met or that they were denied the opportunity to be heard.

[44] With respect to the alleged representations by Mr. Dunn, the respondents say that the petitioners are in effect asserting a legitimate expectation of a substantive result and that the doctrine of legitimate expectations does not go that far. They cite the well-known statement of Sopinka J. in *Reference Re Canada Assistance Plan (B.C.),* [1991] 2 S.C.R. 525 at 557 - 558:

> There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultation.

[45] See also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2011 SCC 41.

[46] The respondents also rely on the Supreme Court's discussion in *Mount Sinai* about the application of the doctrine of promissory estoppel to a public authority and the significant evidentiary burden that must be met by an applicant asserting estoppel. They say that even taken at face value, the representations alleged to have been made by Mr. Dunn do not constitute an unequivocal promise to the petitioners about a particular outcome.`

[47] As noted by the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 at para. 94:

> … if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[48] However, the Supreme Court goes on to cite with approval the statement from D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* at para. 7:1710 that "the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified".

[49] I do not take the petitioners to say that the Registrar was estopped from making his decision or that the alleged representations of Mr. Dunn created a legitimate expectation of a particular substantive result. Rather, they assert that because they were misled about the likely result, the process leading to a result that was different from what they expected was therefore unfair.

[50] On the evidence before me, I am not satisfied that the Registrar breached the principles of procedural fairness in his treatment of the petitioners.

[51] With respect to the allegation that the petitioners were not told that a finding of fraud was possible, and therefore did not know the case they had to meet, I would note that the Registrar's decision does not use the term fraud. Rather, the Registrar found that the petitioners committed a deceptive act or practice and that they did so deliberately, within the meaning of ss. 4 and 164 of the *BPCPA*.

[52] Moreover, the notice of hearing served on the petitioners sets out the basis of the allegations against the petitioners, namely that they "did in relation to a consumer transaction contravene sections 4 and 5 of the [*BPCPA*] by making an oral, written, visual, descriptive or other representation … that had the capability, lendency or effect of misleading …", and states that, at the conclusion of the hearing, the Registrar may make orders pursuant to ss. 154, 155 and 164 of the *BPCPA*, which includes reimbursement of any money received from a consumer. Section 164 in turn provides that in considering an appropriate administrative penalty, the Registrar must consider whether the contravention in issue was deliberate.

[53] In other words, the notice of hearing specifically put the petitioners on notice that one possible outcome of the process was a finding that they deliberately committed a deceptive act or practice, a finding that is expressly contemplated by the *BPCPA*.

[54] Similarly, I am not satisfied that the petitioners were denied the right to be heard and to present a full answer due to anything said by Mr. Dunn. Again, the notice of hearing clearly sets out the specific nature of the allegations being advanced against the petitioners and the range of possible outcomes. Further, the petitioners were provided with the Kilback affidavit setting out the evidence in support of the allegations four months in advance of the hearing date.

[55] I agree with the respondents that the representations of Mr. Dunn alleged by the petitioners, even if taken at face value, do not constitute "clear, unambiguous and unqualified" promises by Mr. Dunn about the expected result. In this regard, even the petitioners' evidence qualified the promises as "likely" outcomes.

[56] It may be that the petitioners did not fully understand the process before the Registrar and the possible penalties that they faced, but I am not satisfied that they were led to that misunderstanding by Mr. Dunn.

[57] If anything, the misunderstanding, if it indeed occurred, arose in large part from the petitioners' own failure to take proper steps to understand the process and to act accordingly in their own interests.

[58] This failure is reflected in Mr. Romaya's admission that he accepted the contents of the Kilback affidavit despite having not read the whole affidavit. Further, apart from confirming that he received it, Mr. Romaya does not say in his affidavit whether he read the notice of hearing, whether he did or did not understand it or whether he took any measures to clarify any aspect of the notice of which he was uncertain.

[59] In my view, it is incumbent upon a party that operates within a regulated industry to develop at least a basic understanding of the regulatory regime, including its obligations under the regime, as well as the obligations, and the authority, of the regulator.

[60] Further, the Registrar was under no obligation to remind the petitioners to either read or read carefully the notice of hearing or the statutory provisions referenced therein (see *Moreau-Bérubé v. New Brunswick*, 2002 SCC 11 at paras. 79- 81). Therefore, I find that that there was no breach of natural justice or breach of the duty of procedural fairness owed to the petitioners in the overall context of the hearing of the complaint.

Did the Registrar Err in Ordering a Full Refund of the Purchase Price?

Standard of Review

[61] The parties agree that the standard of review to be applied to decisions of the Registrar is reasonableness.

[62] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada articulated that standard as follows at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[63] As noted by the Federal Court of Appeal, the "range of possible outcomes" may vary depending upon the context and the particular decision under review. The Court said in *Canada (Attorney General) v. Abraham,* 2012 FCA 266 at paras: 44 - 45:

> [44] For example, where the decision-maker is considering a discretionary matter that is based primarily on factual and policy matters having very little legal content, the range of possible, acceptable outcomes open to the decision-maker can be expected to be quite broad. As a practical matter, the breadth of the range in that sort of case means that it will be relatively difficult for a party applying for judicial review of the decision to show that it falls outside of the range.
>
> [45] In other cases, however, the situation might be different. For example, where the decision-maker is considering a discretionary matter that has greater legal content, the range of possible acceptable outcomes open to the decision-maker might be narrower. Legal matters, as opposed to factual or policy matters, admit of fewer possible, acceptable outcomes.

Analysis

[64] In ordering a full refund of the purchase price, the Registrar relied on s. 155(4)(a) of the *BPCPA* which states that a compliance order may include a term requiring that "a person reimburse any money or return any other property or thing received to a consumer or a class of consumers".

[65] The Registrar noted that while he was not a court of equity and could not therefore grant the equitable remedy of rescission of the contract, s. 155(4)(a) provides for a statutory remedy similar to rescission.

[66] The Registrar considered whether an award of damages sufficient to cover any required repairs to the truck would be an adequate remedy in the circumstances. However, he concluded that it would not be adequate because there was no clear evidence of the extent of the hidden damage and the cost to repair that damage and, in the Registrar's view, the complainants should not have to bear the risk of further unknown costs.

[67] The Registrar also considered whether a deduction should be made to reflect the subsequent use of the Dodge and the additional damage. He declined to make such a deduction because there was no evidence that the additional damage had caused accelerated depreciation of the value of the Dodge and, in his view, to allow a discount for the complainants' use of the Dodge would permit the petitioners to benefit from an intentional wrong.

[68] The petitioners submit that the Registrar erred by effectively granting rescission in circumstances in which that remedy was not properly available. Specifically, the petitioners' say that the Registrar erred in:

a) failing to consider whether the parties could be placed in their original position; and

b) failing to apply the principle that an innocent party must account for benefits received.

[69] With respect to the first of the alleged errors, the petitioners cite *Brook v. Wheaton Pacific Pontiac GMC Ltd.,* 2000 BCCA 332 where the Court of Appeal upheld a trial decision, subject to a minor variation, granting the plaintiff an award of damages against a motor vehicle dealership that had misrepresented the damage history of the vehicle. The trial judge however had declined to order rescission of the sale contract on the basis that the plaintiff had driven the vehicle for eight months

after purchase and it had sustained $11,000.00 worth of additional damage while in the plaintiff's possession which meant that *restitutio in integrum* was not possible.

[70] The Court of Appeal confirmed the trial judge's decision on this point, stating at para. 42, "It is a well-known principle that rescission will not be granted where *restitutio in integrum* cannot be made. …".

[71] On the issue of whether the Registrar erred in failing to account for the benefits obtained by the complainants from the possession and use of the truck, the petitioners rely on *Vieira v. Prestige Auto Sales Inc.,* [2004] O.J. No. 4480, which again involves similar facts to the case at bar, but was not decided pursuant to the *MDA*. There, the plaintiff sought damages for misrepresentation and breach of contract relating to the defendant auto dealer's failure to disclose the history of damage to a vehicle purchased by the plaintiff. The claim was allowed but the damages ordered included an adjustment for the benefits obtained by the plaintiff from her use of the vehicle.

[72] The court cited the following statement about the correct measure of damages in an action for fraudulent misrepresentation, taken from *Kerr on the Law of Fraud and Mistake,* 7th ed. (London: Sweet & Maxwell Ltd., 1986), at para. 51:

> In actions of deceit the measure of damages is not the full consideration which has passed from the defrauded party. Any benefits received by him under the contract must be taken into consideration, and the damages recoverable will be the excess only of the value of the one over the other.

[73] The petitioners refer as well to *Casillan v. 565204 B.C. Ltd.,* 2009 BCSC 1335, where Madam Justice Dillon found that, at common law, the purchaser of a vehicle was entitled to recover all of his loss flowing from a fraudulent misrepresentation, subject to credit for benefits received (at para. 32).

[74] However, Madam Justice Dillon also noted that there was no evidence of the value of the benefit obtained by the plaintiff while the vehicle was in his possession, thus the plaintiff was entitled to recover the whole of the loss without set off.

[75] In response, the respondents submit that the Registrar has a broad discretion under s. 155(4) of the *BPCPA* to fashion a remedy consistent with the Act's protective goals and the objectives and provisions of the *BPCPA* as a "comprehensive and effective scheme for the administration and enforcement of the statutory rights and obligations its creates" (*Koubi v. Mazda Canada Inc.,* 2012 BCCA 310 at para. 65).

[76] In my view, s. 155(4) does confer on the Registrar a broad discretion as to the scope of a compliance order issued in response to a contravention of the *BPCPA*. Section 155(4)(a) specifically contemplates an order for reimbursement to a consumer of any money received. This includes either a partial or full refund of the purchase price of a consumer good such as a vehicle.

[77] Further, in determining the appropriate remedy, the Registrar considered both whether an award of damages would suffice and whether a deduction should be made to reflect the complainants' use of the vehicle and the subsequent damage to the vehicle. On the specific facts before him, he concluded that a full refund was warranted.

[78] Again, that remedy is specifically contemplated by s. 155(4)(a) of the *BPCPA*. While it is true that the section provides for a statutory remedy similar to the equitable remedy of rescission, the common law limitations on this remedy, such as the requirement to account for benefits, do not apply as the "right to statutory rescission is different from equitable rescission and the principles of the latter do not apply to the former" (*1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd.*, 256 D.L.R. (4th) 451, [2005] O.J. No. 3040 (C.A.) at para. 28. See also *Woo v. ONNI Loco Road Five Development Limited Partnership*, 2012 BCSC 764 at para. 113, rev'd on other grounds, 2014 BCCA 76). Therefore, while it was open to the Registrar to apply a deduction to reflect subsequent use and damage, the statute did not require him to do so, nor was he foreclosed from granting the remedy under s. 155(4)(a) because the parties could not be put back into their original position.

[79] While I accept that the choice of remedy has a legal component to it, ultimately the Registrar's decision was driven largely by the factual context and by the policy considerations that underpin the consumer protection objectives of the statutory regime. The range of possible outcomes available to the Registrar, under the reasonableness analysis, is therefore broad. I find that the remedy granted by the Registrar fell within that range.

[80] The role of the court on judicial review is not to second guess the decision of the tribunal or to substitute its own views. Rather, the court's function is to determine whether the tribunal's decision meets the standard of justification, intelligibility and transparency. I find that the Registrar's decision meets this standard and is therefore reasonable.

[81] The petition is dismissed.

[82] There will be no order as to costs.

"Skolrood J."