



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 433

APPLICANT NX

RESPONDENT B Association Ltd

**SECOND
RESPONDENT** JE

The Tribunal orders:

NX's claims against B Association Ltd and JE are dismissed.

REASONS

Brief Details of Claims

1. On 16 October 2022, NX purchased a [vehicle] for \$10,500 from JE, in a private sale. Prior to purchase, NX arranged for a pre-purchase inspection by [B Association Ltd]
2. Five months later, the vehicle engine overheated. NX had the vehicle inspected by two mechanics at separate garages. The diagnosis is a suspected blown head gasket, with the possibility of a cracked head. NX provided an estimate from [Mechanic] for \$8,023.23 for repairs.
3. NX has combined two separate claims in the one application., seeking \$10,500. From JE, NX seeks a refund of the purchase price on the basis that the condition of the vehicle was misrepresented. From B Association Ltd JE seeks compensation for failure to properly carry out the pre-purchase inspection.

Issues

4. The issues for the Tribunal to determine are:

The claim against JE

- (a) Whether JE misrepresented the condition of the vehicle in respect of the cooling system;
- (b) If so, whether NX is entitled to compensation and if so, how much.

The claim against B Association Ltd

- (c) Whether B Association Ltd has failed to carry out its inspection of the cooling system with reasonable care and skill;
- (d) If so, the remedy NX is entitled to.

Did JE misrepresent the condition of the vehicle in respect of the cooling system?

5. The ordinary law of contract applies to private sales. Part of the law of contract is the law of misrepresentation, which provides a remedy for a buyer if a seller makes a misrepresentation about an item being sold.
6. A misrepresentation is: a statement of fact; made by one contracting party to another; before or at the time the contract is formed; that the purchaser relies on in entering into the contract; and which proves to be wrong. If a misrepresentation is proved, the purchaser is entitled to a remedy, whether the misrepresentation was made innocently or deliberately.
7. The onus to prove a claim lies with an applicant. The standard of proof in the Tribunal is “the balance of probabilities”. That means that NX must prove it is more likely than not that JE misrepresented the condition of the vehicle. There must be more certainty than doubt.
8. I find that NX has not proved that JE misrepresented the condition of the vehicle for the following reasons:
 - (a) While it may look suspicious that the advertisement included the phrase “hasn’t been hot or anything like that”, when engine overheating is the very problem NX has experienced, JE’s explanation for including that phrase in the advertisement is plausible. In the advertisement, NX had listed the work he done on the vehicle which included a new thermostat and new radiator hoses. JE said that the obvious question in a prospective purchaser’s mind would be had the vehicle overheated, so he included the phrase “hasn’t been hot or anything like that”. JE, who is himself a mechanic, said he replaced these items as a precaution as he had intended to use the vehicle to tow his boat.
 - (b) NX claimed, on advice from BD [(Mechanic)], that there was a product known as Stop Leak in the coolant, which NX believes was in the coolant when the vehicle was sold to him. BD gave evidence to the Tribunal. He confirmed he believed the grey substance in the coolant to be Stop Leak. However, UH [(Mechanic 2)] who was the second mechanic NX had engaged to examine the engine, also gave evidence. UH said he believed that, based on its blackish colour, the substance in the coolant to be oil. There is insufficient certainty about what substance was in the coolant.
 - (c) The evidence supplied to the Tribunal by B Association Ltd is that B Association Ltd’s inspector inspected the coolant, performed a coolant concentrate test as well as pressurized the cooling system to check for any pressure drop. It seems to me that if the greyish/blackish substance had been in the coolant at the time of the B Association Ltd inspection, the inspector would have seen it, and apparently, he did not. JE said he did not put Stop Leak into the cooling system. There is insufficient evidence to prove to me that there was a Stop Leak product in the coolant at the time of sale.
 - (d) The other significant factor is that the vehicle engine did not overheat until 5 months, and at least 2,800 km, after purchase. With that passage of time and travel distance, it is difficult to link the engine overheating problem experienced by NX to an alleged misrepresentation by JE.
9. Because NX has not proved any misrepresentation by JE, the claim against JE is dismissed.

Did B Association Ltd fail to carry out its inspection with reasonable care and skill?

10. The Consumer Guarantees Act applies to the contract with B Association Ltd. There is a guarantee in the CGA that a supplier of a service must carry out the service with reasonable care and skill. That means the reasonable care and reasonable skill of a competent person in the trade.
11. NX claims that B Association Ltd did not properly test the cooling system.
12. I find no failure by B Association Ltd to carry out its inspection with reasonable care and skill for the following reasons:
 - (a) The B Association Ltd report shows that a crankcase blow by test was carried out. BD [(Mechanic)] said that the blow by test does not test the cooling system for any leaks. BD has noted that there is no report on antifreeze in which the grey coloured solution would have been

noticed. He also noted there was no tee-kay test, which is used to detect any engine combustion gases in the coolant. However, I am satisfied that the B Association Ltd inspector did "inspect the coolant level, performed a coolant concentrate test, and pressurized the cooling system to check for any pressure drop which could indicate an internal or external leak and none was detected".

- (b) Although a tee-kay test was not carried out by the B Association Ltd inspector, the inspector carried out other checks on the cooling system. Methods of inspecting a vehicle are likely to vary to some extent between providers of such a service.
- (c) Furthermore, given the passage of time (5 months) and travel (2,800km) it is not possible to say with any certainty that there would have been any combustion gases in the coolant at the time of the B Association Ltd inspection. There is a reasonable likelihood that the failure that has caused the engine to overheat during NX's period of ownership has occurred after sale to NX.
- (d) For the above reasons, I find no proven failure by B Association Ltd to carry out its inspection with reasonable care and skill.

13. Because NX has not proved any failure on the part of B Association Ltd, the claim against B Association Ltd is dismissed.

Referee: J.F. Tunnicliffe

Date: 15 August 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>.