

BETWEEN

AFF

APPLICANT

AND

ZUP

RESPONDENT

Date of Order:

19 November 2013

Referee:

Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZUP is to pay to AFF the sum of \$1,200.00 within 28 days.

Facts

[1] In October 2013, AFF purchased an automatic Honda [model] from ZUP. The car had done about 105,000 kilometres and had been imported by a previous owner. The car had been advertised on TradeMe but had failed to sell. After the classified was withdrawn, the parties negotiated directly and agreed on a sale at \$4,400.00.

[2] AFF's husband went to [the city] to collect the car. However, by the time he reached [a nearby town], the transmission was showing problems. He was able to get home, but the car has since been diagnosed with a transmission fault that cannot be remedied without a \$3,000—\$3,500 overhaul of the gearbox.

[3] AFF filed a claim seeking a contribution from ZUP of \$1,999.00 to the repairs.

Issues

[4] ZUP is not a car dealer and was selling the car privately. As a result, the car was not sold with the benefit of any statutory warranties or trading protection (for example, the Fair Trading Act 1986 or Consumer Guarantees Act 1993).

[5] Accordingly, AFF needed to prove under s 6 of the Contractual Remedies Act 1976 (CRA) that she and her husband had been induced to purchase the car as a result of a misrepresentation. If she could establish this, she would also need to establish the quantum of her loss. There is a related statute, the Contractual Mistakes Act 1976 (CMA), that would also apply in these circumstances, but under which the outcome would usually be the same, as a misrepresentation creates a common mistake giving rise to a right to compensation (s 6(1)(a)(ii), s 7(2) and s 7(3) CMA).

[6] The dispute therefore raised three issues:

- (i) Did the advertisement for the car contain a misrepresentation?
- (ii) Did that misrepresentation induce the purchase?
- (iii) If so, what loss has been suffered?

[7] Each is considered in turn.

Decision

Did the advertisement for the car contain a misrepresentation?

[8] I find that a reasonable person reading the advertisement would, in all likelihood, have taken from the way the ad was written that the car was in excellent condition. As this was not the case, given the defect in the transmission, I am satisfied that the advertisement did contain a misrepresentation.

[9] I have reached this conclusion for the following reasons.

[10] Firstly, the opening line of the ad referred to the car as being “a very neat specimen for its age”. Both parties agreed that this tended to refer to the appearance of the car, rather than mechanical issues. This is a fair reading of this phrase. As the car was neat and tidy in appearance, this opening line was not a misrepresentation.

[11] However, later in the ad, the text reads:

Upholstery in good condition except some wear on the front armrests and on the floor... Some chips and scratches here and there on the bodywork as you'd expect but overall in excellent condition.

[12] Later, the ad reads:

Got it in January this year, it had 97297 km then, my sister and her family used it to travel around NZ. Now selling again as I no longer have a use for it.

[13] Reading these statements as a whole, I am satisfied that a reasonable person would taken the words “overall in excellent condition” to refer to the general state of the car, not just the paintwork. ZUP stated that he had only meant to confine this statement to appearance, and I accept this may well have been what he intended given that the words appear in a sentence about paintwork. However, the statement is ambiguous and it could reasonably be read to have a wider meaning. This is particularly so in light of the suggestion of reliability in the history of its use. Whilst this history may have been correct, unbeknownst to everybody, the car was no longer in excellent condition. Also, ZUP had already dealt with appearance as being “neat” in the first line, and the bodywork did not sound as good as “excellent” with the chips and scratches noted. In the context of this ad, and so to protect himself from unintentionally misleading any purchaser, ZUP would have been better to clarify that overall “the bodywork” is in excellent condition. Without these words, it is reasonable for a purchaser reading the ad to believe ZUP was stating that the car overall is in excellent condition.

[14] The transmission fault appeared immediately after collection. Common sense dictates that the fault probably existed at the point of sale, but was not noticed due to it being masked at low speeds around town. Nevertheless, the existence of the fault establishes that the statement that the car was in excellent condition was regrettably not correct.

Did that misrepresentation induce the purchase?

[15] Upon request, ZUP arranged for AFF and her husband to obtain a mechanical check on the car from [a car mechanic]. The garage picked up one or two minor issues, but not the transmission fault. It is not clear whether the garage’s brief included gearbox issues, and as the fault only appeared on open road driving, the mechanic may well have not had an adequate opportunity to discover it. For whatever reason, the fault remained undetected.

[16] Consequently, the statement in the ad that the car was in excellent condition remained as a statement upon which AFF and her husband relied in making their purchase decision, and thereby induced the purchase.

What loss has been suffered?

[17] AFF did not seek, and would in any case not be able to get, a refund on the purchase as this was a misrepresentation in a private context for which only damages can be sought (s 15(d) of the CRA; *Finch Motors Ltd v Quinn* (No 2) [1980] 2 NZLR 519; *Crump v Wala* [1994] 2 NZLR 331). Whilst it is technically possible under s 7 of the CMA to order a refund if this is “just”, this section should not be used except in exceptional circumstances to override the general principle in the CRA, reinforced in the High Court and Court of Appeal, that buyers of goods in private sales can apply only for damages. A buyer making a private purchase must accept that there remains a risk of loss that cannot be recovered, putting a high value on their pre-purchase homework.

[18] In light of these issues, AFF correctly applied for a contribution to her repair costs.

[19] It is not easy in cases such as these to quantify a fair contribution. However, having spoken in the hearing to the mechanic who has driven the car and assessed the transmission as best he is able without stripping it, I am satisfied that the work required to fix the fault, even in the best case scenario, would be such that it would be worthwhile overhauling the whole transmission at a cost of between \$3,000.00 and \$3,500.00. Given the uncertainty about extent of damage and cost to fix, the lower figure must be taken as the starting point. I am also satisfied, having heard the evidence of AFF and the mechanic, that AFF will undertake the repair, rather than sell the car at a loss. AFF states that this is her intention and the mechanic has confirmed the car is worth repairing and has seen others succeed in doing so in similar cars. However, the \$3,000.00 cost to repair is not a fair assessment of the loss caused by ZUP’s ad, as there would be betterment in having paid the purchase price for this car with a new transmission. As AFF’s claim recognised, a deduction must therefore be made to the repair cost to take this into account.

[20] It was established from the mechanic’s evidence that given a notional usual life of about 160,000 kilometres, this transmission was already at least two-thirds of the way through its likely life even if the car had been in excellent condition. AFF and her husband purchased an older and previously imported car at a low price. They would have expected that there would be ongoing service and maintenance issues and that at some point the transmission would require work. There would be a significant betterment if they were to replace the transmission at ZUP’s cost.

[21] In the circumstances, given that the existing transmission was two-thirds used, the notional loss is \$1,000.00 (being one third of \$3,000.00). There does remain a financial cost of the unintended early investment of the balance of the \$2,000.00 being funded by AFF, which again, is hard to quantify, but is technically the net deposit rate (say, three per cent of the cost over the number of years earlier that the work is done (say three to four years), assuming the car was to be kept for that period). I have allowed a further \$200.00 for this sum, bringing the total awarded to \$1,200.00.

Conclusion

[22] For these reasons, ZUP is to pay AFF the sum of \$1,200.00 within 28 days.