



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 767

APPLICANT **OC**

RESPONDENT **NQ**

The Tribunal orders:

NQ is to pay OC \$4,304.74 by Monday 22 January 2024.

Reasons

1. OC lives in [Country] and was going to holiday in New Zealand so was looking for a van which was converted into a campervan. Before he arrived in New Zealand he contacted people who have advertised such vans for sale on [social media application]. He contacted NQ by [messaging application] asking if he had any vans “ready to go”.
2. OC purchased a [redacted] campervan in [City 1] from NQ for \$9,250.00. On the day of purchase, he drove to North to the [Region]. A few days later he was driving South from [City 2] to [City 3] and says his engine blew up when he was driving past [City 4].
3. Repairs were done at a cost totalling \$4,304.74.
4. OC sold the van for \$9,500.00 with his camping equipment hence it was more than what he purchased it for.

Was NQ a motor vehicle trader?

5. NQ says he is not a motor vehicle trader. He says he was selling the van “on behalf” of someone else and the van “was owned and sold privately with no promises/warranties applicable to the sale.” NQ also says he sells the vans as a hobby.
6. However, based on the sale and purchase agreement I am satisfied that NQ was not selling on behalf. He is recorded as the seller and gave certain certifications as the seller. In any event even if he was selling on behalf of someone else the Motor Vehicle Sales Act 2003 (MVSA) defines “*motor vehicle trading*” as being:

the sale of motor vehicles by a person (whether or not the person is a principal or agent)

Therefore, even if NQ was selling on behalf (which I have determined he wasn't) he would have been selling as a principal (assuming he was otherwise selling as a motor vehicle trader).

7. Under the MVSA, a person (X) is treated as carrying on the being of a motor vehicle trading (and is therefore a motor vehicle trader for the purposes of the MVSA) if:
 - a. X holds out that it is carrying on the business of motor vehicle trading; or
 - b. In a specified period (of 12 consecutive months), X sells more than 6 motor vehicles, unless X proves that those vehicles were not sold for the primary purpose of gain.
8. OC said he could find 5 cars being sold by NQ between November and January, being 3 on [social media application] and another 2 on [messaging application] from the exchanges. I note his evidence supports this. NQ says it was 4 cars because one of the cars mentioned on the [messaging application] exchanges was also on [social media application].
9. OC's van was not advertised on [social media application]. That does not matter for the purposes of determining if NQ was a motor vehicle trader. I note OC contacted NQ through [messaging application] asking if any vans were available. At the time the van was getting a service and other thing done. It is likely there were other van's that were to be sold once completed on [social media application] or by some other means. It is more likely than not therefore that NQ would have sold more than 6 vans within a 12-month period
10. I note (as mentioned by OC and confirmed by NQ) D Ltd (for which NQ was the sole director and shareholder) was trading in the campervan business from December 2017 to June 2021. That company was removed from the Companies Register in June 2021 and its motor vehicle traders' registration expired on 12 Dec 2020. NQ did not have an individual registration.
11. Even if NQ sold less than 6 vans, I find that he held out to OC he was carrying on business (see paragraph 7a.). It was not a hobby as NQ maintains. I refer to the exchanges on [messaging application] and in particular it refer to the message which says "...I will be at our companies workshop and can check with him if he has cost or time of changing it.
12. I conclude for the reasons above that it is more likely that not that NQ was a motor vehicle trader at the time he sold the van to OC.

Was the van of acceptable quality under the Consumer Guarantees Act

13. Having determined on balance that NQ was a motor vehicle trader I then must determine whether the van was of acceptable quality for the purposes of s 6 of the Consumer Guarantees Act 1993 (the CGA).
14. Section 6(1) of the CGA provides that "where goods are supplied to a consumer there is a guarantee that the goods are of acceptable quality". "Acceptable quality" is defined in s 7 of the CGA (as far as is relevant) as follows:

Meaning of acceptable quality

- (1) For the purposes of section 6, goods are of acceptable quality if they are as—
- (a) fit for all the purposes for which goods of the type in question are commonly supplied; and
 - (b) acceptable in appearance and finish; and
 - (c) free from minor defects; and
 - (d) safe; and
 - (e) durable,—
- as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to—
- (f) the nature of the goods:
 - (g) the price (where relevant):
 - (h) any statements made about the goods on any packaging or label on the goods:
 - (ha) the nature of the supplier and the context in which the supplier supplies the goods:

- (i) any representation made about the goods by the supplier or the manufacturer:
- (j) all other relevant circumstances of the supply of the goods.

[8] Whether a vehicle is of acceptable quality is considered from the point of view of a reasonable consumer who is fully acquainted with the state and condition of the vehicle, including any hidden defects

15. At the last hearing I spoke with E of [Mechanic Shop 1] and B of [Mechanic Shop 2]. I summarise their comments below:

- a. E said the van overheated when going to [City 4]. He said the saw leaks from the radiator and there were bolts missing which meant the engine had work done on it before. He said a lot of stuff had not been put back properly on the engine. These are also referred to in the notes in [Mechanic Shop 1]'s invoice.
- b. B said there was overheating. He checked the system and it was not pressurising which would normally be because of a faulty radiator cap. He said there was something wrong with the radiator cap as it had wire/staple put in which stopped the cooling system from doing its job. I asked why someone would put a wire/staple in. He said on a normal test drive the cooling system can still operate as there would be no stress because it is not pressurised during a normal test drive. He says once pressurised that would show that there was a problem. He thinks someone put the wire/staple in so it wouldn't show a fault on a test drive.

16. Clearly there were issues. I cannot determine if NQ was privy to the issues before the van was sold to OC. However, I don't need to as it is not relevant. Under the CGA a trader selling goods must ensure the goods are of acceptable quality bearing in mind the nature of the goods/supply of the goods and price. The van was sold as a campervan so it was clearly going to do reasonably high kilometres over a short period (compared to someone using it to travel for work purposes).

17. For the reasons above, I find the van was not of acceptable quality for the purposes of the CGA.

Were the issues of "substantial character"?

- 18. Under the CGA, where goods supplied to a consumer fails to comply with a guarantee, if it can be remedied, the supplier is required to remedy the failure within a reasonable time. However, this does not apply where the breach of a guarantee is one of 'substantial character'.
- 19. The definition of 'a failure of substantial character' under the CGA includes situations where the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure.
- 20. I find on all the evidence there was failure of substantial character by NQ. OC would not have acquired the van if he knew the resulting nature and extent of the breach.

Did NQ misrepresent the van?

- 21. I have determined that NQ was a motor vehicle trader and there must comply with the guarantees under the CGA. However even assuming he wasn't a motor vehicle trader my comments below are relevant.
- 22. A contract is a binding commitment formed by an offer made by one party and a subsequent acceptance by the other party. There is a well-known principle of contract law which is "caveat emptor" or "let the buyer beware". This implies that the buyer must be cautious, as the risk of the sale is his/hers and not that of the seller.

23. However, the Contract and Commercial Law Act 2017 qualifies that principle and sets out the law governing misrepresentation which applies to contracts (whether or not the person is selling in trade or privately). A misrepresentation is a false statement of fact (not opinion) which is made before or at the time the contract is made and which induces a person to enter into that contract. It does not have to be an intentionally false statement of fact. A seller does not need to disclose any or all defects about an item. However, if the item has a known or suspected defect, the seller cannot make a statement of fact that suggests otherwise. This applies even if the goods are sold on an “as is/where is basis” (which it was not even though NQ said it was – there is no such wording in the agreement).
24. A person who enters into a contract based on a misrepresentation may be entitled to cancel the contract or claim compensation depending upon how significant the misrepresentation is.
25. OC says he was told by NQ that the van was mechanically safe and sound. At an earlier hearing on 23 August, I asked NQ what he said to OC about the car before he purchased it. He said there was a new radiator, service and wheel alignment. He also said *most probably he would have said that it was in good mechanical condition*.
26. I note what he said in his email to the Tribunal in his later email dated 17 November that he didn't say anything about the mechanical condition of the van. He said at the last hearing that the 3 advertisements say nothing about those vans being in good condition mechanically. I note that OC's van was not advertised on [social media platform] anyway. Further even though an advertisement might not say anything and the mechanical condition a seller might later make verbal representation that it was in good mechanical condition.
27. I find it is more likely that not NQ did say the van was “mechanically safe and sound” as OC says, particularly given NQ's conflicting statements.

What remedy is available?

28. Repairs were done at a cost totalling \$4,304.74. This was \$4,174.24 charged by [Mechanic Shop 1] (which included fitting a second hand engine and removing the radiator and cleaning and fitting new top tank). \$130.00 was charged by [Mechanic Shop 3] which was earlier in the trip. This was because there was a bubbling sound and it transpired the coolant liquid was boiling. [Mechanic Shop 3] found a leak in the hose which was repaired.
29. Accordingly, NQ must pay OC \$4,304.74.

Referee: Ms Gayatri Jaduram
Date: 20 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>.