



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1314

APPLICANT **DQ Limited**

RESPONDENT **MS Limited**

The Tribunal orders:

1. MS Limited is to pay DQ Limited \$29,980.00 on or before Wednesday 13 January 2021.
2. Once the amount in Order 1 is paid, DQ Limited is to make the vehicle available for collection by MS Limited, at the cost of MS Limited.
3. If through no fault of DQ Limited, MS Limited has not collected the vehicle by 13 February 2021, DQ Limited may deal with the vehicle as it sees fit and MS Limited remains liable to pay all or any outstanding amount under Order 1.

Reasons:

1. DQ Limited purchased a 2016 Mazda BT-50 from MS Limited, a motor vehicle trader. MS Limited provided DQ Limited with a Consumer Information Notice at the point of sale. The notice incorrectly stated that the vehicle had not been imported as a damaged vehicle. DQ subsequently became aware of the vehicle's history and now seeks to return the vehicle for a full refund.
2. DQ claim \$29,980.00 being the cost of the vehicle (including warranty) and sign writing the vehicle.
3. The issues to be determined are:
 - a. Was there a false or misleading representation in the sale of the vehicle?
 - b. Did MS Limited comply with the Consumer Information Standard (Used Vehicle) Regulations?
 - c. Is there a defence MS Limited may rely upon to avoid liability?
 - d. Is DQ entitled to the sum claimed?

Was there a false or misleading representation in the sale of the vehicle?

4. Under section 13(a) of the Fair Trading Act 1986 (“Act”) there is a prohibition against a person in trade making a false or misleading representation that the goods being supplied have had a particular history. A representation may be by way of affirmation, denial or description. If the statement is untrue, it is false. It does not matter if there was no intention to mislead.
5. By way of analogy, the Courts have found that false statements as to the odometer reading of a vehicle or the number of prior owners of a vehicle constitute a false and misleading statement under section 13(a) of the Act.
6. MS does not dispute that the Consumer Information Notice (“Notice”) stated that the vehicle had not been imported with damage, and that this was incorrect.
7. No other facts need to be ascertained. By circling “No” under the box “Imported as a Damaged Vehicle” in the Notice, MS, a company in trade, in connection with the supply of a good (i.e. the sale of the car), made a false representation that the goods had a particular history. That statement contravened section 13(a) of the Act.
8. I therefore find that there was a false representation made in the sale of the vehicle.

Did MS Limited comply with the Consumer Information Standard (Used Vehicle) Regulations?

9. Section 28 of the Act requires compliance with any relevant consumer information standards. The Consumer Information Standards (Used Motor Vehicles) Regulations 2008 (“Regulations”) apply to the sale of the vehicle.
10. Under the Regulations, MS was required to include the Notice with the online advert (reg 6), and the Notice must be in the prescribed form (reg 7).
11. The Notice was in the prescribed form, except that it omitted to include the section at the end titled “Important Information”. This should be included with all Notices. In this instance it alerted the purchaser to the need to have a mechanical check of any vehicle imported with damage prior to purchase and notified the purchaser of certain consumer rights.
12. The Notice was not provided in the online advertisement, in contravention of reg 6 of the Regulations.
13. Most importantly, the Notice was completed with incorrect information as to the status of the vehicle’s history as a damaged vehicle. It is implicit in the Regulations and in section 28 of the Act that a failure to give correct information in the Notice is a failure to comply with section 28 of the Act.
14. I find that MS did not comply with the Regulations because the information given was incorrect, the Notice did not contain all the wording required by Schedule 1 of the Regulations, and the Notice was not included in the online advertisement.

Is there a defence MS Limited may rely upon to avoid liability?

15. Under section 44(5) of the Act, it is a defence to proceedings in relation to a contravention under s 28 (related to the incorrect Notice) if MS proves that it did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with the consumer information standard or that it had not complied with the standard.
16. This defence may be employed in proceedings before the District Court. It is less certain whether it is relevant to the jurisdiction of the Tribunal.
17. The defence also does not apply in the case of a contravention of s 13 of the Act in relation to the false statement.

18. Nevertheless, for completeness the evidence of MS in relation to how the false representation came to be made is considered.
19. MS says that it rarely sells vehicles imported from Australia and that nearly all its vehicles are imported from Japan (perhaps in response to a statement by DQ that it was aware of an influx of damaged vehicles from Australia). MS says it is a reputable dealer and would not knowingly mislead its purchasers.
20. MS says that the salesperson who conducted the sale was new to the role and not aware of the car's history. The Director of the company said he was aware that the vehicle was imported as a damaged vehicle and it is understood a prior salesperson working for the company was also aware of the condition. However, the salesperson who completed the Notice did not have this information and made the false representation not knowing it to be incorrect. I accept that MS did not set out to mislead DQ as to the true history of the vehicle. (Although, in relation to section 13 and making a false statement, if a statement is false, the intention of the party in making the statement is irrelevant.)
21. MS was in possession of the correct information at the time of the sale and was responsible for ensuring the Notice was completed correctly. As a motor vehicle trader, it should be aware of the importance of giving correct information. That includes ensuring that the person making the sale has the correct details for the vehicle and having processes in place to check that Notices have been completed with the correct information.
22. Without commenting on whether s 44(5) may be invoked in Tribunal proceedings, I find that in any case MS has not proved that it could not have, with reasonable diligence, ascertained that it had not complied with the standard.
23. I am therefore satisfied that there is no defence under the Act that MS may rely upon as the defences provided do not cover the making of a false statement under section 13 and nor does section 44(5) afford protection when MS knew, or should have known, that it had not complied with the standard.

Is DQ entitled to the sum claimed?

24. Under section 43 of the Act, if DQ has suffered loss or damage by the conduct of MS due to a contravention of s 13 or s 28, the Tribunal may make an order directing MS to refund DQ and for MS to pay DQ for its loss associated with the contravention (s 43(3)(e)/(f)).
25. DQ claims the purchase price for the vehicle of \$28,500.00 (including GST and warranty) and \$1,480.00 in sign-writing fees.
26. MS says that DQ has gained from use of the vehicle since the purchase. The vehicle was purchased in June 2020 and DQ says it became aware of the false representation in or around October 2020. The vehicle was still in use at the date of the hearing and had travelled approximately 25,000km since it was purchased.
27. DQ was adamant that it would not have purchased the vehicle had it known its true history. It did not dispute that the vehicle was safe and said it would not allow it to be driven if it did have any such concerns. DQ had had a business need for the use of such a vehicle and could not afford to be without the use of it whilst the matter was resolved.
28. DQ is entitled to be put back into the position it was in prior to entering the contract, including the costs of any acts taken in reliance on the contract, such as sign-writing the vehicle and taking out a warranty. It is not entitled to better its position. Whilst DQ has gained the use of the vehicle for approximately 25,000km, but for entering this contract it is likely that it would have purchased another vehicle and been able to use that vehicle during this time. It also would have accrued many of the kilometres travelled prior to gaining knowledge of the vehicle's history. I therefore

find that while DQ may have had a small gain from the use of the vehicle, it has not materially benefited.

29. MS contravened the Fair Trading Act by making a false statement about the particular history of the vehicle and by failing to comply with the consumer information standards. The remedies available to DQ in the circumstances include a full refund and compensation for loss.
30. For these reasons, I find that MS Limited is to pay DQ Limited \$29,980.00, and MS Limited is to collect the vehicle, by the dates stated in this order.

Referee: T Baker
Date: 21 December 2020