

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20060126
Docket: S054685
Registry: Vancouver

Between:

Royal Bank of Canada

Plaintiff

And

Abbotsford Auto World Ltd.

Defendant

Before: The Honourable Madam Justice Gerow

Oral Reasons for Judgment

In Chambers
January 26, 2006

Counsel for the Plaintiff:

C. Schuld

Counsel for the Defendant:

J. Meyers

Place of Trial/Hearing:

Vancouver, B.C.

[1] THE COURT: The Royal Bank is applying for an order pursuant to Rule 18A that Abbotsford Auto World pay \$43,131.57 plus interest pursuant to the ***Court Order Interest Act*** and costs on a solicitor and own client basis to the Royal Bank.

[2] The issues between the parties arise out of the sales of two vehicles pursuant to an agreement entered into between Abbotsford Auto World and the Royal Bank on or about December 22, 1999. The agreement was that Abbotsford Auto World would enter into conditional sales contracts for vehicles with its customers and subsequently assign the contracts to the Royal Bank in exchange for the Royal Bank paying any balance remaining on the purchase price of the vehicle to Abbotsford Auto World.

[3] The agreement between the parties was entitled "The Royal Wave Finance Program". The program operated in the following manner: Abbotsford Auto World would provide a customer credit application to the Royal Bank for prospective vehicle buyers. The Royal Bank would review the customer credit application and stipulate an interest rate, a referral fee and the terms of loan to be granted to Abbotsford Auto World's customers. Abbotsford Auto World and its customer would enter into a conditional sales contract for the purchase of the vehicle. Abbotsford Auto World would assign the contract to the Royal Bank. The Royal Bank would pay the balance of the purchase price of the vehicle to Abbotsford Auto World less any fees. Abbotsford Auto World's customers would subsequently repay the Royal Bank according to the terms as set out in the conditional sales contract and the Royal Bank would obtain the right to repossess the vehicle and the right to collect all sums due and owing from the Abbotsford Auto World's customer.

[4] On or about May 5, 2003 Abbotsford Auto World sold a Pontiac Grand Prix to an individual purporting to be Karim Kassam. The sale of the Pontiac Grand Prix was subject to the terms of the program and the Royal Bank took an assignment of the conditional sales contract for the payment for the Pontiac Grand Prix.

[5] On or about April 10, 2003 Abbotsford Auto World sold a Dodge Durango to an individual purporting to be Peter Hawkshaw. The sale of the Dodge Durango was subject to the terms of the program and the Royal Bank took assignment of the conditional sales contract for payment for the Dodge Durango.

[6] Pursuant to the terms of the program the Royal Bank paid to Abbotsford Auto World the balance of the purchase price of the Dodge Durango and the Pontiac Grand Prix and took assignment of the conditional sales contracts with the buyers of the vehicles.

[7] In or around May and July of 2003, the Royal Bank was informed that neither of the individuals who purported to purchase the vehicles had in fact purchased the vehicles. Subsequent investigations by the Royal Bank, the Insurance Corporation of British Columbia and the Vancouver Police Department confirmed that the vehicles were obtained by identity theft. On or about November 4, 2003 the Royal Bank advised Abbotsford Auto World that, pursuant to the program, Abbotsford Auto World was obliged to indemnify the Royal Bank for the loss that it suffered as a result of advancing funds to Abbotsford Auto World for the two vehicles.

[8] The vehicles were recovered and on March 8, 2004 the parties entered into a forbearance agreement whereby the vehicles would be delivered to Abbotsford Auto

World's premises for the purposes of sale. The proceeds of any such sales were to be paid to the Royal Bank on account of its claims arising from the obligation of Abbotsford Auto World to indemnify the Royal Bank which arose out of the assignment of the original sales contracts for the vehicles.

[9] The vehicles were not sold pursuant to the forbearance agreement. The Royal Bank retrieved the vehicles from Abbotsford Auto World for the purposes of sale by auction. The vehicles were sold at auction. On May 6, 2005 the Royal Bank provided an accounting of the outstanding funds owed by the Abbotsford Auto World to the Royal Bank including a setoff based on the recoveries made by selling the vehicles at auction.

[10] The Royal Bank seeks recovery in this action of the balance outstanding after the sale proceeds of the vehicles have been deducted from the total amount owing under the conditional sales contracts.

[11] The Royal Bank relies on paragraph 9 of the agreement between the parties which states:

Pursuant to the assignment agreement contained in each Contract, the Dealer makes certain representations and grants certain warranties to the Bank. The Dealer agrees that it shall be liable for any breach of its representations and warranties. The Dealer agrees more particularly that the Bank may look to the Dealer for any customer non-payment due to a right of defence or set-off against the Dealer resulting from a breach by the latter of its representations and warranties, in any other circumstances, customer non-payment will not give rise to such right of the Bank.

The Dealer shall indemnify and save harmless the Bank, its officers, directors, employees and agents from any and all liabilities, obligations, losses, damages, penalties, claims, costs, expenses,

including legal expenses, of any kind whatsoever arising from or relating to any act or omission or default of the Dealer including, without limitation, acts, omissions or defaults which affect the obligations of the Customer or any co-borrower or guarantor under any Contract assigned to the Bank and any misrepresentation or breach of any terms, covenants and warranties contained in the assignment of Contract.

[12] The assignment agreements executed by Abbotsford Auto World state:

The Seller represents and warrants that ... (2) the cash payment specified in the Contract was received by the Seller and no part of the cash payment was loaned to the Buyer by the Seller; (3) the Contract arose from the bona fide sale of the Goods in the normal course of business and the Goods have actually been delivered into the possession of and have been accepted by the Buyer; (4) all information contained in the Contract is accurate and complete; (5) the obligations of the Buyer as set out in the Contract are binding and will continue to be free from defence or set-off ... The Seller agrees to indemnify Royal Bank for all loss, damages, or expenses resulting from any breach of the above representation, warranties or promises regardless of any action or inaction by the Royal Bank.

[13] The Royal Bank asserts the following breaches of the assignment agreements:

- that the purchases of the vehicles were not in the normal course of business due to the fraudulent identities used to make the purchases,
- that the purchases were not in the normal course of business because the vehicles were not actually delivered into the possession of and accepted by the named buyers,
- the information contained in the contracts was not accurate or complete as the actual buyers did not provide particulars of their identities; and

- the contracts were not binding upon the named buyers due to the defence that the goods were not actually delivered to the named buyers and other defences as the named buyers could assert against the Royal Bank and Abbotsford Auto World.

[14] The Royal Bank argues that due to the breaches Abbotsford Auto World's agreement to indemnify and save harmless the Royal Bank is triggered and Abbotsford Auto World is obligated to indemnify the Royal Bank for the losses it has suffered as a result of advancing funds to Abbotsford Auto World under the conditional sales contracts.

[15] Abbotsford Auto World points to the fact that the Royal Bank accepted an interim driver's licence and a void cheque from each of the purchasers of the vehicles as sufficient information on which to approve the loans. Abbotsford Auto World says that the Royal Bank did not take reasonable steps to ascertain the identity of the purchasers of the vehicles. Abbotsford Auto World argues that if the Royal Bank had taken reasonable commercial steps to protect its commercial interests it would have ascertained that the purchasers were not who they purported to be.

[16] However, that argument does not address the issue of the representations and warranties made by Abbotsford Auto World to the Royal Bank. Those representations and warranties are set out in the assignment agreements and are that the contracts which are being assigned arose from the *bona fide* sale of the goods in the normal course of business, that the goods have been delivered into the

possession of and have been accepted by the buyer, that all information contained in the contract is accurate and complete, and that the obligations of the buyer as set out in the contract are binding and will continue to be free from defence or setoff.

[17] The assignment agreements state that there is no positive duty on the part of the Royal Bank and, in fact, provide that: “[t]he seller agrees to indemnify the Royal Bank for all loss, damages or expenses resulting from any breach of the above representations, warranties or promises regardless of any action or inaction by the Royal Bank.”

[18] The authorities Abbotsford Auto World has provided are not on point. In this case, the parties have contractually agreed that Abbotsford Auto World will be liable for any breach of the representations or warranties. These representations and warranties were breached on the facts of this case.

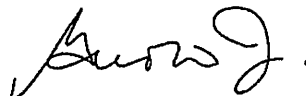
[19] Abbotsford Auto World further argues that if it is liable under the agreements, the Royal Bank has failed to mitigate its losses. The vehicles were retrieved by the Royal Bank and sold at auction approximately eight months after the parties entered into a forbearance agreement. The Royal Bank has provided the details of the sale and accounting of the monies recovered. Although counsel for Abbotsford Auto World asserts that the vehicles should have been left on the lot of Abbotsford Auto World and may, if they had been left on the lot, been sold for more money, there is no evidence in that regard. Abbotsford Auto World therefore has not discharged the onus on it to show that the Royal Bank has failed to mitigate its losses.

[20] Accordingly, the Royal Bank is entitled to judgment in the amount of \$43,131.57 plus interest pursuant to the ***Court Interest Act***.

[21] The Bank seeks solicitor and own client costs on the basis of paragraph 9 of the agreement between the parties. Paragraph 9 of the agreement between the parties provides that: "[the] Dealer shall indemnify and save harmless the Bank, its officers, directors, employees and agents from any and other liabilities, obligations, losses, damages, penalties, claims, costs, expenses, including legal expenses, of any kind whatsoever arising from or relating to any act, omission or default of the Dealer including, without limitation, acts, omissions or defaults which affect the obligations of the Customer or any co-borrower or any guarantor under any Contract assigned to the Bank and any misrepresentation or breach of any of the terms, covenants and warranties contained in the assignment of Contract."

[22] In that provision Abbotsford Auto World has agreed to pay the Royal Bank its legal costs in a situation such as this.

[23] Accordingly, the Royal Bank is also entitled to its costs.

A handwritten signature in black ink, appearing to read "A. J. J.", is located at the bottom center of the page.