



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1412

APPLICANT BF

RESPONDENT BN

The Tribunal orders:

BN is to pay BF \$1,000.00 on or before 22 April 2021.

Reasons:

1. BF purchased a [vehicle] from BN in a private sale on 20 September 2020 and drove it home to [Town 1] from [Town 2] that day. He purchased the vehicle as he wished to use it to tow a food caravan. Shortly after purchasing the car, BF experienced problems driving the car up a hill. Eventually it was discovered that the gear box needs replacing.
2. BF now wishes to return the car to BN and claims \$8,860.00 from her. This amount consists of the purchase price (\$7,500.00), \$660.00 for the cost of a service, and \$750.00 for a new tow bar he had fitted to the car.
3. BN denies liability.
4. The issues I must consider are:
 - a. Was there a misrepresentation by BN that induced BF into the purchase of the car?
 - b. If so, what remedy is appropriate?

Was there a misrepresentation by BN that induced BF into the purchase of the car?

5. This was a private sale between two individuals. That means the sale of goods provisions in Part 3 of the Contract and Commercial Law Act 2017 apply. As this was a private sale, there are no implied warranties or conditions concerning the quality of the car. Contract law in New Zealand recognises that a buyer in a private sale has a responsibility to carry out due diligence before entering a contract – that principle is called “buyer beware”.
6. However, s 35 of the Contract and Commercial Law Act 2017 states that where a party is induced to enter into a contract by a misrepresentation, they are entitled to damages as if the representation was a term of the contract that had been breached. A misrepresentation is a false statement of fact. A misrepresentation may be made either fraudulently, or innocently. In other words, the person making the false statement does not necessarily need to know that it is false for it to be a misrepresentation.
7. BF stated there were a number of misrepresentations made by BN, including that the car had been serviced regularly, was in good condition and that BN was not aware of any problems with the vehicle. He also claimed there was a misrepresentation that the car was running well.

8. I find that there has been no misrepresentation with regard to the statement that the car had been serviced regularly. BF said that the latest service date in the log book was 2009, and therefore it was not true to say it had been serviced regularly.
9. However, I find BF has been unable to show on the balance of probabilities that the car had not been regularly serviced. I accept the evidence from BN that she did not use the logbook to record the services once she brought the car to New Zealand from Australia, and that she continued to have it serviced whenever it was due. Although BN did not provide any evidence of that service record, she stated she could do so if necessary. BF did not request the service record prior to purchase.
10. I also find there was no misrepresentation by BN when she stated that she was not aware of any issues, or that nothing needed to be done "as far as I know". I accept BN's evidence that she did not experience any problems with the car and that these statements were true. Alternatively, they could be seen as BN's opinion, and therefore not implying anything about the mechanical soundness of the car.
11. I also find that there was no misrepresentation with regards to the claim the car was in "good condition". Neither party was able to locate or provide the advertisement which BF saw before purchase, but BN was sure that it said the car was in "good condition for age". There is no evidence that this was not the case, given the car was 13 years old and had driven 177,000km.
12. However, I do find there was a misrepresentation with regard to the claim that the car "ran well" or was "running well". I say this on the basis of the evidence from BF and two witnesses that shortly after purchase the car struggled to drive up a hill and instead was sliding back or slipping down.
13. NN and NU are friends of BF. At the hearing both described BF helping NU to shift to a new house. BF picked them up in the car, and drove to NU's new house, which was up a steep hill. NN was in the back seat of the car and described the car sliding back or sliding down the hill, before BF managed to back down to a flat piece of road and was then able to drive up the hill.
14. NU was in the front seat of the car and also described the car sliding backwards when BF tried to drive up the road. She said to him something like "it's going back" and she said it felt like the car did not have enough power but agreed that BF managed to get the car up the hill once it had gone back to flat ground. NU was sure that this occurred on 25 September 2020. She remembered as she had family arriving on 26 September.
15. BF originally stated that this incident occurred on the day he purchased the car. At the hearing he said he thought it was the same day but accepted that there might have been a delay of a few days between the purchase of the car and this incident. BF agreed that he did not notice the problem on the drive home from [Town 2] to [Town 1] but speculated that this may have been because he did not have to stop on any hills and then start again.
16. In my view it is more likely than not that NU was correct about this incident occurring on 25 September, rather than the day the car was purchased. However, given it was only five days after the purchase, in my view, there is a reasonable inference that the issue was present at the time of sale, and that consequently, the statement that the car "runs well" was not true.
17. I acknowledge BN's point that BF did not experience any problems on the way home, and that it is still possible to drive the car around on flat roads. However, in my view, being unable to get enough power to drive up a hill means that the car does not "run well", at least not consistently.
18. This conclusion is supported by BF's evidence that after having a similar problem in [Town 3] in November, he took it back to the mechanic. The mechanic drove the car to see what the problem was, and then discovered that the problem was caused by the gearbox, which required replacement. Consequently, the statement that the car "ran well" was a misrepresentation

made by BN that induced BF into the contract because he relied on it when deciding to buy the car.

If so, what remedy is appropriate?

19. BF indicated that his preference was to get a refund of the purchase price and return the [vehicle] to BN. However, s 35 of the Contract and Commercial Law Act 2017 does not allow for a winding back of the transaction and a refund. Instead, the only remedy available is damages, or in other words, a monetary sum. BF is entitled to damages from BN in the same manner and to the same extent as if the representation were a term of the contract that has been breached. This reflects the general principle of “buyer beware” that applies to a private sale, in that buyers must accept that there remains a risk of loss that cannot be recovered.
20. In my view, the appropriate way to quantify this is to assess a fair contribution to the repair costs that would fix the gearbox on the [vehicle] so that it “runs well”. BF received a quote of \$6,000.00 to repair the gearbox, although he stated that he had been told by the mechanic that it was uneconomic to repair the car, and that there was no guarantee that would fix the problem.
21. I accept BN’s point that there is only one quote available, and no second opinion. In the absence of any other evidence I adopt the figure of \$6,000.00 as a starting point. However, an award of \$6,000.00 would potentially put BF in a better position than he would have been if the misrepresentation was a term of the contract. That is because BF would have paid the \$7,500.00 purchase price for a car with a new gearbox, rather than one with the original gearbox. BF said that his mechanic had spoken to the [vehicle] dealer in [City] and that it is common for [vehicle] gearboxes to have problems at around 170,000km. The [vehicle] purchased by BF had driven 177,000km. Therefore, the gearbox was towards the end of its natural life. Having bought a second-hand car BF would have anticipated some ongoing service and maintenance requirements. There would be significant betterment if BF was to simply replace the transmission at BN’s cost.
22. However, there is also the possibility that the problems with the gearbox were contributed to by an ongoing lack of oil in the gearbox during the time BN owned the car.
23. BF also indicated that he had bought another vehicle to tow his food truck. It is not at all clear that he would use any award from the Tribunal to undertake the repairs, but may instead sell the car for parts. He did not believe he would receive more than \$1,000.00 in these circumstances.
24. Having taken into account the issues outlined above, and particularly given the fact that the existing gearbox was likely to need replacement soon in any event, I assess the sum of \$1,000.00 to represent a fair contribution to repairs by BN.
25. BF also claimed costs for servicing the vehicle and adding a tow bar. In my view, BF would have incurred those costs even if the vehicle had been running well. While they might be expenses he has incurred that he ultimately does not get any benefit from, they are not losses directly relevant to the misrepresentation. Consequently, I decline to award any costs under this heading.

Referee: Souness - DTR

Date: 1 April 2021



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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.