

CANADA / JUDGMENT

Toyota Canada Inc. v. Ali

2013 BCSC 1904

COURT

Supreme Court of British Columbia

DECIDED

18 October 2013

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2013 BCSC 1904 Toyota Canada Inc. v. Ali IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Toyota Canada Inc. v. Ali, 2013 BCSC 1904 Date: 20131018 Docket: S125471 Registry: Vancouver Between: Toyota Canada Inc. Petitioner And Sinan Ali Respondent On judicial review from: A decision of the Canadian Motor Vehicle Arbitration Plan, dated June 6, 2012 Before: The Honourable Madam Justice B.J. Brown Reasons for Judgment Counsel for the petitioner: T. Pinos J. Beitchman The respondent, Sinan Ali: On his own behalf Place and Date of Hearing: Vancouver, B.C. June 24, 2013 Place and Date of Judgment: Vancouver, B.C. October 18, 2013

- [1] Toyota seeks an order setting aside the decision of the Arbitrator dated June 6, 2012; dismissing the consumer's complaint and finding in favour of Toyota, or, in the alternative, remitting the matter back to the Canadian Motor Vehicle Arbitration Plan (the "CAMVAP.") with directions to determine the matter in accordance with the principles set out in the Court's Reasons for Decision and costs.

BACKGROUND

- [2] On March 20, 2012, Mr. Ali brought a claim against Toyota pursuant to the CAMVAP Guidelines and Agreement for Arbitration. Mr. Ali requested that Toyota buy back his 2009 Toyota RAV4 on the basis that he believed that there was a software problem with the vehicle which caused the vehicle to suddenly accelerate.
- [3] Both parties filed documentary records with the Arbitrator.
- [4] Mr. Ali said that there were four incidents where his vehicle accelerated unintentionally. He had two accidents as a result.
- [5] During the hearing, a representative of Toyota requested an opportunity to inspect the condition of the vehicle and download the Event Data Recorder ("EDR") and other data to determine if an event was stored at the time of Mr. Ali's collision on December 27, 2011. Mr. Ali consented to the collection of EDR data. However, the Arbitrator declined to permit Toyota to download the EDR data and to submit it into evidence, saying that the EDR data would not be necessary as it would not have any effect on his decision.

[6] Toyota sought to adduce this evidence to address Mr. Ali's allegation that when he applied his brakes, the vehicle accelerated. The EDR data should disclose, amongst other things:

- (a) whether Mr. Ali was depressing the brake;
- (b) whether he was also depressing the accelerator pedal at the same time as the brake;
- (c) the state of engine speed at the time of the collision.

[7] Mr. Ali adduced as evidence consumer complaints about Toyota RAV4 vehicles which were downloaded from the internet. Toyota objected to this evidence as hearsay. The Arbitrator acknowledged the objection but made no ruling on whether it was relevant and reliable.

THE POSITION OF TOYOTA

[8] Toyota argues that when the Arbitrator issued his decision in favour of Mr. Ali, he did so solely on the basis of Mr. Ali's oral evidence and without proper regard for the fact that:

- (a) Mr. Ali had never complained to Toyota of unintended acceleration prior to December 2011;
 - (b) Any number of factors can result in a collision including driver error, vehicle condition and road conditions;
 - (c) Extensive testing by Toyota had disclosed no fault with the vehicle;
 - (d) The gas pedal in the vehicle was fixed in March 2010;
 - (e) Evidence at the hearing showed that even if the brake was deployed simultaneously with the accelerator, the brake would override any acceleration and the vehicle would stop;
 - (f) EDR and other testing data that could have been collected during the physical inspection of the vehicle and may have disposed of the matter, was rejected by the Arbitrator;
 - (g) Documents printed from the internet and filed by the consumer were admitted into evidence when they ought to have been disregarded entirely and given no weight.
- [9] Toyota argues that the Arbitrator failed to observe the rules of natural justice and therefore committed an arbitral error pursuant to s. 30(1) of the Arbitration Act, R.S.B.C. 1996, c. 55 and as a result the award must be set aside.

[10] Toyota argues in addition that the Arbitrator committed errors of law pursuant to s. 31(4) of the Arbitration Act, and the award must be set aside. THE DECISION

[11] The Arbitrator decided: After careful consideration of the evidence of both parties, I am persuaded by the evidence of the Consumer describing the unintended acceleration is creditable and the events did in fact take place. I accept that the Manufacturer has made significant efforts to replicate the events experienced by the Consumer and to diagnose the cause. The Manufacturer has been unable to replicate and find a cause for the events and has therefore concluded that the vehicle operates [sic] normally. The Consumer's experience is that the events are random and uncommon (four in eighteen months), but this does not

mean they do not occur. The Manufacturer has demonstrated that under normal operating and design mode the braking system overrides [sic] the accelerator. However the Consumer has testified that on several occasions the vehicle was trying to accelerate while he was braking at low speeds and that the brakes did not override [sic] the accelerator. In this condition the vehicle is not operating as intended and therefore malfunctioning. This must be considered a manufacturing defect. DISCUSSION

[12] I am persuaded that the Arbitrator committed arbitral errors and therefore the matter must be remitted back for reconsideration. Accordingly, I do not propose to deal with all of the arguments advanced by Toyota.

[13] Section 30 of the Arbitration Act provides: 30 (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may

(a) set aside the award, or

(b) remit the award to the arbitrator for reconsideration.

(2) The court may refuse to set aside an award on the grounds of arbitral error if

(a) the error consists of a defect in form or a technical irregularity, and

(b) the refusal would not constitute a substantial wrong or miscarriage of justice.

[14] An arbitral error is defined in s. 1 as: "arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

(a) corrupt or fraudulent conduct;

(b) bias;

(c) exceeding the arbitrator's powers;

(d) failure to observe the rules of natural justice.

[15] Toyota relies on a failure to observe the rules of natural justice.

[16] In *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834 the Court explains natural justice in the context of arbitration at para. 81: Natural justice requires an arbitrator to act with procedural fairness. The concept of natural justice can mean different things in different cases, however, and the standard will vary to suit the circumstances. For example, natural justice may be denied where the arbitrator fails to give a party the opportunity to present its case, refuses to admit relevant evidence, or fails to deal with all issues for determination. In addition, depending upon the circumstances, a failure to order production of necessary documents may amount to a breach of the rules of natural justice: *Williston Navigation Inc. v. BCR. Finav No. 3 et. al.* (2007), 69 B.C.L.R. (4th) 187; *Amos Investments Ltd. v. Minou Enterprises Ltd.*, 2008 BCSC 332.

[17] Here, the breach arises in two ways:

1. apparently admitting hearsay evidence without considering the purpose for which it is introduced, whether it is relevant and whether it may be fairly regarded as reliable.
 2. refusing to admit relevant evidence.
- [18] Toyota has referred me to *British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111 where the court said:
- [72] In addressing the procedural fairness issue, Rowles J.A. (at para. 30) relied in part on the text, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 308, where the authors, J. Sopinka, S.N. Lederman & A.W. Bryant stated: I. Administrative Proceedings In proceedings before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless its receipt would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant, it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law.
- [73] Thus, a tribunal's reliance on hearsay, in whole or in part, to form the basis of its decision does not render a hearing procedurally unfair if the evidence is relevant and may fairly be regarded as reliable. Nor is cross-examination a requirement of procedural fairness before a tribunal provided the other side has the opportunity to respond to the evidence (*Cambie* at 28). Once the evidence is admitted, which I am satisfied was correctly done in this case, it is for the tribunal to assign what weight it will attach to that evidence. Thereafter, the focus of any judicial review shifts from hearing fairness to the reasonableness of the decision: *Ocean Port Hotel* at 15, *Cambie* at 35 and 36 [emphasis added].
- [19] Here, Toyota objected to consumer complaints downloaded from the internet. The Arbitrator referred to the objection, saying: The Consumer presented information from a web site documenting "events" of a similar nature to that described in his evidence, I accept that this evidence is hearsay and therefore the evidence "must be objectively reviewed as to its weighting and based on its relevance and reliability" However, the Arbitrator did not address the objection, nor did he determine whether it was relevant or could fairly be regarded as reliable. In my view, admitting such hearsay evidence goes to the heart of the issue before him: assuming that the vehicle accelerated as the consumer alleged it did, was the acceleration due to a mechanical default or due to driver error. Introducing evidence of other consumer complaints would tend to suggest that unintended acceleration was due to a manufacturing issue, rather than driver error. By failing to address the relevance and reliability, the Arbitrator failed to observe the rules of natural justice and committed an Arbitral error.

- [20] Second, the Arbitrator refused to accept apparently relevant evidence. Toyota asked to be permitted to obtain EDR and other testing data. Mr. Ali consented to them doing so. Nonetheless, the Arbitrator refused to accept that evidence. Refusing to admit relevant evidence on an important point in issue is a breach of natural justice and an arbitral error (*Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at para. 48).
- [21] Accordingly, the award must be set aside and the complaint remitted to the Canadian Motor Vehicle Arbitration Plan for reconsideration in light of the Court's reasons herein.
- [22] The arbitral errors occurred through no fault of the consumer and I decline to award costs against him. "B.J. Brown J." The Honourable Madam Justice B.J. Brown

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