

BETWEEN

AGQ

APPLICANT

AND

ZTY

RESPONDENT

Date of Order:

6 January 2014

Referee:

Referee Davidson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZTY must pay \$1,600.00 (incl GST) to AGQ within 10 days of today's date.

[1] AGQ and ZTY were involved in a traffic accident on 27 August 2013 in “[place name]”. ZTY pulled out of her car park in front of AGQ. It is a matter of agreement between the parties that the accident was caused by ZTY’s manoeuvre. The parties’ agreement in this regard is similarly reflected in the Police report regarding the accident produced by AGQ at the hearing.

[2] Shortly after the accident, while still at the scene, the parties came to an agreement: ZTY would buy AGQ’s car for \$1,000.00 cash in compensation for the accident. AGQ accepted the offer, signed a brief handwritten note confirming arrangements and received the cash.

[3] AGQ quickly realised that she had agreed to a very poor deal. She had after all paid \$2,600.00 for her car only several months earlier and the accident was not her fault. Obviously the \$1,000.00 she had received was not sufficient to purchase a similar car to that damaged in the accident. The day after the accident AGQ went to ZTY’s home with a friend to see if she could get her car back or get more compensation. By that time the car had already been sold to a wrecker. ZTY’s husband offered a small additional amount of compensation but AGQ was not satisfied with his offer.

[4] AGQ now seeks to have the agreement between the parties set aside and to recover the full amount of compensation that she would have otherwise been entitled to.

[5] The issues are:

- (i) is there any legal basis for setting aside the agreement?
- (ii) if there is a basis for setting aside the agreement, what is the amount of AGQ’s loss?

Is there a legal basis for setting aside the agreement?

[6] The law of unconscionable bargain provides that a contract may be set aside where a party to the contract is labouring under a special disadvantage which the other party is able to exploit.¹

An unconscionable bargain... would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. "Fraud" in its equitable context does not mean, or is not confined to, deceit, "it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties"; *Earl of Aylesford v Morris* (1873) 8 Ch App 484, 490. It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

[7] It is not enough for a party to have entered into a poor or foolish bargain. There must be something more; there must be some kind of qualifying disability or disadvantage such that in the particular circumstances it would be unconscionable for the other party to take the benefit of the bargain. Factors such as an imbalance of consideration and the failure of one party to receive independent advice may be considered when determining whether it would be unconscionable for the other party to take the benefit of the bargain.²

[8] AGQ produced evidence at the hearing to show that she had purchased her 1996 Mitsubishi RVR in January 2013 for \$2,600.00. Given the age of the vehicle at the time of purchase it would seem likely that its value would not have materially changed in the few months between its purchase and the accident. The car's purchase price appears reasonable on the balance of probabilities in light of value of similar vehicles on Trade Me. I am satisfied that the transaction involved a significant imbalance of consideration.

[9] The transaction took place shortly after the accident in which both cars were written off. Although ZTY said at the hearing and in her written submissions that AGQ was not in shock I accept that there would be some element of shock following a significant accident; few would argue I think that the hours following an accident is the most prudent time to enter into a significant financial transaction. Another factor to consider is the unequal numbers of the two parties following the accident. AGQ was on her own while at the time the transaction was done ZTY was supported by her husband and his friend. This was a situation where

¹ *Hart v O'Connor* [1985] AC 1000 at 1024.

² *Gustav and Co Ltd v Macfield Limited* [2007] NZCA 205.

AGQ was outnumbered and unsupported. XY's friend bears special mention: he was a car dealer or at least worked in the motor vehicle industry. He was able to say that the cars were not economic to repair. He was able to advise XY that the combined scrap value of the two cars would be approximately \$1,000.00, the amount eventually paid to AGQ. So this was a situation where ZTY had the benefit of informed advice and AGQ did not.

[10] Having regard to the circumstances at the time of the transaction I am satisfied on the balance of probabilities that this is a transaction where it would be unconscionable for ZTY to take the benefit of the bargain agreed between the parties. There is a significant imbalance of consideration, AGQ was in shock or at least under stress at the time of the transaction, AGQ was outnumbered and unadvised. If ZTY did not consciously know that AGQ was being taken advantage of then she ought to have.

[11] For the reasons given above I find the agreement between the parties is of no effect.

What is the amount of AGQ's loss?

[12] As the agreement between the parties is of no effect, liability, as between the parties, returns to that determined under the tort of negligence. The tortious measure of damages seeks to put a party back into the position they were in before the tortious act took place. In this case AGQ purchased her car in January 2013 for \$2,600.00 and, as noted earlier, given its age it is unlikely to have depreciated to any material degree in the period leading up to the accident. Accordingly ZTY is liable to pay AGQ the lesser of \$2,600.00 or the cost of repairs. It was accepted by all parties that the cost of repairs would have exceeded \$2,600.00 and as such I find AGQ's loss to be \$2,600.00. AGQ has already received \$1,000.00 in damages, leaving a balance of \$1,600.00 outstanding.

Conclusion

[13] In the particular circumstances of this case I find that it is reasonable that the agreement between the parties not be enforced and that AGQ be compensated for the loss of

her car. As AGQ's car was worth \$2,600.00 and she has already received \$1,000.00 I find that ZTY must pay AGQ \$1,600.00.