



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2022] NZDT 110

APPLICANT SH

RESPONDENT TS

The Tribunal orders:

1. TS is to pay \$2,500.00 to SH on or before Friday 16 September 2022.
2. Within 21 consecutive days of SH receiving the money in full, TS may collect the [vehicle] at his sole cost. SH is to ensure the vehicle is reasonably available for collection during normal business hours in that 21 day period. If TS fails to collect the vehicle within that time, then it will be deemed he has abandoned it and title will pass to SH who may dispose of it as he sees fit without accounting for any of the proceeds to TS.

Reasons:

1. SH saw a car advertised on Facebook Marketplace. He contacted the seller, TS, and arranged to view it. The car was at PN and TS worked there in the sales team. SH took it for a test drive and purchased it for the asking price of \$2,500.00. He did not drive it much for the first two days, but on the third, he drove it on a motorway and it started blowing smoke. SH took it to a mechanic who told him that the car had a blown or cracked head gasket, which would cost approximately the same price to repair as he purchased the car for. SH claimed for an order that he return the vehicle and be refunded his purchase price.
2. The issues to resolve the claim are:
 - (a) Is TS in trade selling cars?
 - (b) If so, is the car of acceptable quality and reasonably fit for its intended purpose?
 - (c) Was the vehicle misrepresented as having no issues? Was it an implied term that that the vehicle was in reasonable running order?
 - (d) Is SH entitled to cancel the contract and be refunded his purchase price?

Is TS in trade selling cars?

3. The Consumer Guarantees Act 1993 applies to contracts where a consumer purchases a good from an entity that is in trade selling goods of that description. TS said he was not in trade as the

vehicle was owned by him and he was selling it privately from his Facebook Marketplace advertising. He agreed the vehicle was at the yard of PN where he worked selling cars, but said SH knew he was selling the car privately.

4. SH agreed he saw the car on TS's Facebook advertisement, but said that when he viewed the vehicle it was at the yard of PN. He said that when he saw it at a car sales yard he thought it was a car they had difficulties selling and so gave it to TS to sell. He assumed the previous owner was PN because it came with a key ring with the PN label on it.
5. An adjournment was provided so TS could provide evidence of the ownership history of the vehicle, but he did not provide that evidence.
6. If the surrounding context of the sale creates the appearance that the vehicle is sold in trade, then the seller will be held to be selling in trade, even if they personally do not ordinarily sell vehicles. A one off sale can still be in trade if a consumer would have reasonable grounds to believe that the sale was being made in trade. I find that it was reasonable for SH to conclude that the vehicle was being sold in trade because it was sold from a car yard that sold other vehicles, TS's occupation was a car salesman, and the car came with a key ring advertising the car yard.
7. Although I accept that TS may not have sold many cars in his personal capacity, nevertheless when assessing whether he is in trade or not, it must be assessed from the position of the consumer.
8. SH is regarded as a consumer under the Act because he purchased a good that is commonly sold for personal use. The guarantees implied by the Act therefore apply to this contract.

Is the car of acceptable quality and reasonably fit for its intended purpose?

9. Section 6 of the Act provides that where goods are supplied to a consumer, there is a guarantee that they are of acceptable quality. Section 7 provides that a good will be of acceptable quality if they are fit for their intended purpose, free from minor defects and durable. In making that determination I must also have regard to the context of the sale and all relevant circumstances.
10. SH considered the car was not of acceptable quality as it has a blown or cracked head gasket. He said he had only travelled 60km and provided a photo of the odometer in support of the distance he had travelled. He said the issue became apparent as soon as he drove the vehicle on the open road.
11. TS said that the car showed no signs of having a cracked head gasket while he owned it and therefore it was not possible to know if it was sold in that condition.
12. I am satisfied that the car was not reasonably durable and therefore was not of acceptable quality. Although the car was 28 years old, it still needed to be reasonably durable. However, the car broke down on the first day that it was driven any significant distance, which was on the third day that SH owned it. The vehicle was sold for the purposes of driving and therefore, at least for a reasonable period of time, it needed to be sufficiently durable. For a vehicle that is 28 years old the period for which it must be durable is much less than a relatively new car, but nevertheless I find it must be more than three days.
13. Additionally, I am satisfied that the vehicle was most likely sold with that defect, although it may have been not apparent to TS. Section 6 of the Act, however, provides that goods must be free from any hidden defects. I therefore find that TS breached the guarantee that the car was of acceptable quality.

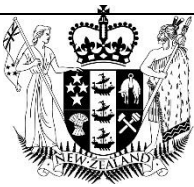
Was the vehicle misrepresented as having no issues? Was it an implied term that that the vehicle was in reasonable running order?

14. Although I do not need to consider this issue, as I have found that TS breached a statutory guarantee, for the sake of completeness, I will briefly include my findings on this issue.
15. A misrepresentation is a false statement of fact that one party reasonably relies on when they decided to enter into the contract. SH said that TS told him that the car had no issues. TS agreed he said that, but said it was true as it had no issues while he owned it.
16. I have found, however, that it is more probable that the car was sold with an issue with the head gasket. It may be that TS was unaware of that issue, however, a misrepresentation can be made innocently. It is the state of mind of the purchaser that is important and not whether the seller knew of the correctness of the statement. I therefore find that the vehicle was misrepresented.

Is SH entitled to cancel the contract and be refunded his purchase price?

17. SH provided an estimate from DS that, on a best case scenario, the repair would cost a minimum of \$2,000 and five hours of labour. It is therefore not economic to repair the vehicle.
18. The Act provides that if the failure of a guarantee is of a substantial character, then the consumer may reject the goods and obtain from the supplier compensation for the loss they have suffered. I find that the failure was of a substantial character as a reasonable consumer would not have purchased the car if they had known in advance of the nature and extent of the failure. SH is therefore entitled to be refunded his purchase price and have TS collect the vehicle. An order is therefore made to that effect.

Referee: K Cowie DTR
Date: 2 September 2022



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.