NOTES

A New Approach to the Protection of Used Car Buyers

Second-hand car dealers are regarded by many members of the community today in much the same lignt as were used slave dealers in Ancient Rome and horse traders in more recent times; that is, inherently tricky, mostly dishonest, and always a gamble to do business with. While this view is probably too harsh, consumer grievances with used car purchases have always constituted a major area of complaint.

The most common legal response to the need to protect consumers against abuses in the used car trade has been to require dealers to be licensed. The Quebec *Consumer Protection Act 1971* [1] is the most recent example in Canada of such a response. Licensing has not, in the past, proved a marked success in this area. Firstly, the effectiveness of a licensing system largely depends on the size of the resources appropriated to administering it. Too often, inadequate resources have led to understaffing and ineffective policing. Secondly, de-licensing is a draconian sanction and only likely to be invoked in very extreme cases or after a substantial accumulation of more minor infractions. Thirdly, an aggrieved consumer gains nothing directly out of sanctions attaching to a licensing system and has little incentive to press complaints seriously.

A less common response in Canada has been the introduction of a certificate of roadworthiness system. While the details of these systems vary considerably from one jurisdiction to another, commonly they require that a dealer must provide a used car buyer, at the time of sale, with a certificate of roadworthiness from a registered mechanic certifying that certain components in the car pertaining to its safe operation are in sound condition. Again, this system has proved much less than a fully effective counter to consumer problems with used car purchases. Firstly, such a system is concerned only with safety-related defects. Secondly, standards of certification vary greatly (in all good faith) from one mechanic to another. Thirdly, malpractices in the issue of, or trafficking in,

[1] Bill 45, 29th Leg., 2nd Sess., 1970, Que. Nat. Ass.

certificates, tend to develop. Fourthly, a consumer's private law redresses against the mechanic and the dealer for an inaccurate certificate are unclear.[2]

In 1969, a committee, of which the writer was a member, from the Adelaide Law School, reported to the Australian Attorneys-General on reform of the law of consumer credit.[3] The report contained proposals for a new approach to the regulation of used car sales,[4] inspired, appropriately enough, by provisions in Justinian's *Corpus Juris* on used slave sales.[5] These proposals provoked widespread industry opposition at the time and seemed destined for a dusty fate. However, late in 1971, the South Australian Parliament enacted the *Second-Hand Motor Vehicles Act 1971* which gives effect to most of the Committee's recommendations.

The Act has three broad thrusts:

a. *Licensing of Used-car Dealers (ss.6-22)*

All used-car dealers must be licensed by a special Second-hand Vehicle Dealers Licensing Board, appointed by the Government, in order to carry on business. The licensing provisions of the Act in themselves call for no special remark except that the potential for committing infractions under other provisions of the Act is such (as will be seen) that the threat of loss of licence may be more real than under other licensing systems.

b. *Provision of Information (s. 23)*

Every car offered for sale by a dealer must have attached to it, in prescribed form, a notice setting out:

i) the name and business address of the person from whom the vehicle is to be bought;
ii) the name of the last non-trade owner;
iii) the odometer reading at the time the vehicle was acquired from the last non-trade owner;
iv) the cash price of the vehicle;
v) the year of first registration and the model designation of the vehicle.

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[2] *Presley* v. *Macdonald*, (1963), 38 D.L.R. (2d) 237 (Ont. Co. Ct.); D.M. McRae, *Warrant of Fitness and the Sale of Motor Vehicles*, Legal Research Foundation, School of Law, University of Auckland, (New Zealand, 1968).

[3] Adelaide Law School Report on the Law Relating to Consumer Credit and Moneylending, (S.A. Gov't. Printer, 1969).

[4] *Ibid.*, chap. XIII.

[5] See Digest, 21. 1. 44.1; Macintosh, *Roman Law of Sale*, (1907), at pp. 278-9.

A dealer commits a criminal offence if any of this information is false. A defence of reasonable care is provided in the case of (v).

c. *Imposition of a Statutory Guarantee Against Defects (ss. 24-29)*

By far the most important aspect of the Act is the imposition of mandatory guarantees against defects. When any used car is sold by a dealer to a non-trade buyer for a price of $1,000 or more, any defect (undefined) which appears in the vehicle during the next 5,000 kilometres or three months (which ever arrives first), whether or not the defect existed at the time of the sale, must be made good by the dealer so that the car is placed in a reasonable condition having regard to its age. In the case of cars sold for a price between $500 and $1,000, a similar guarantee is imposed except that its length is limited to 3,000 kilometres or two months. Neither guarantee applies to accidental damage occurring to the vehicle after sale, to defects arising from misuse or negligence on the part of any driver of the vehicle after the sale, or to defects occurring in the tires, battery or prescribed accessories. The only general circumstance in which these guarantees can be excluded is where the dealer attaches to a vehicle offered for sale a notice in prescribed form setting out with reasonable particularity any defect that he believes to exist in the vehicle together with, in relation to each defect, the estimated cost of repairing the defect. A purchaser must receive and sign a copy of this notice at the time of the sale if the dealer is to avoid liability for the defects disclosed. If he under-estimates the cost of repairing a defect, he is liable to the purchaser for the difference between his estimate and the fair estimated cost of repair.

If a dispute arises between a purchaser and dealer as to the application of the guarantee to any situation, the two parties can agree in writing to submit the dispute to the Commissioner of Consumer Affairs or his nominee who will make a final and binding determination of the dispute. If the parties cannot agree on a reference to the Commissioner, the consumer will have to litigate his rights in the Local Court which is enjoined to hear and determine the matter as expeditiously as possible.

The only major departure by the Act from the Committee's proposals is in relation to the question of rescission. The Committee recommended that where the cost of repairing defects which materialised during the guarantee period exceeded a certain figure, or where defects were disclosed but the estimate of repair fell short of the actual cost of repair by this figure, the buyer should

have a right of rescission of the contract of sale (and any collateral finance arrangement), with an automatic right to recover his purchase money from the dealer within a specified number of days of the purported rescission on pain of a penalty for non-payment. If the dealer wished to claim that the rescission was wrongful because [e.g.] consumer misuse had caused the defect, he would have been required subsequently to sue the consumer in damages for wrongful rescission. He could not, however, resist the rescission at the time it was claimed or refuse return of purchase monies. Thus the onus of litigation would rest with the dealer and the consumer would not be without his money pending resolution of the case. It remains to be seen whether the Act has adequately met the problems created by requiring a consumer to litigate what may be a relatively small, but, to him, important claim. It may be that the desire to avoid the publicity attached to litigation will be a sufficient inducement to dealers to utilize the arbitration machinery provided in the Act. One other apparent deficiency in the Act at present is its failure to require a dealer to furnish a buyer with notice of his rights under the Act at the time of sale. Hopefully, the wide regulation-making powers in the Act will be invoked to fill this lacuna.

The widespread opposition from business interests to the Committee's recommendations and subsequently to the Act, culminating in a late night dead-lock conference between the two Houses of the South Australian Parliament before the Act was passed, suggests that it starts to touch the heart of consumer problems in the used car field. Canadian jurisdictions, which are still searching for ways to take the bulk of the risks out of used car buying, may find that the South Australian Act would repay close study.

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