



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1349

APPLICANT **RK**

RESPONDENT **KS**

The Tribunal orders:

The claim is dismissed.

Reasons:

1. RK purchased a jetski from KS via Facebook marketplace. She did not test run the jetski in the water prior to purchase but took it out on the water with her partner a few days after collection. Once the motor had warmed up, they tried to give it some throttle and it made a whining noise and lost its jet power. RK has since been advised that the crankshaft is faulty and will need to be replaced and that it must have been faulty at the point of sale. RK seeks a refund of the purchase price.
2. RK claims \$6,000.00 from KS in relation to the purchase.
3. The issues to be determined are:
 - a) Was a misrepresentation made in the sale of the jetski?
 - b) Is RK entitled to the sum claimed?

Was a misrepresentation made in the sale of the jetski?

4. The starting point is the principle of caveat emptor, or 'buyer beware'. The general position is that the buyer must be responsible for his or her own purchasing decision.
5. It is also the sale of a good, made in the context of a private sale. KS is not in trade and sold the jetski privately.
6. Where goods are sold by a seller in trade, there are implied conditions, such as those relating to the goods being reasonably fit for purpose. However, there are otherwise no implied warranties or conditions as to the quality or fitness of goods sold (s 137, Contract and Commercial Law Act 2017 (**CCLA**)). These provisions then reinforce the position of buyer beware in private sales, except in limited circumstances.
7. There is, however, relief available for a buyer of a good in a private sale when a misrepresentation is made in the process of the contract being formed. Under section 35 of the CCLA when someone has been induced to enter a contract by a misrepresentation, whether innocent or

fraudulent, that person is entitled to damages as if the representation were a term of the contract that has been breached.

8. A misrepresentation must be untrue and a statement of past or present fact. It may be made by a party to the contract, or by someone else on behalf of a party to the contract.
9. It is not enough for a party to say that a representation caused him or her to act in a particular way. They must also show either that the person making the representation intended him or her to act that way, or wilfully used language to induce a normal person in the circumstances to act that way (here, to make the purchase) (*Savill v NZI Finance Ltd* [1990] 3 NZLR 135).
10. Therefore, RK must show that it is more likely than not that an untrue statement induced her to make the purchase, and that KS intended for her to respond in that way to the representation.
11. The advert for the jetski read as follows:

“Just testing the waters. Keen for swaps for atv/cash my way or 6000\$ firm. Used about 8 times myself since owned. Trailer has brand new warrant, lights and bearings replaced, Rego til next year. 207hrs has had rebuild from previous owner and serviced as he was a boat mechanic, next service due 230hrs. Gets upto 90 – 100 km not supercharged 2 stroke.”
12. There is no statement in the advert about the condition or quality of the jetski, nor regarding its working order. Therefore, I am satisfied that there was no misrepresentation made in the advertisement for the sale of the jetski.
13. RK says that when KS showed her the jetski he said it worked really well and was in good working condition. KS could not recall whether that was said, but he says he hadn't had any problems with the jetski and didn't think it was faulty when he sold it.
14. KS says he ran the jetski with water running through it for 30 minutes before RK arrived to ensure it was running properly.
15. RK brought along a witness, TU, who had previously worked as a marine engineer and had significant knowledge of jetski engines. TU advised that the drive shaft, which connects the engine and the jet drive, was faulty. He said it would not have been possible to detect this fault without running the jetski in the water – it would only come to light when submersed and when throttle was applied.
16. TU's evidence is that the crankshaft has been stripped and needs to be replaced. RK supplied a quote to fix the crankshaft of \$5,674.08, being close to the sum paid for the jetski.
17. TU said that there were two things that were most likely to cause the fault. The first was a ski rope getting caught around the crankshaft, the second was lack of regular servicing. KS gave evidence that he had not towed with the jetski. RK likewise gave evidence that she had not attached a ski rope to the jetski in the brief time she had it on the water.
18. Therefore, the most likely cause of the fault, according to RK's witness, is a lack of regular servicing.
19. That is relevant because KS says he told RK that he had not serviced the jetski. The reason being that he had done so few hours over the period that he had owned it that it was still not due a service in terms of hours on the water.
20. KS says he hadn't used the jetski for 8 – 9 months prior to the sale (since the previous summer) and it had been sitting in his shed. In the communications prior to the purchase he had said that he needed to charge the battery. He says he had only done 16 hours on the clock since owning the jetski, and most of those were maintenance or warming it up, with only approximately 8 hours of time in the water.

21. KS says he told RK at the time of the sale that he had not used the jetski on the water for a long time and had not serviced it. RK did not dispute that this was said.
22. TU gave evidence that if the jet drive was not regularly serviced, it would tend to wear. Therefore, a lack of servicing, which was disclosed to RK, relates directly to the latent defect that was later discovered.
23. Due to the limited nature of the representations made by KS in relation to the condition of the jetski and the disclosure in relation to the lack of use and servicing of the jetski, I am satisfied that KS did not make a misrepresentation with the intention of making RK purchase the jetski.
24. I therefore find that KS did not make a misrepresentation in the sale of the jetski.

Is RK entitled to the sum claimed?

25. As I have found that no misrepresentation was made in the sale, there is no corresponding entitlement to receive damages (compensation) for the faulty jetski.
26. I therefore find that RK is not entitled to the sum claimed.
27. For these reasons, the claim is dismissed.

Referee: T Baker
Date: 20 April 2021



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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside 20 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>.