



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 14

APPLICANT **BT**

RESPONDENT **WN Ltd**

SECOND **LB**
RESPONDENT

The Tribunal orders:

LB is to pay directly to BT the sum of \$47.72 on or before 27 July 2022.

This order determines both the claim and counterclaim.

Summary of Reasons:

- [1] The hearing was convened by teleconference. All parties appeared at the hearing.
- [2] Both parties claim damages under the sale and purchase agreement for the vessel BB dated 3 March 2022.
- [3] The purchaser, BT, claims \$13,833.09, an amount she paid to install a new fridge and freezer, replacement hatch and forward berth swabs, to reconnect the chartplotter and the cost of haul out and hardstand fees while this work was completed. The applicant claims she is entitled to this amount because the seller breached the sale and purchase agreement, failed to meet warranties under the Consumer Guarantees Act 1993, and misrepresented the condition of the vessel. Further the applicant claims she is entitled to recover this amount from WN Ltd because as broker of the sale, WN Ltd breached its obligations to her under the Fair Trading Act 1986.
- [4] The seller, LB denies liability referring to the sale and purchase contracts and counterclaims she is entitled to a further \$25,000 as she only agreed to discount the sale price to a lower amount if the purchaser agreed to accept the vessel *as is where is*. As the purchaser has now made a claim against her, she feels she is entitled to the advertised purchase price, \$275,000 rather than the \$250,000 paid.
- [5] WN Ltd has been named a respondent by BT but denies any liability pointing to its role as broker only and denying any deceptive or misleading conduct.
- [6] At hearing LB admitted she agreed after the sale to compensate BT for the disconnected chartplotter and has again offered BT the \$47.72 claimed.

[7] BT was also clear at hearing that she wished the Tribunal to make a decision on the evidence before it and did not wish to provide any further witnesses or evidence to support her claims. In making this decision BT understood that the Tribunal would make its decision based on the relevant law including the sale and purchase agreement.

[8] As stated at hearing, to determine this matter I have carefully considered the extensive written documents provided, the oral evidence of the parties, and the relevant law, including the law of contract, the Contract and Commercial Law Act 2017 (CCL), the Fair Trading Act 1986 (FA) and the Consumer Guarantees Act 1993 (CGA).

[9] BT has outlined four specific areas of loss plus consequential damages. The applicant claims \$6,715.00 to replace a fridge freezer system, \$3,004.83 to replace a hatch, \$1,698 to reinstate the forward berth squab and \$47.22 to reconnect the chartplotter¹. Consequential losses claimed are the cost of placing the vessel on hard stand while carrying out these were repairs, \$2,104.50.

Contract

[10] As stated above, I cannot ignore the terms of the contract. The contract sets out the sale price, apportions risk and sets out the terms and conditions of sale. The contract also contained specific additional conditions appended in appendix A of the agreement. These conditions included removal of Christmas lights, cleaning and some minor repairs. None of the matters claimed by BT in this application are referred to in the additional conditions. BT admits the specific conditions have been met.

[11] A further condition of sale in the standard contract is that a boat survey is mandatory before sale for the protection of both the buyer and seller. In this case BT waived this condition after being warned not do so WN Ltd. The contract was amended, and BT signed appendix B of the agreement, a survey waiver. In doing so BT agreed that by waiving the survey she acknowledged there was no warranty given that the vessel was fit for purpose or free from minor defects. Further she acknowledged that she was strongly advised by the broker not to purchase the vessel without a survey and that in doing so she was relying on her own skill and judgement only. In essence BT agreed to purchase vessel *as is where is*.

[12] Notwithstanding BT's express agreement that she was relying on her own skill and judgement in buying the vessel she now claims she is entitled to make further claims on the seller. In particular:

Fridge Freezer

[13] BT claims the fridge freezer units were not working satisfactorily and she was forced to replace them. There is some disagreement as to whether this was due to total failure, a faulty compressor, lack of refrigerant or other cause. Given my decision in this matter I have looked no further at this.

[14] BT admits that no express warranty was given about the condition of the fridge freezer units. Further the units themselves are approximately 30 years old with an expected life of about the same. BT bases her claim on the CGA, claiming that as the vessel was supplied with a fridge freezer those units must be fit for purpose and free from minor defects. She refers me to section 5 of the CGA. Section 5 is a guarantee as to title and not relevant to this claim however I accept that the CGA does provide warranties as to condition, but the matter was not as simple as BT hopes.

[15] First the condition that is warranted under the CGA is not as *new condition* but rather the condition that goods of that type would have given their age and use. It is clear on the evidence of both parties that these fridge freezer units had expended their expected life and could be expected to fail at any time. I do not accept that the seller was warranting these units to be in good working order given the lack of

¹ as stated above LB has offered to pay this amount

any reference to them in the advertising or sale documents. Further and perhaps more importantly CGA imposes obligations on traders. This is a private sale and CGA obligations simply do not apply to LB.

[16] Neither do they apply to the broker notwithstanding WN Ltd is in trade. WN Ltd does have additional obligations being in trade, but these are not the same obligations that apply to a seller but rather obligations imposed under the FA. I have addressed this below.

Hatch

[17] BT also makes a claim for a replacement hatch. Again, I note that this is not included in the additional conditions. Further as an integral or watertight issue it is clearly covered by the survey waiver condition.

[18] For the reasons outlined above I find no liability against LB under the CGA neither is there any evidence she has breached the sale and purchase agreement.

[19] In relation to the claim against WN Ltd for the hatch replacement I note that BT alleges liability because she asked WN Ltd to include repair of the hatch as an additional condition in the sale and purchase agreement. It is clear on the written evidence that this request was not agreed too and the seller never warranted the condition or watertightness of the hatch or indeed the entire vessel. On that basis there can be no liability under the contract.

[20] Neither do I find that WN Ltd deliberately failed to advance BT interests by not including the watertightness of the hatch as a condition of the sale. WN Ltd was engaged in a negotiation. It was open to BT not to purchase the vessel without this special condition, but she chose not to. That is not evidence of WN Ltd's negligence.

[21] Again, I refer BT to her clear agreement to purchase the vessel in *as is where is* condition relying on her own judgement and not a survey. She made this decision after personally inspecting the vessel on 2 March 2022 albeit through her representative. Further I am satisfied on the evidence of LB that if BT had not requested this condition, she would not have agreed to sell the vehicle \$25,000 under asking price. It is not open to BT to now attempt to renegotiate the terms of the contract.

V berth mattress

[22] Again, I note that the condition of the mattress was not warranted in the contract and a private seller is not bound by the obligations of the CGA. In this case BT claims that the seller is liable as she omitted to inform her that one half of the mattress was missing. Further she claims the seller actively misled her in a video walk-through on 10 March 2022 making the berth up in such a way that she assumed that both mattresses were present.

[23] With regards to a misrepresentation, the CCL applies. A misrepresentation is to be understood in its established sense of a false or erroneous statement of fact. For the Tribunal to allow a misrepresentation to be treated as if it were a breach of a term of the contract, the applicant must have been induced to enter into the contract by the representation made. An omission can be a misrepresentation but requires more than failing to mention something.

[24] I have considered the applicant's claim that the remote walk-through could amount to a misrepresentation by failing to draw her attention to the missing squab to her attention. I am not persuaded of this. Notwithstanding BT's memory of the video walk-through, the seller has a different view claiming that the absence of a squab was in clear view and no attempt was made to hide this.

[25] Of more importance to me is the issue of inducement. Even if I was to accept that the seller knew BT was unaware of the missing squab and chose to hide this information, which I am not, BT has clearly not relied on the video walk-through when purchasing the vessel. The applicant had a personal

inspection on 2 March 2022, purchased the vessel on 3 March 2022 and the video referred to did not occur until 10 March 2022.

[26] This confirms the written contract clearly stating that the purchaser was relying upon their own judgement in purchasing the vehicle and it is now simply too late to claim that the condition of the front squab was misrepresented and that this induced her in some way into buying the vessel a week earlier. It is clear on the evidence that BT has not relied on any representations made by the seller but has instead determined to rely upon her own judgement in purchasing the vessel, albeit that she may now regret this.

Chartplotter.

[27] I note that the condition of the chartplotter is also not referred to in the additional conditions, however as LB has accepted this claim I order the modest amount paid.

Fair Trading Act

[28] BT alleges that WN Ltd has not acted in her best interests and has misled and deceived her in relation to the sale and she seeks compensation from them for this. Having heard BT submissions, I take it she is making a claim against the broker under the FA.

[29] In terms of the FA, no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Engaged in trade is defined as carrying out business for gain or reward and conduct includes an omission whether deliberate or not. Whether conduct is misleading generally requires that the overall impression given by the conduct or representation is inaccurate, looked at from the point of view of the ordinary person.

[30] WN Ltd is in trade and the provisions of the FA apply. I understand that BT is disappointed in her bargain and that she has incurred costs she did not expect to incur after purchasing the vessel. However, that does not make the behaviour WN Ltd misleading or deceptive.

[31] I have carefully reviewed the behaviour complained of and can see nothing in WN Ltd's conduct that could be considered a breach of the FA. I understand BT requested the watertightness of the hatch be added as a condition of purchase, however that was not agreed and she was aware of that when she signed the sale and purchase agreement. Further it is clear that WN Ltd went to great lengths to advise BT against purchasing the vessel without having the survey done and was clear that if she did so she was relying solely on her own judgement. I fail to see what else WN Ltd could do to advise BT of the possible pitfalls in her chosen action.

[32] A careful review of the extensive written documents before me show that WN Ltd has been even handed and fair to both parties, clearly recording the contractual arrangements and offering advice and assistance where appropriate. I find no actionable breach.

Counterclaim

[33] As discussed at hearing I understand the sellers disappointment that the sale has not gone smoothly. Further I understand that consideration for dropping the purchase price was that the vessel would be accepted without a survey and on reliance only of BT's judgement and it would appear that she has not felt bound by that agreement. However, that does not mean that the seller is now able to raise the purchase price.

[34] I can see no legal basis of which the counterclaim can succeed. Without evidence of loss LB has no claim for breach under the contract. Purchasers are entitled to litigate their claim.

[35] Apart from the amount allowed for the chartplotter the remainder of the claim and counterclaim are dismissed.

Referee: Hannan DTR
Date: 21 July 2023



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 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>.