



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 131

APPLICANT ET

RESPONDENT SK

The Tribunal orders:

SK is to pay ET \$9,396 by 6 April 2023.

Reasons

1. In September 2021, ET bought a campervan that had been advertised on Trade Me from SK for \$17,500. SK lives in the [redacted] and so ET also paid another \$396 to have him transport it to [Town] where she picked it up. ET picked up the campervan and drove it to [City].

2. After driving it down, ET didn't use the campervan immediately as she was not well. In early November she and her partner SP took it for a drive to [redacted] mall. Unfortunately, the campervan was too high for the mall carpark and was damaged when the roof of the campervan hit the roof of the carpark building, damaging the roof and causing the window to shatter.

3. ET had insured the campervan under a Covid policy for \$18,000 with [Insurer]. Repairs were assessed at \$22,479.63. Her insurer has paid ET \$8,539.63 towards the campervan but has refused to pay more as it says its assessor has determined the campervan had rust prior to the damage at the mall and this was an existing problem not covered by her policy.

4. ET sought to negotiate a full refund of all money paid to with SK on the basis of the campervan having pre-existing rust as well as a gas bottle in the wrong place and a loose battery. Despite raising it directly with SK no refund was paid and ET has claimed for the \$17,896 she paid SK. As I understand it the campervan has been stored by ET outside since November 2021. ET must prove her claim on the balance of probabilities (and consistent with the *Parkinson* decision cited on behalf of SK).

5. The issues I need to decide are:

- a. Whether SK sold the campervan 'in trade' such that the condition of the campervan as sold was in breach of the Consumer Guarantees Act 1993 (CGA) and/or the Fair Trading Act 1986 (FTA); and/or
- b. Whether SK misrepresented the condition of the campervan.
- c. If there has been a breach or misrepresentation, what loss that caused ET.

Was the campervan sold in trade?

6. ET had explained that she believes SK was in trade as he used a Trade Me account to advertise the campervan which is the account for F Ltd of which SK is a director. However I am not satisfied the campervan was most probably sold 'in trade'. This is because I accept F Ltd provided services to BC service and ceased trading by 31 March 2019 which is when it advised Inland Revenue it ceased trading by way of a completed IR 315 form. The campervan is not listed as a retained asset of that company in

that form. I am not therefore persuaded the CGA or FTA applied to the sale and so compensation is not available to ET by considering those Acts.

Did SK misrepresent the condition of the campervan before she bought it?

7. SK says he did not misrepresent the condition of the campervan. He has explained:

a. It was in good running condition at the time of sale and photos of the campervan show it in good condition;

b. Although there were rust repairs to the campervan undertaken before sale they were minor and were fixed to obtain a WOF. A subsequent WOF was obtained before sale and was valid;

c. Gas bottles inside the campervan were safe as they were inspected by a qualified gasfitter and a compliance certificate obtained and displayed in the window of the campervan.

d. ET was given the opportunity to inspect the campervan when he brought it to [Town].

8. However I prefer ET's evidence before sale SK had discussed the campervan had rust but he had fixed it and it had a new WOF. This is because I consider it likely this was part of the discussion as ET was trying to decide whether or not to buy the campervan. However, I am not persuaded by ET's evidence SK made any representations about either the gas bottle or the battery and I do not consider those claims further. I consider the campervan was sold on 13 September 2021 which is when ET paid SK for it, and so consider any inspection by ET in [Town] does not effect any representation.

9. I consider this was a misrepresentation by SK. This is because I accept it is more probable than not there was rust in the campervan prior to sale. I say this because:

a. I consider what evidence there is of the insurance assessment, including photographs, support significant and extensive rust in the campervan existing well before the collision. This is confirmed by the written information provided by [redacted]. I am not persuaded the photographs ET has provided were must probably taken in early November 2021 as they are undated and appear to show the campervan in a different condition to the photographs taken by the assessor.

b. I accept it is not likely the rust occurred during the limited period to the collision at the Mall.

c. SK now agrees he undertook rust repairs himself having previously told ET he had taken it to [City] to occur. The evidence of the NZTA WOF records suggest this work most probably occurred between 12 and 17 November 2020, which is the period between the campervan failing its WOF inspection on the basis of the recorded fault code "SR-Structure/Rust" and passing it's inspection (having travelled on 1km in between). The WOF the campervan was sold with was then obtained on 2 August 2021. The comments noted are "Fresh paint repairs unknown". While I do not consider the rust was obvious at the time of sale, I consider it was there and suggesting there was not rust, even innocently, is still a misrepresentation, and one that I consider was actionable as the misrepresentation was relied on by ET and induced entry into the sale in relation to s35 of the Contract and Commercial Law Act 2017 (CCLA).

What loss has the misrepresentation caused ET?

10. I consider the appropriate damages relate to the costs that ET would have had to expend to repair the rust at the time of sale. This has been difficult to assess on the evidence provided and given the extensive nature of the repairs needed following the incident at the [Mall]. I accept the rust will have aggravated the damage to the rest of the campervan caused in the incident. On balance I consider \$9,356.37 is the appropriate measure, being the difference between the sum claimed by ET and the non-rust related repairs she has been compensated for already. I note this figure is also broadly consistent with the \$9,396 demand ET has previously made on SK.

Referee: J Costigan

Date: 5 March 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 of 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>.