



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1351

APPLICANT TX

RESPONDENT OI

The Tribunal orders:

OI is to pay TX \$7,100.00 on or before Wednesday 5 May 2021.

Reasons:

1. TX purchased a 2006 Toyota Prado from OI via Facebook marketplace. An advert for the vehicle said it was reliable and ran well. On the day of purchase, the vehicle ran hot. TX found that the pressure cap for the radiator reservoir was off. The cap was replaced, and she assumed that must have been responsible for the overheating. The vehicle was only used for short trips in the week that followed before being taken for a day trip, when the car again overheated. TX was then advised that the head gasket had blown, and the engine would need to be replaced. TX seeks a refund of the purchase price.
2. TX claims \$10,000.00 from OI in relation to the vehicle purchase.
3. OI was not able to attend the hearing due to a serious and last minute family illness in Wellington. A representative, DY, was approved to appear on her behalf, with the consent of TX. OI provided a written statement and a supporting statement from her mechanic.
4. The issues to be determined are:
 - a) Was a misrepresentation made in the sale of the vehicle?
 - b) Is TX entitled to the sum claimed?

Was a misrepresentation made in the sale of the vehicle?

5. 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.
6. It is also the sale of a good, made in the context of a private sale. OI is not in trade and sold the car privately.
7. 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.

8. However, there is 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.
9. 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.
10. Therefore, TX must show that it is more likely than not that an untrue statement induced her to make the purchase.
11. The Toyota Prado was listed under the Facebook profile of KZ, OI's husband. The advert stated, "It has been well serviced and goes very well...the interior and exterior I consider as being rough...price reflects this...So this is a bargain if you want a reliable modern looking landcruiser and not fussed about it looking mint."
12. TX says she met with KZ and viewed the vehicle with her husband. TX says that KZ stated that the car was rough on the outside but mechanically sound, and that it "goes very well". TX took the car for a test drive at the initial inspection.
13. TX agreed to buy the car for the purchase price of \$9,500.00 and says she was convinced by the statements that the car ran well.
14. TX collected the car on 5 August 2020 and drove it home approximately 70km from Hikurangi to Kaikohe. Later the same day she drove the vehicle a few minutes down the road and the temperature gauge rose quickly. She and her husband messaged KZ and communicated the problem, and he expressed surprise at the issue. NX and TX then identified that the pressure cap for the radiator reservoir was off. They screwed that back on and believed they had identified and rectified the cause of the overheating issue. They purchased coolant and the car seemed to work fine the next day. During the following week, the vehicle was used for short trips to and from work without any further problems.
15. On 11 August 2020 they took the vehicle for a longer trip: Kaikohe to Kerikeri, Kerikeri to Paihia and then from Paihia to Kaikohe. Approximately 5 minutes before reaching home the gauge started to rise quickly. They pulled the vehicle over and then proceeded to crawl home at a slow pace. TX then took the vehicle to a mechanic. The mechanic advised TX that it was suspected that the head gasket had blown and the best option was to replace the engine.
16. The written statement from OI does not deny the representations that TX says were made during the sale. On OI's behalf, those statements were accepted by DY. He says that OI maintains that the vehicle was in good condition, regularly serviced with no mechanical issues at the point of sale. Her mechanic has provided a statement that he saw the vehicle a few weeks prior to the sale and it was in good mechanical order.
17. There was reference in the communication to the radiator being nearly new. This was not explained during the hearing. It could indicate that there was a prior heating issue and that was why the radiator was replaced, or the replacement might be unconnected to the heating issue.
18. DY stated that the overflow cap being off would not have been related to the overheating. His position was in relation to the reasonableness of the assumption by TX that the issue had been resolved by replacing the cap. Equally, it would support that TX had not caused the overheating problem by driving with the cap off.

19. Since the overheating problem arose on the day of the purchase, I find that it is more likely than not that there was a latent defect in the vehicle at the time of the sale.
20. The statements that the car was reliable, mechanically sound and went well were therefore untrue statements that were made on behalf of OI as a party to the contract. It does not matter that KZ and OI may have believed those statements to be true at the time. An innocent misrepresentation is still a misrepresentation.
21. Those untrue statements induced TX to purchase the vehicle.
22. I am therefore satisfied that a misrepresentation was made in the sale of the vehicle.

Is TX entitled to the sum claimed?

23. The provisions in the CCLA and common law relating to sale of goods apply when a misrepresentation is made in the sale (ss 59(1)(e) and 201 CCLA; *Crumphall v Wala* [1994] 2 NZLR 331).
24. Under the sale of goods provisions, there is no right to reject the goods after they have been accepted (ss 133(2) and 195(2) CCLA; *Finch Motors Ltd v Quinn (No2)* (1980) 2 NZLR 519). Likewise, the remedy for a misrepresentation is damages (i.e. compensation/compensatory restitution). This means that this is not a situation where the buyer can cancel the contract or return the goods for a refund. The only remedy or avenue available to the victim of a misrepresentation is to seek damages for the loss he or she has suffered.
25. Section 35 of the CCLA confers an entitlement to damages to be paid by the other party to the contract as if the representation were a term of the contract that had been broken. That is ordinarily the sum required to put the buyer back into the position he or she would have been in had the representation been true.
26. OI's representative, DY, says that TX should not have continued to drive the car after the first heating warning the day it was purchased. He noted that a text from KZ had recommended that she take the car to the mechanic. However, the wording of that text was more of a question rather than a recommendation, "Do you live near a mechanic?". Also, it was after this communication that it was realised that the pressure cap was off, and NX and TX believed the cause of the problem had been rectified.
27. DY, for OI, also did not accept that it was reasonable to think that the cap for the reservoir would be the cause of the problem. TX said that neither she nor her husband knew much about cars. It is difficult to gauge what should be expected of a reasonable person in terms of mechanical knowledge. However, it does not seem to be unreasonable for NX and TX to believe that the overflow cap may have been the cause of the initial heating problem when screwing the cap back in place appeared to have fixed the problem and the car ran well in the following days.
28. DY says OI was denied the opportunity to identify and rectify the problem at an earlier stage when it might have been possible to locate and fix the problem without further expense. Because TX continued to drive the vehicle, the problem was exacerbated. It appears that TX continued to drive the car because she was not fully aware of the fault with the vehicle until it was too late (it ran well for the short trips in the week after purchase).
29. The mechanic for TX said that "Aerated fluid keeps coming up so highly suspect a blown head gasket is pressurizing the radiator and pushing fluid out." It was recommended that the engine be replaced.
30. DY noted that the mechanics that had diagnosed the issue were called panel beaters. It was confirmed that they were certified mechanics. The mechanic gave evidence that he could not confirm the head gasket was blown without pulling the engine apart, but said the head gasket was the only place the pressure could come from. Without sending it away to be stripped down for further inspection, it was not possible to properly diagnose the issue.

31. It is not ideal that it was not sent away so that the cylinder head could be removed for further inspection. It is accepted that there is limited information available to identify the cause of the overheating.
32. TX says when she first raised the issues regarding the vehicle with OI it was in the spirit of compromise and at a time when she had more financial ability to address the problem. However, there was little response to her communications at that time. TX gave evidence that her financial situation is now such that she simply is not able to pay for further investigation into the mechanical issues. DY, for OI, also declined to pay for such an assessment.
33. Therefore, the determination must be made on the evidence before me.
34. The mechanic has advised that a new engine is required. TX obtained two quotes for a new engine, being 6,894.25 and \$7,331.25 respectively. The median of those prices is approximately \$7,100.00.
35. TX obtained such evidence as she believed might be necessary to show that a serious defect existed. That consisted of the mechanic's initial assessment and quotes for a replacement engine. Had she been entitled to return the vehicle for a refund, she would not have needed to be concerned with other costs required to rectify the defect. The quotes obtained therefore do not cover installation of the new engine and towing the vehicle (it is no longer running).
36. As these costs are not proven, the damages are limited to the cost of the replacement engine.
37. This is a very unfortunate situation for both parties. TX has only had use of the vehicle for one week and has now not been able to drive it for 8 months. She also has not had the use of the money she paid for the car (and indeed will have been paying interest on the finance for the vehicle).
38. OI did not get to inspect the problem with the car following the earlier indication that there was an issue, has limited information on the cause of the failure, and says the car had always run well.
39. However, as I have found that there was a latent defect in the car that caused the over heating and that untrue statements were therefore made, even if innocently, at the time of the sale, TX has a right to damages due to the misrepresentation in the sale.
40. The median price of the replacement engine is the only costing before me and so that is the basis for my determination on the sum required to put TX back into the position she would have been if the representation had been true.
41. For these reasons, I find that OI is to pay TX \$7,100.00 by the date stated in this order.

Referee: T Baker
Date: 19 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 of 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>.