IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CIV-2018-057-000114
[2018] NZDC 23929

BETWEEN	OAKLAND WHOLESALE LIMITED Appellant
AND	GEORGE O'BYRNE Respondent

Hearing: 6 August 2018

Appearances: Applicant – Self Represented
Respondent – Self Represented

Judgment: 21 November 2018

RESERVED DECISION OF JUDGE P RECORDON

---

[1] The sale of a motor vehicle has always carried with it particular potential difficulties. Who, amongst us is mechanic enough to detect all but the simple and obvious issues. Or who, amongst us has the will and ability to cover up and hide mechanical defects?

[2] Motor vehicle dealers have rules and governing bodies designed to protect the buyer. Prices can be higher with dealers than where no dealer is involved, but for those less able to tell a good motor from a faulty one, there is some protection for the buyer if, indeed, the motor vehicle turns out to be a lemon.

[3] This is an appeal from a Motor Vehicle Disputes Tribunal decision on 21 December 2017. The hearing was before Mr B. R. Carter as adjudicator and Mr S. Gregory as assessor (non legal 'expert'). Mr O'Byrne, the purchaser, appeared before me on 6 August 2018, by telephone, and at the first hearing, via video link.

[4] The Tribunal relied on the legal principles of the Fair Trading Act 1986 (FTA) and the Consumer Guarantees Act 1993 (CGA). The maxim of "caveat emptor" – let the buyer beware was referred to as having been replaced in the situation of our parties, by the two named Acts. The Tribunal found that the buyer had been misled into flying to Auckland from Wellington and that no mention of problems with the car's clutch was made until the buyer arrived in Tuakau, without a return ticket to Wellington. The Tribunal found that the buyer would not have travelled to Tuakau had he had notice of the faulty clutch with the inquiries he would have made regarding the potential costs of a new clutch would have steered him away from a purchase. This, notwithstanding, they said, that on arrival at Tuakau and with fresh knowledge of the clutch issues, he proceeded to buy the car, drove to Wellington and drove the car for 42 days before a failed warrant on grounds of faulty clutch alerted him to the extent of the clutch issues and led him to the Tribunal.

[5] Oakland Wholesale Limited (OWL) was ordered to pay $2,684 to Mr O'Byrne and after receipt of that amount, the car was to be uplifted by OWL. The Act forming the basis for the claim was the Fair Trading Act 1986.

[6] In his appeal papers Mr Wilson, of OWL, says that:

> It was strongly indicated in the Tribunal hearing that the appellant did not have any grounds under the Fair Trading Act and that appellant (OWL) would have grounds to appeal under the Consumer Guarantees Act. After hearing this from the adjudicator, I presented my case based on the Consumer Guarantees Act. Given the adjudicator said he was looking at this case based on the Consumer Guarantees Act, I was not allowed the opportunity to present my defence in relation to the Fair Trading Act, which is unfair and strongly affected the outcome of the case given I had no opportunity.
>
> The hearing was run under a pretence that a decision was to be made based upon whether or not I had met my responsibilities under the Consumer Guarantees Act. The pretence was made clear by the adjudicator, he even stated such.
>
> Had the hearing been run in a manner where the adjudicator had said he will be making his decision based on the Fair Trading Act, I would not have presented my case. To have the decision judges against me under the Fair Trading Act is unfair, given the nature of the hearing and what was said by the adjudicator. It is unfair I had no opportunity to present my case, as I was led to believe that this was not a relevant act, and the Consumer Guarantees was. I request a fair hearing where I am given a fair opportunity to present my defence against the Fair Trading Act.

[7] An appeal under rule 18.19 of the District Court Rules 2014 is a rehearing except where an empowering statute states that an appeal is to be other than by way of rehearing. The Motor Vehicle Tribunal is set up under the Motor Vehicle Sales Act 2003.

[8] Under schedule 1, s 16 of the Act stipulates how an appeal from the Tribunal to the District Court can take place. If the amount of the claim does not exceed $12, 500, as is the case here, the appeal can be brought on the single ground that the proceedings conducted by the Tribunal were unfair to the appellant and prejudicially affected the result of the proceedings. Schedule 1, s 16(4) provides:

> For the purposes of this section, the Disputes Tribunal is taken to have conducted the proceedings in a manner that was unfair to the appellant and prejudicially affected the result if—
>
> (a) the Disputes Tribunal fails to have regard to any provision of any enactment that is brought to the attention of the Disputes Tribunal at the hearing; and
>
> (b) as a result of that failure, the result of the proceedings is unfair to the appellant.

[9] The scope of the appeal, for claims under $12,500, is strictly limited to cases of procedural unfairness.

[10] Similar to the Disputes Tribunal, the right of appeal from the Motor Vehicle Disputes Tribunal is on very limited grounds where there has been procedural unfairness and this prejudicially affected the result.

[11] Mr Walker said he did not know until shortly before Mr O'Byrne arrived at Tuakau that the clutch had an issue. He said he had driven the car around and "did not pick up" on the issue, the air conditioning was faulty but it was generally "an okay car" and the price of $2,000 was at the lower end as he wanted to clear it out of his yard. Mr O'Byrne, Mr Wilson says, "spotted a bargain" on Trade Me and sought to profit from this,

[12] Mr Wilson's mechanic told Mr Wilson the clutch was "tired but had life in it". He said Mr O'Byrne was told this when he arrived at Tuakau and paid for the car, and drove it away. Had he protested, Mr Wilson said he would have taken him back to the

airport and refunded his travel costs, and paid for his flight back to Wellington. Mr O'Byrne did not test drive the car before buying it. He said that he felt, he had no choice but to drive it, faults and potential faults and all, back to Wellington as it was his only viable method of returning to his home town.

[13] Was there a breach of the FTA? Was disclosure given of faults sufficient under the CGA? Was the vendor 'misled' by the Tribunal re: the Act to be applied? Should the purchaser have decided otherwise than to buy the car after faults divulged and why was it 42 days before he complained? Is there another 'settlement' which might be fair to both? Was the quote obtained by Mr O'Byrne for another clutch reasonable and relevant?

[14] What we had, effectively, was a rehearing as both parties wanted to tell their stories. I did not have the benefit of an expert sitting alongside as Mr Carter had. That expert, would interpret phrases such as the clutch 'had a fair bit of life in it' (Mr Wilson's Mechanic's statement). What did this mean? That the clutch would last the journey to Wellington, 6 months, a year, or longer?

[15] I am limited by statute to the single ground that the proceedings conducted by the Tribunal were unfair to the appellant and prejudicially affected the result of the proceedings. I have a view based on what I have read and heard that a compromise settlement might have been fairer then the Tribunal's decision, but I cannot interfere unless I find unfairness affecting the result of the proceedings.

[16] The hearing that took place on 6 August 2018 was to ascertain whether procedural unfairness occurred in respect of the Tribunal decision and whether the applicant has a right to appeal that decision to the District Court.

[17] Evidence was heard from Mr Wilson, of OWL and Mr O'Byrne.

[18] Mr Wilson submitted that he had been directed by the adjudicator that the purchaser was unlikely to succeed under the FTA but had a stronger claim under the CGA. He says he therefore presented his defence in relation to the CGA. He argues that, to the contrary, the Tribunal made its final decision based on the FTA.

[19] On page 14, lines 5 and 27 of the transcript of the Tribunal hearing, the adjudicator states that the purchaser would struggle under the FTA and has a stronger argument under the CGA:

> Q. And he argues under two different Acts really as to why he ought- two different bits of law as to why he ought to be entitled to a refund. Firstly, he says he was misled by you, by your failure to disclose that the vehicle had a clutch fault. I think he'll struggle with that aspect of his claim and the reason is, even if you should have disclosed before he got on the plane to come to Auckland about the existence of an issue with the clutch, Mr O'Byrne says you did tell him before he paid the money that there was an issue with the clutch. So at the time he bought the vehicle he was aware of an issue with the clutch.

[20] The adjudicator then said to Mr O'Byrne:

> You'll struggle under the Fair Trading Act to prove that you've been misled on the point. I think your stronger point is under the Consumer Guarantees Act.

[21] However, the Adjudicator concluded clearly that he was going to consider the argument under both the FTA and the CGA, and from the transcript of the Tribunal hearing it seems clear to both parties that these are the two Acts being assessed. The adjudicator states in his concluding paragraph:

> I think I understand the matter here well and truly. What this is going to come down to, Mr O'Byrne is firstly, in relation to the Fair Trading Act side of things, it's going to come down to whether or not the- because a trader doesn't have an absolute obligation to disclose all faults for the vehicle, even if they do not know of those faults. So, what your Fair Trading Act claim will come down to is whether or not the trader was aware of an issue with the clutch...And in relation to the clutch, I will also need to take account of whether you became aware of that fault before you agreed to buy the car despite knowing the problem with the clutch.
>
> In relation to your Consumer Guarantees Act claim, what this will come down to is, firstly, whether this vehicle had a fault with its clutch when you bought it, because if it did, then you have a far stronger case. If the fault with the clutch didn't arise until sometime later, and perhaps, as Mr Wilson suggests 42 days later, then what I need to do is determine whether or not this vehicle has been durable as a reasonable consumer would expect, taking into account price, age an mileage….A reasonable consumer would expect that type of vehicle to be less durable than a more expensive later model vehicle.
>
> So, that's the analysis I'm going to have to conduct when I sit down to write a decision.

[22] To an extent, Mr Wilson may well have been misled into presenting his defence only in respect of the CGA and there may have been some unfairness. The adjudicator's conclusion suggests that both acts were a relevant consideration, and would be considered in his judgement. However, unfairness must also have prejudicially affected the Tribunal's decision.

[23] In *Sell Your Car Ltd v Ibrahim* the District Court stated:[1]

> [6] The most obvious example of procedural unfairness is not notifying a party of the date of the appeal and a decision may be given in the absence of that party. *Another example is if a party was unfairly prevented from presenting evidence to the tribunal which may have affected its decision.* Those are only examples of procedural unfairness and are not exhaustive but I can discern in this case no evidence of any procedural unfairness.

[24] In the case of Mr Wilson, even if he had presented a defence under the FTA, I have assessed that Mr Wilson nonetheless fails under the CGA, the claim having been brought under both Acts. The remedies available under the FTA and the CGA are very similar and consequently, the final order made against Mr Wilson would have been virtually identical. The unfairness would not have prejudicially affected the final decision of the Tribunal.

[25] I will set out my reasoning in relation to the CGA. The issue under the CGA arises in respect of whether disclosure of the faulty clutch was sufficient under s 7(2) and was therefore, not a breach of the "acceptable quality'' guarantee. The definition of "acceptable quality" in s 7 focuses on the quality of the goods and not the state of the mind of the supplier. It is therefore possible for goods to fail to meet the requirements of "acceptable quality" even if it can be shown that a supplier has taken all reasonable skill and care.

[26] It seems unlikely that a reasonable person in Mr O'Byrne's shoes, fully acquainted with the state and condition of the goods, that being a second hand vehicle, with hidden defects, being the defective clutch, would have found the vehicle acceptable quality as the cost of fixing the clutch far exceeds the price of the vehicle itself. Mr Wilson may have been able to find a clutch replacement at lesser cost then

[1] *Sell Your Car Ltd v Ibrahim* [2018] NZDC 5739 at [6].

Mr O'Byrne's quotes, as he said in evidence. This could have been part of a compromise but is now irrelevant to what I have to decide.

[27] Nonetheless, the car could be considered acceptable quality when having regard to the price of the car itself, if it was sufficiently priced to take account of the defective clutch. This is unlikely on the facts as Mr O'Byrne claims to not have known about the clutch issue until after agreement as to price was made. However, s 7(2) provides that where there is disclosure of defects to the consumer before agreement to supply, the goods will not fail to comply with the guarantee as to acceptable quality.

[28] Mr Wilson disclosed to Mr O'Byrne, upon his arrival to Tuakau, that he had recently been informed by his mechanic that the clutch was "tired but still had life in it". This indicates that the clutch would need repair in the future but would not pose any immediate problem. When looking at the context in which the transaction occurred, having travelled a distance with a one-way ticket, and the purpose of the CGA as well as the Motor Vehicle Sales Act 2003 which regulates the behaviour of motor vehicle traders, it seems that the disclosure was insufficient to enable the purchaser to understand the true nature of the clutch issue. Furthermore, at the time of disclosing the clutch issue no suggestion was made to seek independent advice.

[29] There are remedies available under both the FTA and the CGA. The Tribunal concluded that there was a breach of s 9 of the FTA and ordered under s 43 for the payment of $2,684 by OWL to Mr O'Byrne and for Mr O'Byrne to make the vehicle available for uplift. Under s 18 of the CGA, the appellant can be ordered to pay for the repair where the failure can be remedied or the goods can be rejected. The remedies available under the FTA and the CGA are very similar, if not the same.

[30] While there may have been some level of unfairness to Mr Wilson in the Tribunal hearing, it was not sufficient to prejudicially affect the outcome. If the appellant had successfully provided a defence to the FTA, he would have nonetheless failed under the CGA, and the result would have been the same.

[31] Appeals from the Tribunal are only allowed on the very limited ground of procedural unfairness. This limits the ability of this Court to provide a fairer outcome

in the present case and I acknowledge that there was no evidence of a direct intention to mislead or conduct in bad faith by the appellant. There are difficulties encountered in running a commercial operation involving the sale of used motor vehicles, there is a degree of unpredictability as not all defects can be known by the seller. Nonetheless, I cannot disturb the Tribunal's finding and the order stands.

P Recordon
District Court Judge