

DISCIPLINE DECISION

IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE MOTOR
VEHICLE DEALERS ACT 2002, S.O. 2002, C.30, Sch. B

B E T W E E N :

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*

- AND -

RAYMOND APLIN o/a R.A.E.S. Auto Sales

Date of Hearing: October 3, 2022

Date of Decision: October 3, 2022

Findings: Breach of Sections 9 of the Code of Ethics

Order:

1. Aplin is ordered to pay a fine in the amount of \$10,000. \$5,000 will be paid no later than **January 31, 2023**, and the remaining balance will be paid no later than **June 30, 2023**.
2. Aplin is ordered to successfully complete the MVDA Key Elements course no later than **March 31, 2023**.
3. Aplin is ordered to offer all current and future sales staff the opportunity to complete Automotive Certification course (the "Course"). Current sales staff will be offered the Course no later than **January 31, 2023**. Future sales staff will be offered the Course within 90 days of being retained in this capacity. The Dealer will incur all costs associated with this. It is understood between the parties this clause does not apply to sales staff who have completed the Course or who are otherwise required to do so pursuant to the Act.
4. Aplin agrees to comply with the Act and Standards of Business Practice, as may be amended from time to time.

Introduction

This Penalty hearing was held virtually via the Zoom platform. The Registrant, Mr. Raymond Aplin was not in attendance, he was however represented at the hearing by his counsel, Mr. Justin Jakubiak. OMVIC's representative was Ms. Andrea Korth, who attended with OMVIC's counsel, Mr. Husein Panju. Independent Legal Counsel (ILC) to the Panel was Mr. Edward Marrocco. Prior to the hearing the parties were able to achieve consensus on an Agreed Statement of Facts (ASF), the terms of which are set out below (page 4).

At the commencement of the hearing the Parties advised that they had also reached agreement on a Joint Submission on Penalty.(JSOP)

The Notice of Complaint (NOC) was submitted and Marked as Exhibit 1. The ASF was marked as Exhibit 2. The signed JSOP is attached in Exhibit 2 at page 5.

The Parties were invited to make their submissions with regard to the proposed Joint Submission on Penalty.

Mr. Panju submitted that the JSOP was an appropriate resolution to the matter before the Panel. He spoke to the principles behind the imposition of penalties, those being Deterrence to both the Dealer and the Industry in General, Public Protection and Remediation. It is Mr. Panju's position that each of these goals have been achieved with the JSOP. Mr. Panju recognized that R.A.E.S. Auto Sales, of which Mr. Aplin is the sole owner and salesperson, is a small dealership, and the penalty agreed upon is appropriate and in this instance is much more than simply the cost of doing business. Mr. Panju also submitted that reaching agreement on the matter is a mitigating factor. The aggravating factor, he submitted, is the conduct identified in the NOC.

Mr. Jakubiak submitted that he was in agreement with Mr. Panju, that all the principles of sanctions are met in the JSOP before the Panel. He emphasized how small the dealership is with Mr. Aplin being the only employee. He acknowledged that the training component of the JSOP is somewhat of a boiler plate, however, should Mr. Aplin expand his business in the future, all future sales persons would be offered the OMVIC course within 90 days of their employment. It was Mr. Jakubiak's submission that the dealership is so small and the penalty so significant that Mr. Aplin requested an order which would permit him to pay the fine in two instalments. Mr. Jakubiak also submitted that Mr. Aplin needed the deadline extended to complete the Motor Vehicle Dealers Act (MVDA) Key Elements Course so as to complete the course while maintaining his business. Mr. Jakubiak further submitted that Mr. Aplin has already made significant changes in his business and has agreed to complete a mechanical inspection of every vehicle prior to sale, and to retain a copy of this, along with any repair and reconditioning records for the vehicle. (as set out in paragraph 28 of the ASF) Finally, as a mitigating factor, Mr. Jakubiak submits that while Mr. Aplin has been licenced as a salesperson since 1983, and a dealer since 2008, there have been no previous matters brought before a Discipline Panel.

There was no case law submitted by either party.

Mr. Marrocco (ILC) was asked to provide the Panel with his advice. Mr. Marrocco advised the panel to make their findings guided by the ASF. He advised the Panel to make their findings as to whether or not the facts as presented in the ASF support a finding of a breach of the Code of

Ethics s.9.2, on a balance of probabilities. (*In carrying on a business, a registrant shall act with honesty, integrity and fairness. O. Reg. 332/08, s.9(2).*)

ILC directed the panel's attention to the clauses in the JSOP (Exhibit 2, page 5). In Mr. Marrocco's opinion the four penalty clauses are appropriate to the circumstances of the case before the Panel. He advised the Panel to take note of the fact that Mr. Aplin was a long time registered small dealer, that a fine of \$10,000 is significant to a dealership of this size and that the parties have agreed upon the penalty.

Mr. Marrocco advised the Panel that they must accept an agreement on penalty unless it brings into disrepute OMVIC's Discipline process, (the administration of justice) or is contrary to the public interest. Mr. Marrocco advised the Panel that they were free to take all, some or none of his advise.

Both Parties were given an opportunity to make submissions in response to ILC's advise to the Panel.

Mr. Panju submitted that he agreed with the advise of ILC. He informed the Panel that the JSOP had been carefully crafted in the public interest.

Mr. Jakubiak stated that he echoes the opinion of ILC and is in agreement with Mr. Panju that the JSOP is in the public interest and does not bring OMVIC's disciplinary process into disrepute.

The Panel adjourned to a breakout room to deliberate on the matter. The parties were asked to return in 30 minutes. At the end of that period, the Panel determined that they would require a further 15 more minutes to complete their deliberations. The Panel advised ILC that they would exit the breakout room and return to the virtual hearing room where the Parties had been reassembled.

Upon return the Chair provided an oral decision of the Panel to the Parties. The Chair advised that the Panel accepts the Joint Submission on Penalty as meeting the threshold of protecting the public interest as well as preservation of the integrity of OMVIC's disciplinary process. The Chair advised that it will issue it's written decision with reasons to follow.

Reasons for Decision

The Panel was satisfied that the Agreed Statement of Facts supported a finding of a breach of s.9.2 of the Code of Ethics. The facts reflect that within days of purchasing a car from the Dealer, two separate individuals, Consumer A and Consumer B suffered mechanical failures to the vehicles they had just purchased. Each of them approached the Dealer and requested remediation. The Dealer refused to provide payment for the repairs or to take return of the vehicles. Both individual Consumers separately contacted OMVIC to assist them. OMVIC was unable to find a resolution that was satisfactory to both the purchaser and the dealer in either of the cases. When they could not attain a resolution with the dealer each individual purchaser made application to OMVIC's Compensation Fund.

In both of the cases the Dealer failed to include a delivery date on the bills of sale, and failed to take responsibility for the mechanical fitness of the vehicles he sold. The Panel is satisfied that

these actions, admitted by the Dealer, constitute a breach of s.9.2 of the OMVIC's Code of Ethics.

The Panel considered the submissions with regard to Penalty from OMVIC, the Dealer's representative, and Independent Legal Council.

The Panel was troubled by the circumstances of this case. Certainly the consumers were left by the Dealership to fend for themselves when the Dealer refused to compensate them for the mechanical failures of the vehicles they had so recently purchased from him. In the Panel's estimation the Dealer's behaviour was appalling. The consumers were left with no course of action but to apply to OMVIC's Compensation Fund because of the Dealer's unwillingness to make them whole again.

If the provisions of the Motor Vehicle Dealers Act provided the Panel with the authority to suspend or revoke the Dealer's license, the Panel may well have exercised that authority in a contested hearing in a case such as this. The Dealer's absolute failure to address the issues raised by his customers is completely contrary to the goal of consumer protection.

However, the submissions of the Parties as well as the advice of ILC convinced the Panel that the Dealer is implementing changes required to bring his dealership into compliance with the MVDA. Furthermore, the Panel is convinced that the penalty is significant for a dealership of this size.

While the Panel was not provided case law to compare the penalty with, the panel members are cognizant that in many cases resolved by both hearing and/or agreement, lower or similar penalties have been applied even when much larger dealerships are involved. Panels have begun trending to larger penalties when they have the latitude to do so as it becomes more and more apparent that larger dealerships are not deterred by fines that do not significantly impact the bottom line. This is also true of the smaller dealership. If it doesn't hurt, the penalty doesn't help.

The Panel is satisfied that the Penalty agreed to in the JSOP will hurt the Dealer sufficiently to motivate change and deter him from repeating the behaviour that was the subject of the Notice of Complaint. The change in conduct and process will subsequently serve to protect the consumer going forward. Lastly, the message to the industry as a whole is that this kind of conduct will not be tolerated.

Agreed Statement of Facts

1. Raymond Aplin ("Aplin") was first registered as a motor vehicle salesperson in or around April 1983.
2. In or around March 2008, Aplin was registered as a motor vehicle dealer, operating as R.A.E.S. Auto Sales. operated this business as a sole proprietorship.
3. On or about March 18, 2008, Aplin executed terms and conditions of registration as a dealer.
4. Per condition 20, Aplin agreed that he was under a positive obligation to disclose all material facts about the vehicles he sells.

5. Per condition 25, Aplin agreed to take responsibility for the quality of any repairs or alterations which were completed on a motor vehicle he offered for trade.

OMVIC publications

6. Since Aplin was registered as a dealer in or around March 2009, OMVIC has issued numerous publications reminding dealers of their obligations to disclose all material facts about the vehicles they sell, including accident repair histories ("material fact disclosure"). The subject publications are attached hereto as Schedule A and continue to be available of OMVIC's website.

Direct correspondence with Dealer:

7. During an inspection on or about October 28, 2010, Aplin was reminded of his material fact disclosure obligations.

Consumer A:

8. On or about November 28, 2020, Consumer A purchased a 2012 Mazda CX-9 (VIN JM3TB3DA4C0351775) from Aplin.
9. A delivery date of December 5, 2020 was mutually agreed upon.
10. Aplin did not deliver the vehicle by the delivery date.
11. As a result of the mechanical inspection report and the delayed delivery, Consumer A requested that Aplin cancel the trade and return her deposit.
12. On or about December 9, 2020, Consumer A contacted OMVIC for assistance with this matter.
13. Aplin refused to cancel the trade. The vehicle became available for delivery on or about December 17, 2020.
14. On or about January 9, 2021, Consumer A took delivery of the vehicle.
15. On or about January 12, 2021, Consumer A incurred the cost of \$325.75 plus HST to replace the fuel pressure switch.
16. On or about January 30, 2021 Consumer A incurred the cost of \$972.52 plus HST for the purchase of replacement transfer case parts for the Vehicle.
17. Consumer A asked Aplin to either reimburse her for the repair costs or take the vehicle back and refund the purchase price. Aplin refused. OMVIC was unable to find a resolution that was satisfactory to both parties.

Consumer B:

18. On or about December 22, 2020, Consumer B purchased a 2015 Subaru WRX (VIN JF1VA1A68F9807484) from Aplin.

19. Within approximately 14 days of Consumer B taking delivery of the vehicle, and after being driven for less than 400 kms, it became undriveable due to mechanical issues.
20. On or about January 14, 2021, Consumer B had the vehicle's problems diagnosed by an independent mechanic. The mechanic determined that the vehicle needed to have its engine and clutch either rebuilt or replaced.
21. On or about January 15, 2021, Consumer B contacted OMVIC for assistance with this matter.
22. Consumer B asked Aplin to either assist with the repair costs or to take the vehicle back and refund the purchase price. Aplin refused. OMVIC was unable to find a resolution that was satisfactory to both parties.
23. The parties are unable to reach an agreement about the origin or cause of this vehicle's damage..

Generally:

27. Aplin failure to include a delivery date on bills of sale, and his failure to take responsibility for the mechanical fitness of vehicle[s] he sold, is unprofessional and contrary to section 9 of the Code of Ethics.
28. Aplin has since agreed to complete a mechanical inspection of every vehicle prior to sale, and to retain a copy of this, along with any repair and reconditioning records for the vehicle.

It is thereby agreed Aplin failed to comply the following sections of the Code of Ethics:

Professionalism:

9(2) In carrying on a business, a registrant shall act with honesty, integrity and fairness.

Joint Submission on Penalty

1. Aplin agrees to pay a fine in the amount of \$10,000. \$5,000 will be paid no later than **January 31, 2023**, and the remaining balance will be paid no later than **June 30, 2023**.
2. Aplin agrees to successfully complete the MVDA Key Elements course no later than **March 31, 2023**.
3. Aplin agrees to offer all current and future sales staff the opportunity to complete Automotive Certification course (the "Course"). Current sales staff will be offered the Course no later than **January 31, 2023**. Future sales staff will be offered the Course within 90 days of being retained in this capacity. The Dealer will incur all costs associated with this. It is understood between the parties this clause does not apply to sales staff who have completed the Course or who are otherwise required to do so pursuant to the Act.

Aplin agrees to comply with the Act and Standards of Business Practice, as may be amended from time to time.

Decision of the Panel

Having reviewed and considered the Agreed Statement of Facts, the Panel hereby concludes that the Dealer has breached subsection 9 of the OMVIC Code of Ethics, as set out in Ontario Regulation 332/08, made under the *Motor Vehicle Dealers Act, 2002*. The Panel also agrees with the Parties' Joint Submission on Penalty and, accordingly, makes the following Order:

1. Aplin is ordered to pay a fine in the amount of \$10,000. \$5,000 will be paid no later than **January 31, 2023**, and the remaining balance will be paid no later than **June 30, 2023**.
2. Aplin is ordered to successfully complete the MVDA Key Elements course no later than **March 31, 2023**.
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4. Aplin agrees to comply with the Act and Standards of Business Practice, as may be amended from time to time.

Ontario Motor Vehicle Industry Council
Discipline Committee



Deb Mattina, Chair
Jon Lemaire, Vice Chair
Wally Pietraszko, Vice Chair