



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

[2023] NZDT 732

**APPLICANT**      **KB**

**RESPONDENT**    **DC**

**The Tribunal orders:**

DC is to pay KB \$1,000.00 on or before Friday 26 January 2024.

**Reasons:**

1. In late July 2023 KB saw a [car] (“the Car”) for sale on Trade Me and eventually purchased it from DC. DC lives in [Location 1], and KB in [Location 2]. KB had the Car freighted to [Location 2] and he says when the Car arrived it was not as advertised.
2. KB says misrepresentations have been made about the Car. He now wishes to cancel his purchase and seeks a refund of the \$4,000.00 purchase price and \$1,300.00 paid in freight costs.
3. DC denies the claim in full saying the Car was clearly advertised as a deregistered race car, with no warrant of fitness. DC denies any dishonest or false representations were made, saying KB purchased at a distance without inspecting the Car and therefore must accept any risk of doing so.
4. The issues to be resolved are:
  - a. Were misrepresentations made in the sale of the Car?
  - b. If so, is KB entitled to return the Car and receive compensation of \$5,300.00?
5. While all evidence presented to the Tribunal has been considered, this order refers only to essential evidence material to the issues and is not intended to be a full record of the hearings or of the evidence presented.

**Were misrepresentations made in the sale of the Car?**

6. Contracts for the sale of goods between private individuals do not offer the same consumer protections available to a consumer buying from a person in trade. When buying privately, New Zealand laws such as the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 do not apply.

7. However, when discussions occur between parties prior to a contract being made, statements made and answers to questions given by a seller can be relied on and can amount to a misrepresentation, if they are false. This law is found in section 35 of the Contract and Commercial Law Act 2017 (“CCLA”). This section says a misrepresentation occurs where a party to a contract is induced to enter that contract by being told a false statement of fact by the other party. The law is clear that it does not matter whether that statement is innocently or fraudulently made, but it must be false, i.e., untrue, and be a statement of past or present fact.
8. I find a misrepresentation was made about the Car.
9. I say that because the Car was advertised as having a Garret Turbo, which it does not.
10. DC says he is not an expert on turbos and simply provided information he believed to be true. Having heard the evidence however, I am satisfied DC’s statement is a misrepresentation because I accept:
  - a. the advertisement does clearly state the Car is fitted with a “*big Garrett turbo*”;
  - b. KB’s evidence the turbo is not a Garrett, but likely to be a cheaper Chinese-made turbo. KB says it is of inferior quality, less desirable, and of lesser value, and the Garrett feature highlighted in the Car’s advertisement was of importance to him because it indicated key information about the Car’s performance and value;
  - c. while DC’s ad says the information provided in the ad is “known”, he said at the hearing that he was only passing on information about the turbo; that he had not really given any thought to what type of turbo it was; and nor did he personally place any value or recognition on the Garrett brand itself being referred to. That seems unlikely, given this is the only brand name referred to in the ad, however as earlier stated the primary point is that New Zealand law does not distinguish between a fraudulent or innocent misrepresentation. If the statement is false, and does induce a buyer into a contract, it will be actionable.
11. KB also says a further misrepresentation was made, namely that the interior of the Car was “*really nice even the driver’s seat has no wear marks*”. On the evidence of the parties, I am not satisfied this statement amounts to a misrepresentation. I say that because this comment is made in the context of the advertised Car, which is 33 years old, and described as being recently prepared for racing purposes. KB acknowledged in supplied photo that wear and tear marks were visible in the vinyl trim on the Car’s centre console, and he accepts those. He says it is not acceptable however there is another vinyl tear on the side door; there are puncture marks on the driver’s seat; and the steering wheel was in such bad condition it had to be replaced.
12. In my view however:
  - a. the interior of the car was not described in being in “excellent” or even “very good” condition. The ‘really nice’ phrase cannot be said to suggest something that is necessarily free from imperfections. The other vinyl tear which is in the door panel was not photographed, and the puncture marks may not be as clearly visible in the photo, but I am not satisfied they are of such significance that they clearly fall outside the description offered in the ad; and
  - b. in all the circumstances there is insufficient evidence for me to say KB’s claim about the steering wheel has been proven on the balance of probabilities. Each party provided their own, significantly different, view about the steering wheel’s condition on departure and on arrival, and each provided a supporting statement from a third party. The views expressed are somewhat like night and day, and on the evidence before me it is not possible for me to reconcile them, nor to find one view more compelling than the other. The claim cannot therefore be said to have been proven.
13. KB also referred to, but did not emphasise, two further representations. That the body of the Car was really straight, and there was no rust. For the record I do not accept either of these meet the threshold of being a misrepresentation in the circumstances, because qualifying statements are included in the ad about these matters. First, the car was a deregistered race car, suggesting it had a different history than a more utilitarian ‘family sedan’. Second the ad recognises the body has one or two very slight impressions. Although KB differs in his view, I am satisfied that this is what his photographic evidence seems to suggest. KB says the car

does have rust in the underbody and therefore the statement is not true about rust. While I accept that someone actively working on a race car is likely to at some time inspect the underbody, DC's ad does not represent that he has done so. The ad clearly refers to visible rust, and on that basis a buyer doing an ordinary visual inspection may well agree there is no visible rust.

14. DC offers further points in his defence. These include:
  - a. that he ultimately sold the Car to KB outside of Trade Me, so the original ad is of no relevance to their discussion; and
  - b. that KB signed a statement that no representations had been made which would override any other dealings between the parties.
15. However, I do not accept in these circumstances these points assist DC's position. The fact the parties ultimately decided to conclude their sale off the Trade Me platform makes no difference to the fact the advertisement clearly did provide relevant information to KB, and this is information he was entitled to rely on and consider to be part of their pre-contract negotiations. Secondly, while in some circumstances a court or Tribunal may look more closely at the statement offered by DC which was intended to exclude any pre-contract discussions and/or representations, I am persuaded on these facts that KB had already agreed to buy the Car before he signed/agreed to this statement, and that timing is a determining factor. It is also important to acknowledge that the law does not always accept such exclusionary statements at face value but will be prepared to look at all the circumstances to determine whether the statement would have the exclusionary effect DC intended.

**If so, is KB entitled to return the Car and receive compensation of \$5,300.00?**

16. The remedy for misrepresentation under s35 CCLA is an entitlement to compensation, as if the representation were a term of the contract that had been broken. A breach of a material term of a contract entitles a party to cancel the contract and claim compensation to put them back into the position they would have been in, had the contract not been breached. A breach of a warranty in a contract, may however only entitle a party to compensation.
17. I find KB is not entitled to return the Car however he is entitled to compensation of \$1,000.00 for the misrepresentation about the Garrett turbo.
18. I say that because I am satisfied:
  - a. while DC says the Car's engine is great, there are no clear or specific representations about the age, or relevant performance capabilities of the turbo function in the Car;
  - b. there is therefore still some clear element of risk remaining in buying the car sight unseen, and untested, and there is no clear evidence provided about the performance of the Car;
  - c. I therefore cannot say with certainty KB has suffered the full extent of the loss claims for the absence of the Garrett branded turbo;
  - d. I do however accept this was a factor which influenced him to enter into the contract and on the balance of probabilities I accept on this basis he has suffered some loss;
  - e. based on the evidence before me, I am satisfied \$1,000.00 is a fair and reasonable assessment of this loss.

**Referee: Malthus**  
**Date: 16 December 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>.