EDITORIAL NOTE: PERSONAL/COMMERCIAL DETAILS ONLY HAVE BEEN DELETED.

**IN THE DISTRICT COURT**
**AT DUNEDIN**

**CIV-2016-012-000500**
**[2017] NZDC 10758**

| | |
|---|---|
| BETWEEN | MCBRIDE STREET CARS LIMITED<br>Appellant |
| AND | STEPHEN LOACH<br>DIANE LOACH<br>Respondents |

Hearing: 13 February 2017

Appearances: L A Andersen for the Appellant
J J Y R Pierce for the Respondents

Judgment: 26 May 2017 at 3:45 PM

---

**RESERVED JUDGMENT OF JUDGE K J PHILLIPS**
**[On appeal pursuant to s 16 Motor Vehicle Sales Act 2013]**

---

## Background

[1] The appellant, McBride Street Cars Limited, appeals the decision of the Motor Vehicle Disputes Tribunal (the Tribunal) at Dunedin dated 14 December 2016. The decision of the Tribunal was in relation to an application made to the Tribunal by the abovenamed respondents, in relation to their purchase from the appellant of a 2013 Volkswagen Amarok motor vehicle, registration number [number plate details deleted](the vehicle). The basis of their application was the dispute between them over the purchase of the vehicle from the appellant. Their case was that it had not been disclosed to them by the appellant that the vehicle was one which Australian authorities had certified as a "statutory write-off vehicle because of storm and flood damage." The respondents' claim to the Tribunal was backed up by information supplied by them as part of their application but particularly in a detailed letter from them to the appellant dated 19 September 2016.

**The Decision**

[2] Following a hearing at Dunedin on 25 November 2016 the Tribunal released it decision on 14 December 2016 and found as follows:

(a) That Mr and Mrs Loach's vehicle offer and sale agreement (VOSA) with McBride Street Cars Limited dated 17 June 2016 to purchase a 2013 Volkswagen Amarok was declared to be void.

(b) That McBride Street Cars Limited was to immediately refund Mr and Mrs Loach the purchase price of $40,000 plus $57.50 for the cost of the report Mr and Mrs Loach obtained from Integrity Automatics.

(c) As soon as McBride Street Cars Limited had paid Mr and Mrs Loach the $40,057.50, it was to arrange to collect the vehicle at its expense.

**The Appeal**

[3] In its Notice of Appeal the appellant details the grounds of appeal as being:

(a) That it had fulfilled its legal obligations in advising the respondents that the vehicle was "imported as damaged" by noting the same on the Consumer Information Notice (CIN).

(b) That in the absence of any inquiry from the respondents, the appellant was under no duty to volunteer the information that the vehicle had been declared to be a statutory write-off in Australia.

(c) That the Tribunal had erred in determining that the non-disclosure by the appellant constituted misleading and deceptive conduct for the purpose of s 9 of the Fair Trading Act 1986 (FTA).

(d) That the Tribunal should not have relied on the case of *Fleetman Pty Ltd v Cairns Pty Ltd*[1] where it was held to be misleading or deceptive for a car dealer to use as a demonstrator a vehicle which was not the latest model because, in that case, the term "demonstrator" implied it was the latest model; whereas there was no behaviour by the appellant in this case that could be considered deceptive or misleading as there was nothing that detracted from the advice that the vehicle was "imported as damaged vehicle" or discouraged any enquiry from the purchaser as to the meaning of the words "imported as damaged vehicle" on the CIN.

(e) That as there was no misleading conduct, there was no proper basis for the Tribunal to declare the agreement void.

**Jurisdiction**

[4] This Court has jurisdiction to entertain an appeal from any decision of a Disputes Tribunal – s 82(4) Motor Vehicle Sales Act 2003 (MSVA) and cl 16 of Schedule 1 of the MSVA:

> **82 Motor Vehicle Disputes Tribunals**
>
> (1) The Minister must, by notice in the *Gazette*, establish 1 or more Motor Vehicle Disputes Tribunals for the purposes of this Act.
>
> (2) The Minister may—
>
> (a) give a distinctive name to each Disputes Tribunal; and
>
> (b) change that name.
>
> (3) Each Disputes Tribunal must consist of—
>
> (a) an adjudicator who must be a barrister or solicitor of the High Court of not less than 5 years' practice; and
>
> (b) an assessor appointed by the adjudicator for the purposes of each hearing from a panel maintained by the Minister under section 88.

[1] *Fleetman Pty Ltd v Cairns Pty Ltd* [2005] FCAFC 80.

(4) **The provisions of Schedule 1 apply to every Disputes Tribunal.** (emphasis added)

(5) …

**Schedule 1**

**16 Appeals from decision of Disputes Tribunal**

(1) Any party who is dissatisfied with a decision given by a Disputes Tribunal may, within 10 working days after notice of the decision is given to that party, appeal to a District Court Judge.

(2) If the amount of the claim exceeds $12,500, the appeal may be brought on either of the following grounds:

(a) that the Disputes Tribunal's decision was wrong in fact or law, or in both fact and law; or

(b) that the proceedings were conducted by the Disputes Tribunal in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.

(3) If the amount of the claim does not exceed $12,500, the appeal may be brought on the ground that the proceedings were conducted by the Disputes Tribunal in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.

(4) 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.

(5) The District Court's decision given under this clause is final.

(6) To avoid doubt, nothing in this clause affects the right of any person to apply, in accordance with law, for judicial review.

[5] Section 89(1) of the MVSA states:

(1) A Disputes Tribunal has jurisdiction, on the application of any party, to—

(a) inquire into and determine any application or claim, as the case may be, under any of the following Acts if that

application or claim is in respect of the sale of any motor vehicle:

(i) the Sale of Goods Act 1908:

(ii) the Fair Trading Act 1986:

(iii) the Consumer Guarantees Act 1993:

(iv) the Contractual Remedies Act 1979; and

(b) make any order that a court or a Disputes Tribunal constituted under the Disputes Tribunals Act 1988 may make under,—

(i) in the case of proceedings under the Sale of Goods Act 1908, section 53 of that Act; or

(ii) in the case of proceedings under the Fair Trading Act 1986, section 43(2) of that Act; or

(iii) in the case of proceedings under the Consumer Guarantees Act 1993, section 39 or 47 of that Act; or

(iv) in the case of proceedings under the Contractual Remedies Act 1979, section 9 of that Act.

**Appeal to the District Court**

[6] In terms of r 18.19 District Court Rules 2014 (DCR) the appeal is to be by way of rehearing. Rule 18.24 of the DCR states the powers of this Court on appeal:

(1) After hearing an appeal, the court may do any 1 or more of the following:

(a) make any decision it thinks should have been made:

(b) direct the decision-maker—

(i) to rehear the proceedings concerned; or

(ii) to consider or determine (whether for the first time or again) any matters the court directs; or

(iii) to enter judgment for any party to the proceedings the court directs:

(c) make any order the court thinks just, including any order as to costs.

(2) The court must state its reasons for giving a direction under subclause (1)(b).

(3) The court may give the decision-maker any direction it thinks fit relating to—

(a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.

(5) Even if an interlocutory or similar decision in the proceedings has not been appealed against, the court—

(a) may act under subclause (1); and

(b) may set the interlocutory or similar decision aside; and

(c) if it sets the interlocutory or similar decision aside, may make in its place any interlocutory or similar decision the decision-maker could have made.

(6) The powers given by this rule may be exercised in favour of a respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.

[7] This decision on appeal from the Tribunal is an appeal against the decision of a specialist body. I refer to Judge McElrea's decision in *Dallimore Motors Limited v Gourley.*[2] I refer to what the Judge said at p 6 of his decision. I adopt what the Judge said when adopting the position that appeals from the Tribunal are the type of appeal where, "… there is a greater reluctance to interfere with discretionary decisions made in the Tribunal below and emphasis is laid on the need to show the decision under appeal was wrong." Judge McElrea then went on to say at p 7:

> For my own part I consider that appeals arising from the Motor Vehicle Disputes Tribunal are probably of the second type. In coming to that conclusion I refer to r 560 [of the District Courts (now replaced by r 18.19)] already noted and also to what I previously said in the case of *Trenwith v Badiei*[3]:
>
> > This provision in the District Courts Rules is a new one adapted in 1992 from the High Court Rules (r 718) and was not considered in *Nelson Education Board* v *Williamson,* decided as it was in 1989. I consider that although r 560 is not entirely clear on the point, it does strongly suggest that the discretionary power to rehear the whole or any part of the evidence and to hear further evidence on questions of fact is supplementary to a consideration of the evidence given to the

---

2 *Dallimore Motors Ltd v Gourley* [1997] DCR 681.

3 *Trenwith v Badiei* [1006] DCR 9 at p 14.

> tribunal from which the appeal has come. However, r 560, on its terms, still leaves open the possibility that, as the learned President indicated in *Shotover Gorge Jet Boats*, it is nevertheless a "de novo" [appeal], which would include a full hearing of oral evidence if any party so insisted.
>
> The reason then that I come to the conclusion that this is an appeal of the second type (where the Court should be slow to disturb a discretionary decision) relies in part on terms of the statue and in part on the nature of the tribunal. I regard it as being a specialist tribunal comprising, in this case, a senior barrister as chairperson, supported by two members …

[8] In the present case the chairman adjudicator, Mr McHerron, is a barrister and Mr Dixon is an assessor. It is clear from the evidence that Mr Dixon has experience in relation to motor vehicles and similar such matters. He has a background in the industry. Accordingly this appeal will be approached on the basis that it is an appeal from a specialist tribunal and on that basis the Court has an overall reluctance to interfere with the discretionary decision made by the Tribunal. The Court will be slow to differ from the Tribunal on the facts. It will treat the findings of the Tribunal on this appeal as being from the exercise of a discretion.[4] This Court will deal with the appeal on the basis of evidence presented to the Tribunal and on the principles set out in *Austin, Nichols and Co Inc v Stichting Lodestar*:[5]

> (1) The appellant has the onus of satisfying this Court that it should differ from the Tribunal's decision;
>
> (2) That this Court should only interfere in the Tribunal's decision if it considers that the Tribunal's decision was wrong;
>
> (3) This Court may or may not find the reasoning of the Tribunal persuasive, for this Court has a responsibility of arriving at its own assessment on the merits of the case.

**The Transaction**

[9] The respondents entered into a VOSA to purchase the vehicle on 17 June 2016. The appellant, trading as "Tokyo Auto Town", was the vendor. The vehicle had 38,540 kilometres on its odometer. The purchase price was $40,000. The vehicle had been seen by the respondents advertised on Trade Me. It was taken for two test drives and it was inspected by another trader. The vehicle was described by

---

4 As per commentary in para 14.17.04(a), Lexis Nexis District Court Practice, Civil Jurisdiction (DCR 2009).

5 *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103.

Mr Loach, one of the respondents, as presenting "incredibly well". The respondents were aware at the time of purchase that the vehicle had been imported from Australia. It was common ground that there were no other discussions about the history of the vehicle.

[10] The appellant, through Mr Cottle, at the hearing told the Tribunal that a CIN was with the vehicle. Mr Cottle's evidence was that he had seen Mrs Loach, the other respondent, reading that CIN. The evidence of Mr Cottle was that he gave the CIN to Mr Loach, three to four minutes, before presenting him with the VOSA for signature. Contrary to this, Mr Loach's evidence was that he could not recall seeing the CIN before agreeing to purchase the vehicle and recollected that he was given a copy of the CIN after completing the transaction as he and his wife were leaving the appellant's yard in the vehicle.

[11] The issue about the CIN and the information contained in that document is an important element in relation to this appeal and I will come back to it. Again, it was common ground that the CIN, under a heading "Information about used imported vehicles" had the following information:

| | |
|---|---|
| Year first registered overseas: | 2013 |
| Country where last registered: | Australia |
| Imported as damaged vehicle: | The "Yes" box is ticked |

[12] The CIN is in a statutory form and has as part of the information a heading of, "If you buy this motor vehicle, the trader must give you a copy of this notice to keep." There is a heading, "Trader confirmation" where there is an acknowledgement from the trader that he has supplied a copy of the notice to the buyer including a copy of the information on the back of the CIN. That acknowledgement appears to be dated 17 June 2016. The corresponding box, "Buyer confirmation" is entirely blank. The respondents' evidence was that neither of them had been asked to sign the CIN.

[13] In the VOSA, in the small print, there is the following clause under the heading of "Purchaser's offer and agreement":

> 2. Supplier Information Notice ("SIN"): I acknowledge that I have been given a copy of the SIN displayed in the vehicle and that I have read, understood and accept the contents of the SIN (including the list of defects (if any) set out on the SIN.

[14] The appellant relies on this clause. Mr Andersen argues that the fact that Mr Loach, one of the respondents, signed the VOSA meant that the appellant had met the requirements to obtain the purchaser's acknowledgement of the pre-purchase receipt of the CIN.

[15] Although there will be further discussion in this decision in relation to the background and the regulatory control of required consumer information, the SIN requirement was replaced by a CIN requirement as long ago as April 2008. The then Minister of Consumer Affairs, Ms Tizard, advised that as from 1 July 2008 motor vehicle traders would need to complete and display the new 'CIN' when they were selling a used motor vehicle. The 'CIN' was to replace the 'SIN'. The Minister in her publicity on this change said that the change highlighted the fact that the information was meant for the consumer's consideration, and that motor vehicle traders and consumers would be required to sign the CIN which will draw attention to the information provided to consumers. The Minister went on to advise that:

> Consumer rights information on the back of the CIN has been revised to make it more readable. Information has been rearranged to bring attention to things consumers need to consider before the vehicle is purchased. Post sale advice is now also offered.
>
> "Buying a car is often one of the biggest purchases a consumer will make. They need accurate and easily understood information to help with their purchasing decision."

**The problems with the vehicle**

[16] In August 2016, some two months after purchasing the vehicle, noises from and shuddering of the vehicle's transmission were noticed. The advice then received in relation to this was that the vehicle should continue to be used to see if the fault persisted. In September 2016 upon returning the vehicle to the persons who had first advised the respondents about the issues with the vehicle, the inspector then noticed a shuddering when the vehicle's lock-up was engaged. There was a further report obtained which referred to "drive-line vibrations at 1500 rpms". By September 2016

the fault was much more apparent to the inspector. It was considered at that time that transmission fluid could have been contaminated by water and/or glycol. At that point in time the respondents made further enquiries about the history of the vehicle through the New Zealand Transport Agency (NZTA). On 13 September 2016 Mr Loach received advice from NZTA showing that the NZTA database information indicated the vehicle had been imported from Australia as a "statutory write-off" in the category of "storm, flood, other – written-off."

[17] This assessment had been completed in Queensland, Australia in May 2015. In June 2015 when the vehicle was auctioned in Australia the invoice described the vehicle as, "Statutory write-off, unable to be re-registered – water affected – mechanical issues." Mr Cottle told the Tribunal that when the vehicle was purchased for import he was aware it was a statutory write-off but that he did not know the precise reason why it had been written-off.

[18] The New Zealand border check in January 2016, when the vehicle was imported into New Zealand, recorded it as "damaged: storm, flood, other – written-off, QLD 06 May 2015, statutory write-off." Through the period January/February 2016 inspections were carried out by Vehicle Inspection New Zealand and Action Panelbeating. The records supplied to the Tribunal note that in March 2016, upon a visual inspection, no traces of water damage were found. There was a certificate from the light vehicle repair specialist inspector confirming that the repairs to the vehicle in relation to electrical components and SRS declaration had been completed in compliance with the Land Transport Rules: Vehicle Repair 1998. Although the NZTA reports noted that deviation in relation to the light vehicle repair certification was appropriate as an inspector had been able to establish that the vehicle had not been fully immersed in/or the composition of the water was unknown, the confirmation was that no vehicle with water damage may have the border flag lifted and said, "if this vehicle is an Australian statutory write-off it will remain listed as an Australian statutory write-off." Despite that, on 10 March 2016 an NZTA compliance certificate was issued in relation to the vehicle.

[19] Following on from September 2016 there was correspondence between the respondents and the appellant with the respondents advising the appellant that if they

had known that it was a damaged vehicle, let alone a written-off vehicle, they would never have knowingly purchased the vehicle. They sought a full refund of the purchase price. They made it very clear that the information that they had obtained from the NZTA had not been disclosed to them when they had purchased the vehicle.

[20] The response by the appellant was that they would repair the vehicle. The respondents decided not to allow that to occur. The respondents then applied to the Tribunal.

**The appellant's response**

[21] The appellant's position at the Tribunal was that the CIN stated that the vehicle was imported as a "damaged vehicle". Mr Cottle's evidence was that the respondents had seen that document prior to agreeing to purchase the vehicle. He disputed that he had misled the respondents. He did not consider he was under any obligation to disclose to the respondents that the vehicle was an Australian statutory write-off. He said that it was "not possible" to add additional information to the CIN as he was restricted from adding that detail to the form and that the respondents were responsible for ascertaining the history of the vehicle. They did not ask questions about the vehicle's history before purchasing it. If he had been asked whether it was a statutory write-off he would have told them. But they did not ask the question.

[22] The Tribunal found at para [58] of its decision that the respondents had not seen, "or did not absorb the information on the CIN prior to purchasing the vehicle." Further, the Tribunal at para [37] said:

> It was common ground that neither the box ticked "imported as damaged vehicle", nor the fact that the vehicle is an Australian statutory write-off, was specifically drawn to Mr and Mrs Loach's attention. Their evidence was that, even if they did see the CIN prior to purchase, they did not notice the box ticked "imported as damaged vehicle". I found their evidence convincing on this point and I accept they were unaware of this aspect of the vehicle's history.

[23] A further finding of note by the Tribunal in its decision on the evidence was in paras [38] and [39] where the Tribunal found:

> [38] Moreover, in my view, Mr Cottle's method of getting Mr Loach to sign an acknowledgement on the VOSA document that they had seen the "SIN", rather than getting them to sign the acknowledgement on the CIN itself, was a deliberate strategy to deflect Mr and Mrs Loach's attention away from the CIN, with the aim that they would not see or absorb the information on it.
>
> [39] I accept Mr Loach's evidence that he did not read the small print terms and conditions on the VOSA, including the acknowledgement that he had been given a copy of the "SIN".

[24] The Tribunal noted also the Consumer Information Standards (Used Motor Vehicle) Regulations 2008, Schedules 1 and 2, details what is required to be completed. It noted at para [40] of its decision that it was compulsory for both the trader and the purchaser to sign and date the CIN. That requirement, said the Tribunal, was to ensure that there is written acknowledgement that the purchaser has received a copy of the CIN and to ensure that purchasers are provided with the CIN prior to purchase. The requirement is also there to protect the interests of the traders to establish proof that the CIN was given prior to purchase.

[25] However, the appellant argues that the signing of the VOSA is sufficient compliance in regard to this. The Tribunal noted that another item contained within that general section of the VOSA is a clause relating to the non-application of the Consumer Guarantees Act as the vehicle was being acquired for business purposes. The Tribunal noted that it was clear to the Tribunal that neither of the respondents had read that clause before and that the vehicle had not been purchased for business purposes.

[26] As I read the Tribunal's decision overall, the Tribunal preferred the evidence given to it by the respondents as against the appellant where there was a difference between them as to what had been said or done.

**Appellant's submissions**

[27] Mr Andersen for the appellant submitted that the appellant had complied with its legal obligations. Mr Andersen describes the CIN and the SIN as if they are the same document and submits that the vehicle was imported as a damaged vehicle and that fact was disclosed. He then makes the submission that as the respondents

denied any awareness of the vehicle being imported as a damaged vehicle, they would not have bought the vehicle if they had had known it was imported damaged, whatever the reason for the damage, and that any non-disclosure of the fact that the vehicle was written-off in Australia is "purely incidental" as it would not have affected the respondents' decision. That is the decision to purchase.

[28] Mr Andersen also submits that s 16 of the MVSA overrides Schedule 2 of the Consumer Information Standards (Used Motor Vehicles) Regulations 2008 (CIS Regs) and thus the written acknowledgement can be in the VOSA.

[29] Mr Andersen's submission was that there was no obligation on the part of the appellant to draw the attention of the respondents to any particular statement in the CIN and that the appellant could reasonably assume that the CIN was read by the respondents. Mr Andersen argues that there was no basis for the Tribunal's conclusions that the respondents were actually misled by the failure to disclose the vehicle as a statutory write-off because they would not have bought the vehicle if they realised it was imported damaged. The loss suffered by the respondents is as a result of their failure to read the advice that the vehicle was imported damaged. That failure, it is submitted, cannot be held to the appellant's account.

[30] Mr Andersen submits on matters of law the authority of *Red Eagle Corporation Ltd v Ellis*[6] and the suggestion in that case that the test in relation to misleading or deceptive conduct under s 9 of the FTA is whether or not a reasonable person with the plaintiff's characteristics would have been misled on the facts of the case. Mr Andersen also notes the authority of *Taco Co of Australia Inc & Anor v Taco Bell Pty Ltd 1982*[7] and the comment contained in that authority in relation to conduct being misleading or deceptive that it "cannot be characterised as misleading or deceptive or likely to be misleading or deceptive **unless it contains or conveys a misrepresentation**." (The emphasis is mine). Mr Andersen distinguishes the authority of *Fleetman Pty Ltd v Cairns Pty Ltd*, in which the failure was where the conduct of the appellant in that authority was misleading and deceptive and thus was the reason for the question not being asked.

---

6 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20 at [28].

7 *Taco Co of Australia Inc & Anor v Taco Bell Pty Ltd (1982)* 42 ALR 177 at 202.

[31] In his written submissions at para 6.7 Mr Andersen submits that:

> There is no evidence whatsoever to suggest or allege any representation by the appellant that there was no previous damage to the vehicle and nothing was said that detracted from the statement in the CIN that the vehicle was imported damaged.
>
> Nothing in the circumstances could reasonably give rise to a reasonable expectation of disclosure of the fact that the vehicle was a statutory write-off.
>
> The respondents here did not ask the question as to whether it was a statutory write-off because they did not read the CIN notice and that the vehicle was imported damaged.
>
> The circumstances of the case do not justify any assessment or finding that there was a reasonable expectation of disclosure. There was no obligation to make further monetary disclosure.
>
> The purchaser, being the respondents, was not deceived because they would not have not purchased the vehicle in any event if they had known it was imported as a damaged vehicle.

[32] Finally, Mr Andersen also takes issue as regards to the assessment of loss.

[33] Mr Andersen in his oral submissions, in addressing his written submissions, further submitted that:

(a) The appellant had no obligation over and above that contained in the CIN.

(b) The CIN is a standard set of obligations put in a standard way.

(c) The appellant had no obligation to point out the "imported damaged" provision whatsoever.

[34] Mr Andersen's submission was that because the Tribunal dealt with the matter under the FTA the statutory requirements in relation to the signing of the CIN and the argument in relation to s 16 of the MVSA had not been in issue, and thus the Tribunal must have considered that there had been no issue raised in relation to the ability of the Tribunal to rescind the transaction on the basis of non-compliance with the CIS Regs.

[35] Mr Andersen argued that the respondents were not lulled into "a false sense of security" as he said they would not have bought the vehicle if they had read the notice. There was nothing to suggest that the degree of damage was something less than a write-off and nothing therefore that could have led the respondents to believe it was at the minor end of damage rather than at the major end of damage.

[36] In general terms Mr Andersen's position on behalf of the appellant was that there is no obligation on the part of a vendor in the position of this appellant to read the notice to the respondents (the purchaser) or specifically draw attention to any statement in the notice. The only obligation on the appellant was to give the CIN to the respondents. The disclosure as "imported damaged" was standard disclosure. That was all that the appellant had to do. Mr Andersen said there was no lulling into a false sense of security because the respondents had not read the information in the CIN that it was imported damaged. There was no obligation on the appellant to make any form of voluntary disclosure because what was to be disclosed was regulated. The FTA could not be used to meet a deemed consumer obligation. The respondents were not being deceived as they would not have purchased the vehicle in any event if it was imported as a damaged vehicle.

**Respondents' argument**

[37] The respondents' case as presented to the Court by Mr Pierce was that:

(a) The appellant failed to satisfy the disclosure obligations as detailed in the CIS Regs; the FTA; and the MVSA.

(b) The respondents had a reasonable expectation that the appellant should have disclosed that the vehicle was a statutory write-off in Australia.

(c) Silence/non-disclosure can constitute misleading or deceptive conduct in the terms of s 9 of the FTA and on the facts of this case the silence by the appellant was and did constitute misleading or deceptive conduct.

(d) The authority of *Fleetman Pty Ltd v Cairns Pty Ltd* was cited by the Tribunal as an example of silence held to be misleading or deceptive and that this was consistent with the law on such issues in New Zealand. The Tribunal's reliance was on the test applied by the Supreme Court in *Red Eagle Corporation Ltd v Ellis* and that is submitted by Mr Pierce is the base for the Tribunal's determination that the appellant's conduct was misleading or deceptive. That determination in Mr Pierce's submission was correct in law and on the facts.

(e) As the determination of the Tribunal was there was misleading and deceptive conduct, the Tribunal had the power to declare the VOSA void.

[38] Mr Pierce's submission was that the CIS Regs has its origin in s 27 of the FTA being a consumer information standard in respect of goods or services. Clause 7 of the CIS Regs requires that the CIN be in the form as detailed in Schedules 1 and 2 of the regulations. Schedule 2 of the CIS Regs requires that both the dealer and the buyer must sign and date the CIN to provide the written acknowledgement of receipt of a copy of the CIN by the buyer from the trader. Mr Pierce referred to cl 8 of the CIS Regs as to a written acknowledgement being required from the buyer, before the sale of the vehicle, of his having received a copy of the CIN. Mr Pierce accepted that the acknowledgement can be contained in the VOSA and thus s 17 can be applied to meet compliance with s 16. However, Mr Pierce submits the VOSA in cl 2 relates to a SIN not a CIN. SINs were used up to 1 July 2008 and are not the same document as a CIN. The respondents were provided only with a CIN and not a SIN. There is no provision in the VOSA to acknowledge that there was the receipt of a copy of the CIN. Therefore, the appellant was required to obtain the respondents' signatures on the CIN, using the test of the "reasonable but unsophisticated buyer" reading the VOSA cl 2 and its reference to a SIN. The appellant could not establish such a person would understand that the SIN referred to the CIN that was provided earlier.

[39] Mr Pierce submitted that the CIS Regs and compliance with s 16 by s 17, if that was to be the finding, would not allow the appellant to escape an obligation to draw the respondents' attention to the fact that the vehicle had been imported as damaged because if that was so then s 27(1A)(a) of the FTA would be defeated which requires "the disclosure of information relating to the kind, grade, quantity, origin, performance, care, composition, contents, design, construction, use, price, finish, packaging, promotion, or supply of the goods or services." The Tribunal's assessment overall on the issues relating to the CIS Regs and the FTA provisions in s 27 result in it having been established on the evidence that the appellant did not fulfil its legal obligations.

[40] Mr Pierce went on to submit that when one looks at s 2(2) of the FTA and the various authorities including *Red Eagle Corporation v Ellis* and *Hieber v Barfoot & Thompson*[8] that the law in New Zealand can clearly be seen that silence in circumstances can amount to misleading and deceptive conduct under the FTA; the test being "reasonable expectation of disclosure". Mr Pierce also submitted the case mentioned in *Hieber v Barfoot & Thompson* of *Guthrie v Taylor Parris Group Cossey Ltd*[9] a High Court decision of Priestley J with particular reference to paras [31] and [35] of that authority.

[41] In that case Priestley J in para [29], under the heading of "Section 9 of the Fair Trading Act 1986" particularly referred to subs (2) and went on to say as follows:

> [31] Both counsel accepted that silence or non-disclosure can in some circumstances constitute misleading or deceptive conduct. That submission is undoubtedly correct. This was recognised by Paterson J in *Phyllis Gale v Ellicott* (1997) 8 TCLR 57,65:
>
> > As already noted, silence when considered with the rest of the conduct may amount to misleading and deceptive conduct under Section 9 of the Fair Trading Act ....
>
> [32] In my judgment it would be wrong to approach the issue of whether an alleged failure to disclose information constitutes misleading or deceptive conduct in a mechanical or formulaic way. Whether or not an omission to disclose information crosses the boundary into misleading and deceptive

---

8 *Hieber v Barfoot & Thompson* (1997) ANZ ConvR 162, (1996) 5 NZBLC 104, 179, (1996) 7 TCLR 301 HC Auckland 19 June 1996, HC174/95, Kerr J.

9 *Guthrie v Taylor Parris Group Cossey Ltd* (2002) 10 TCLR 367.

conduct must ultimately depend on the circumstances of each particular situation. The policy of the Fair Trading Act 1986 obviously must be one factor. The statute's long title declares it to be:

> An Act to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services ....

[33] This approach has been applied with comparable legislation in Australia. In *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 it was stated:

> Accordingly it is incorrect to use liability under the general law as a means of enlivening Section 52.... [S]ilence is not misleading only where there is a duty to disclose at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive, whether or not it also constitutes breach of some other precept of law or equity.
>
> (Per Samuels JA at 88)

[34] A similar approach was adopted in *Demagogue Pty Limited v Ramensky* (1992) 39 FCR 31:

> In my view to inquire ... whether an independent "duty to disclose" has arisen is to digress from the application of the terms of Section 52.... [T]he question is whether in the light of all the circumstances constituted by acts, submissions or statements or silence, there has been conduct which is or is likely to be misleading or deceptive.
>
> (Per Gummow J at 40-41)

[35] In *Mills v United Building Society* [1988] 2 NZLR 392 both the High Court and the Court of Appeal stressed that whether or not conduct should be categorised as misleading or deceptive imported an objective test and also involved elements of misrepresentation. The High Court also stressed the importance of the circumstances of a case when determining whether mere silence would constitute misleading or deceptive conduct.

> Normally it will only amount to conduct which is misleading or deceptive if it conveys, in all the circumstances of the case, a misrepresentation. Mere silence will depend upon the circumstances as to whether that silence will constitute conduct which is misleading or deceptive. [Per Sinclair J at 406]

And in the Court of Appeal:

> Whether any particular conduct by a vendor is misleading or deceptive, or is likely to mislead or deceive, is essentially a question of fact....
>
> The test is objective; that some consumers have been misled is not conclusive. The character of the market reasonably likely to be effected by the conduct must also be taken into account.
>
> [Per Casey J at 413]

[42] Mr Pierce noted that *Guthrie v Taylor Parris Group* was in relation to a mortgage broker's non-disclosure as to the receipt of a commission and whether that non-disclosure was misleading or deceptive. The case was based on an objective test. It involved elements of misrepresentation. Mr Pierce's submission was that silence in this particular case conveyed a misrepresentation of the vehicle in general terms and if there had been a disclosure any reasonable purchaser would have enquired further.

[43] Mr Pierce submits that the reasons behind the vehicle being a "write-off" was water damage/flood damage and that as defects in respect of cars that have been flooded would be difficult to conclusively determine meant that there would have been a reasonable expectation of a purchaser to have been alerted to the fact of the statutory write-off and the notation that it was imported as damaged to enable further enquiries to be made.

[44] Mr Pierce submitted that the purposes set out in s 1A of the FTA in respect of its discussion of a trading environment, to protect the interests of customers and to ensure effective competition and confident participation in the market is also relevant. The disclosure of consumer information relating to the supply of such goods falls clearly within the parameters of the particular case. There needed to be steps taken by the appellant to adequately alert the respondents to the information that the vehicle was imported as damaged or indeed that it was an Australian write-off and thus not doing so meant that there was a lack of further enquiry by the silence.

**Loss**

[45] Both Mr Andersen for the appellant and Mr Pierce for the respondents made submissions on the question of loss which would depend on the Court's finding in relation to the appeal itself at this point in time.

**SIN/CIN discussion**

[46] The CIN requirement came into being in or about 1 May 2008. When the CIN came into place the SIN was replaced and disappeared. The comment by the then Minister drew the public's attention to the requirements of the confirmation of information being provided to customers by the signing of the CIN. The wording contained in the VOSA of the SIN does not relate to the CIN. I note that the heading in para 2 (being a subheading) is "**Supplier** Information Notice". The "**Consumer** Information Notice" is headed accordingly, as is the CIN's "Important Information". (Emphasis is mine).

[47] There does not appear to be any evidence before the Tribunal which indicates that the appellant, through Mr Cottle, drew the attention of the respondents to the information in para 2 of the VOSA, headed "Supplier Information Notice" being the CIN which in Mr Cottle's evidence says was in the vehicle.

[48] Mr Cottle's evidence to the adjudicator was:[10]

> Q. But I think that's why there is a space in the bottom right of the CIN, which for your protection as much as anything else, for a trader's protection because if they are signed, if the purchaser has signed the actual document, then it is pretty hard to argue that they haven't seen it.
>
> A. Well he's got a copy of it and that's all he has to have.

And:[11]

> Q. You would have told him all about the fact that it was a statutory write-off?
>
> A. Yeah, if he had asked I would have told him.
>
> Q. You didn't tell him, is that right?
>
> A. I didn't tell him because there was no reason to tell him.
>
> Q. No reason to tell him?
>
> A. That's what the Supplier Information Notice is for.

---

10 Transcript of Proceedings, Motor Vehicle Disputes Tribunal, page 24, lines 15 and following.
11 Ibid, page 26, lines 21 and following.

Q. I mean, imported as damaged vehicle can mean a lot of different things can't it?

A. Yes it can.

[49] The relevant provisions of the MVSA are:

**Section 14(1):**

**14 Particulars about used motor vehicle must be displayed**

(1) A motor vehicle trader who offers or displays a used motor vehicle for sale, or causes or permits a used motor vehicle to be offered or displayed for sale, must ensure that a notice containing the particulars set out in section 15(1) is attached to the vehicle in a prominent position. …

**Section 15(1)(b):**

**15 Particulars (including statement about buyer taking motor vehicle free of security interests) that must be contained in notice attached to used motor vehicle**

(1) All of the following particulars must be contained in every notice that, in accordance with section 14(1), must be attached to a used motor vehicle:

(a) …

(b) particulars (if any) that are contained in a consumer information standard prescribed by regulations made under section 27 of the Fair Trading Act 1986: …

**Section 16(2):**

**16 Written acknowledgment that buyer has received copy of notice must be obtained**

(1) …

(2) A motor vehicle trader to whom this section applies must—

(a) obtain a written acknowledgment from the buyer that the buyer has received a copy of the notice referred to in section 14(1),—

(i) …

(ii) in any other case, immediately before the sale of the motor vehicle; and …

**Section 17:**

> **17 Requirements of section 16 may form part of contract for sale**
>
> Nothing in section 16 prevents the acknowledgment being contained in the contract for the sale of a used motor vehicle.

[50] The CIS Regs discusses the requirements of a CIN. The requirements of reg 7(1) states:

> Subject to subclause (5), every Consumer Information Notice attached to or displayed in relation to, a used motor vehicle in accordance with reg 6 must:
>
> (a) Be in the form set out in Schedule 1; and
>
> (b) …
>
> (c) Be completed by having the information required by Schedule 2 clearly and legibly typed or written upon it.

[51] The information required in the terms of Schedules 1 and 2 of the CIS Regs insists that:

> Both the motor vehicle trader and a buyer of the motor vehicle must sign and date the Consumer Information Notice in order to provide written acknowledgement that the buyer has received a copy of the Consumer Information Notice from the motor vehicle trader.

[52] My reading of the legislation, together with the CIS Regs and taking into account what the relevant Minister said when CINs were first put in place is that a CIN is an entirely different notice with different input from the reason for and supply of a SIN.

[53] After considering the evidence that the Tribunal heard and Mr Cottle's views of the SIN as against the CIN; I accept overall that the VOSA did not contain any acknowledgement that the statutory and regulatory duties incumbent upon the appellant were met as is required. It was the duty of the appellant to obtain the respondents' signatures to the CIN which would have, in my view of the evidence overall, emphasised to the respondents the importance of the CIN document. I also note that the CIN as presented to the Tribunal (which is not signed or dated by the respondents) has immediately above the box in which the respondents should have

been asked by the appellant (in my decision) to sign a heading, "Imported as damaged vehicle" with the box "Yes" crossed.

[54] It is clear to me on that piece of evidence that if the appellant, through Mr Cottle, had carried out its statutory and regulatory requirements to have the CIN signed by the respondents then the information as to a damaged vehicle would have been clearly and directly in the eyes of Mr Loach as he was requested to acknowledge receipt of the CIN prior to the purchase of the vehicle.

**Tribunal's decision**

[55] In regards to the decision of the Tribunal it held that the respondents had not noticed the box ticked "Imported as damaged vehicle" and thus were unaware of the vehicle's history. More importantly the Tribunal at para [38] said:

> Moreover, in my view, Mr Cottle's method of getting Mr Loach to sign an acknowledgement on the VOSA document that they had seen the "SIN", rather than getting them to sign the acknowledgement on the CIN itself, was a deliberate strategy to deflect Mr and Mrs Loach's attention away from the CIN, with the aim that they would not see or absorb the information on it.

[56] That is a finding of fact made by the Tribunal, which had heard and seen the witnesses giving evidence before it. On my reading of the evidence it was a finding open for the Tribunal to make.

[57] The difficulty therefore for the appellant, in my view, is that as a result of the process of totally relying on the VOSA and by using VOSAs that are very outdated (practically obsolete) in relation to the information contained in the documentation, that the statutory and regulatory requirements in place have not been met. Upon the overall evidence given by the respondents there is not in my view proof on the part of the appellant that the required information was made available to the knowledge of the respondents. This alone in my view would have enabled the Tribunal to rescind the VOSA.

[58] In regards to the overall position I note that Mr Cottle was informed as to the vehicle having been a statutory write-off in Australia as a result of flood and water damage. To describe that as imported as "damaged" quite simply in itself is

misleading. As Mr Cottle said in his evidence, in answer to questions from the Tribunal, damage can mean a whole range of factors. However, a prospective purchaser being told that the vehicle had been statutorily written-off in Australia would have allowed for an informed decision to be made by the purchaser. In the present circumstances the issue as to whether the respondents in fact knew that the vehicle was imported as damaged was a matter that the appellant had to establish to the Tribunal. The Tribunal's decision is that the appellant did not establish that had occurred. Again, that is a finding clearly open to the Tribunal on the evidence.

[59] I find that it is not sufficient for Mr Cottle on behalf of the appellant to argue that the CIN was made available and thus he had fulfilled all his legal duties. I accept the submission made by the respondents that he did not and in the circumstances here could not succeed in such an argument.

**Misleading and Deceptive Conduct – FTA**

[60] The starting point for the discussion on this must be s 2(2) of the FTA. Under the general heading of "Interpretation" s 2(2) states:

> (2) In this Act, a reference to engaging in conduct shall be read as a reference to doing or refusing to do an act, and includes,—
>
> (a) omitting to do an act; or
>
> (b) making it known that an act will or, as the case may be, will not be done.

[61] Section 9 of the FTA states under the heading, "Misleading and deceptive conduct generally":

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[62] It is common ground between counsel for the appellant and the respondents that the Supreme Court decision in *Red Eagle Corporation Ltd v Ellis* is relevant to the issue that fell for determination by the Tribunal.

[63] At para [33] of the decision the Tribunal said:

> The primary issue in this case is to determine whether Mr and Mrs Loach have proved the trader breached s 9 of the Fair Trading Act. The test for establishing a breach of s 9 was set out by the Supreme Court in *Red Eagle Corporation v Ellis*:[12]
>
> > The question to be answered in relation to s 9 … is … whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

(In passing I note that the quotation from *Red Eagle Corporation Ltd v Ellis*, as Mr Andersen submits in para 6.4 of his written submission, does not include the words "would likely to have been").

[64] For the respondent, Mr Pierce argues in his written submissions that the Tribunal was correct to rely on the test as is detailed above and that the law in New Zealand is that silence in certain circumstances can amount to misleading and deceptive conduct under the FTA. Mr Pierce puts *Hieber v Barfoot & Thompson* as the authority for that submission.

[65] For the purposes of this decision I note that the learned High Court Judge in *Hieber* said that whether or not silence of itself or with other factors creates misleading or deceptive conduct has to be looked at having regard to all the facts present in a particular dispute. Further, I consider it to be really unarguable that the test used is the "reasonable expectations of disclosure." The Tribunal was required to look objectively as to whether the information known by the appellant should have been given to the respondents.

[66] I accept Mr Pierce's submissions that the authority of *Guthrie v Taylor Parris Group* is also relevant. I refer to para 32 of his written submissions in this regard

---

[12] *Red Eagle Corporation Ltd v Ellis* above at footnote 6 at para [28].

and the emphasis that is placed on the authorities by the various Judges in the circumstances of each particular situation.

[67] With all due respect to Mr Andersen I do not agree with his submission as detailed in para 6.5 of his written submissions. The position in New Zealand as explained by the Tribunal in its decision has moved from the necessity to have a misrepresentation for actionable non-disclosure to the "reasonable expectation" test. At para [50] the Tribunal discussed the Australian authority of *Demagogue Pty Limited v Ramensky*[13] with approval and the authority in New Zealand of *Des Forges v Wright*,[14] a decision of (the now Chief Justice) Elias J. At para [51] of its decision the Tribunal quoted from p 764 of that decision as to silence constituting misleading or deceptive conduct and the test requiring an "objective assessment in all the circumstances."

[68] The discussion by the Tribunal at paras [51] through [54] of its decision in my view is a correct synopsis of the overall position of the law in New Zealand. That "omitting", as defined in s 2(2) of the FTA, can clearly be seen to include all forms of silence as being capable of being misleading or deceptive conduct.

[69] Mr Andersen argues that *Fleetman Pty Ltd v Cairns Pty Ltd* is an entirely dissimilar situation. The failure to ask the questions being on the point that the conduct of the trader was deceptive as to the model or year of the demonstrator. When I have regard to the comment as detailed in para [53] of the Tribunal's decision, the position is put as to conduct being "no less misleading or deceptive because the consumer might have asked more questions which might have exposed the real facts" cannot logically be argued against.

[70] I find after having considered those various authorities that the position of the Tribunal on law as to misleading and deceptive conduct was correct.

[71] Mr Andersen at para 6.7(a) argues that the decision of the Tribunal was incorrect in regards to:

---

13 *Demagogue Pty Limited v Ramensky* (1992) 39 FCR 31.

14 *Des Forges v Wright* [1996] 2 NZLR 758, (1996) 5 NZBLC 104,030.

> … no … evidence to suggest or allege that the Appellant represented that there was no previous damage to the vehicle and nothing to detract from the statement in the Customer Information Notice that the vehicle was imported damaged.

[72] Mr Andersen submitted that there was therefore no actual misrepresentation and nothing contrary to the statement in the CIN as to the vehicle being imported damaged. The earlier discussion on the issue of the CIN as against the SIN is relevant in this regard. The position of the Tribunal was that there was silence in relation to the vehicle being an Australian statutory write-off, which information was known to the appellant. The Tribunal as a finding came to the decision as detailed in para [55]:

> … I consider that a reasonable person in Mr and Mrs Loach's situation would likely have been misled or deceived by Tokyo Auto Town's conduct, specifically omitting to tell them that the vehicle is an Australian statutory write-off.

[73] On all the evidence that was called before the Tribunal, the finding was open to the Tribunal.

[74] I refer to the questioning by the Tribunal of Mr Loach at the hearing:[15]

> … I noticed the car I wanted to purchase was on Trade Me and it met the criteria we were looking for. It was a late model, low mileage, automatic vehicle so I went to Tokyo Auto Town to view the vehicle and the vehicle was housed in a warehouse and I looked at the vehicle and the vehicle was in very good condition and it presented incredibly well. It was black in colour which wouldn't be my first choice but having seen it, it was something that I was quite happy with. Again, having spoken to Mervin and organised to take the vehicle for a drive, which I did in the first instance, and it drove very well.

And:[16]

> Q. Anything to do with its history? Was there any discussion?
>
> A. No that was never mentioned and quite frankly at that stage I think I did mention to Mervyn about it being an Australian import and I'm not sure if that was on the first of those two occasions or the last occasion when we ended up purchasing it but other than that there was no query from me as to the history of the vehicle.

---

15 Transcript of Proceedings, Motor Vehicle Disputes Tribunal, page 2, lines 24-27.

16 Ibid, page 3, lines 15-24.

Q. So did he tell you it was an Australian import or was that in the documents?

A. That was in the documents, yes it was.

Q. Which documents?

A. It was in the CIN document.

And:[17]

A. I knew nothing about Australian imported vehicles when we purchased this vehicle, as to their history and the information that I obviously know now. I knew nothing about, we knew about the fact that there were damaged vehicles coming into New Zealand.

(**Mrs Loach**:[18]

I have never heard of the words "statutory write-off", no such things existed.)

A. And we would never have gone ahead with the purchase of the vehicle had we had prior knowledge of the vehicle being water damaged.

And:[19]

A. … I can't recall exactly where I did see the CIN but I remember the document, I knew the value of the vehicle, I knew the age of the vehicle, the mileage of the vehicle and I think at the time I knew that it was an Australian import. I don't exactly remember how I know it was an Australian import but whether it was this or whatever I saw it in the TradeMe ad I don't know. I can't recall exactly I'm sorry.

And:[20]

… I'm not saying it's not on there but I didn't see it at the time of the purchase. Had I seen it at the time of the purchase, I would never have entered into the vehicle whether it be damaged for whatever reason. You know, we're safe people.

---

17 Ibid, page 4, lines 17-20.
18 Ibid, page 4, lines 21-25.
19 Ibid, page 5, lines 12-17.
20 Ibid, page 6, lines 6-8.

And:[21]

> Q. Just coming back to the actual transaction itself, and the CIN notice, it seems to me that your evidence is that you think you may have seen the CIN before the sale and you're not denying that it said "imported as damaged vehicle" at the time you saw it but you didn't notice it. Is that what you are saying?
>
> A. I absolutely did not see it. I don't recall seeing the CIN but I am not saying I didn't see it. I may have and that may have been the cue for me knowing it was an Australian vehicle …

And:[22]

> Q. All right. This "imported as damaged vehicle", your evidence is that you didn't notice it before the sale but was anything of that nature mentioned to you by the trader? Did the trader tell you anything about the history of the vehicle and whether it was imported as damaged?
>
> A. No, definitely not.

And:[23]

> A. Well the transaction took place in Mr Cottle's office which is an office within the warehouse, it is a large room adjunct to the warehouse and I sat down at the table, Mr Cottle sat down at the table and we went through the sale and purchase agreement which I have here and, I mean I've signed some of these over the years as you do when you purchase vehicles and it was filled out and I subsequently signed it.
>
> Q. Yes.
>
> A. And at that stage, can I say that this document which was given to me at the end of the sale, was never shown to me or described to me or gone through and I was never asked to sign this document and I have not signed the document.

[75] The adjudicator/Tribunal asked Mr Loach to confirm when he got the CIN document. His answer was:[24]

> A. As we were leaving the office to pick up – as I was leaving the office to grab the vehicle, this documentation is what I took out of the office, which was given to me.

---

21 Ibid, page 6, lines 19-25.
22 Ibid, page 6, line 30 to page 7, line 1.
23 Ibid, page 10, lines 8-18.
24 Ibid, page 10, line 28 to page 11, line 8.

Q. All right, you – so at that stage you had signed the vehicle sale and purchase agreement already had you?

A. Before I left the office?

Q. No no before he gave you the CIN?

A. Yes.

Q. All right, so you signed the sale and purchase agreement first and then you were given the CIN?

A. Yes.

And:[25]

Adjudicator: Yes, I mean I understand your position. Your position is that if you had known about this you would have never have bought it.

Mrs Loach Yeah, exactly.

[76] I take notice of the fact that Mr Cottle gave evidence of a different version of events as to when the CIN was made available to the respondents. It appears from the decision of the Tribunal as detailed in the paragraphs that Mr Andersen criticises (namely paras [55] through [58]) that the Tribunal found against the appellant on this issue.

[77] In my view the argument in relation to the statement in the CIN as to the vehicle being "imported damaged", even if this had been pointed to and the respondents had been made aware of it, only told a very small part of the overall relevant issues in respect of the vehicle. To the knowledge of the appellant it had been statutorily written-off in Australia. An experienced car trader, such as the appellant, would have been aware that was important information to a prospective purchaser. In terms of the New Zealand test of "reasonable expectation", the circumstances that related to a well presented vehicle being sold at a price representative of motor vehicles of its age and quality and no comment being made as to it having been subject to statutory write-off requirements in Australia, would be overall circumstances that the Tribunal would use to decide whether there should have been disclosure of the actual position. The Tribunal, as already stated, came to

[25] Ibid, page 14, lines 7-11.

the decision that there was a duty to disclose and not to do so was a breach of s 9 of the FTA.

[78] The other issue that should be brought to account in this discussion is the finding by the Tribunal that Mr Cottle for the appellant actively discouraged the respondents from reading the CIN by having them sign the VOSA acknowledgement rather than the CIN itself. I have already held that this was a finding available on the overall evidence available to the Tribunal. The finding of the Tribunal in para [56] that the respondents were actually misled by the omission, when one has regards to the overall circumstances relating to the purchase of the vehicle, as is detailed in the decision of the Tribunal, is therefore in my decision a finding open to the Tribunal.

[79] I do not accept the submissions made in writing by Mr Andersen in para 6.7 as to each independent paragraph. It is obvious to me from the findings of the Tribunal that the Tribunal made its decision on the evidence and its application of the *Red Eagle* test ended in a conclusion that the appellant's conduct was misleading and/or deceptive and in breach of s 9 of the FTA.

[80] Mr Pierce in his argument notes that the very purpose of the FTA, as detailed at the beginning of that legislation, is to enable a trading environment to protect the interests of consumers, allow business to compete effectively and for participants to participate competently. Unfair conduct in practises relating to trade is therefore prohibited. The disclosure of consumer information relating to the supply of goods and services is part of that control. The Tribunal found in this case along the lines of the submission of Mr Pierce (at para 36), that there was failure on the part of the appellant to actively and adequately point out "imported as damaged" and/or that it was an Australian statutory write-off. Overall the position of the appellant is that the legal obligations upon him have been met by the CIN containing the notation that it was imported damaged and that without any enquiry from the respondents there was no duty on the appellant to volunteer any further information, therefore the Tribunal had erred in coming to a decision that non-disclosure constituted misleading and deceptive conduct.

[81] It is of course for the appellant to establish its arguments in satisfying me on the balance of probability that the Tribunal was wrong both in law and in fact in the determination that it came to which was the determination that the conduct of the appellant was misleading or deceptive in breach of s 9 of the FTA.

[82] When I have regard to the legal position as detailed by the Tribunal I consider that there was no error in any of its findings on matters of law. In its application of that law and the required test and applying the test to the facts that it had found and accepted the Tribunal was acting appropriately. I reject the appellant's argument that it was not.

[83] On that basis this appeal cannot succeed as to the decision of the Tribunal as detailed in para [2](a) hereof. For completeness I do not accept Mr Andersen's submissions that the respondents saying that if they had read the notice they would not have purchased the vehicle meant that they could not have been deceived. I conclude that submission is plainly wrong on the *Red Eagle* test.

[84] The final issue for determination is what remedy the purchaser was entitled to. At para [59] onwards the Tribunal in its decision discusses the remedy, both in terms of s 43 of the FTA and what orders the Tribunal can make. The Tribunal at para [59] correctly stated that it could declare the VOSA between the appellant and the respondents to be void and to direct the appellant to refund the purchase price of the vehicle to the respondents.[26]

[85] The *Red Eagle Corporation Ltd v Ellis* case, as discussed at para [60] of the Tribunal's decision, suggested that the Tribunal would be required to do justice to the parties in the circumstances of that particular case and in the policy relating to the FTA.

[86] There was evidence available to the Tribunal that the vehicle in question, with the knowledge that it had been a statutory write-off was unsaleable except as to parts. Mr Cottle took issue with that. The determination of whether the vehicle had been water damaged in the finding of the Tribunal remains extant. However, there is

---

[26] Sections 43(3)(a)(i) and 43(3)(e) of the FTA.

also evidence from the NZTA in relation to components showing damage consistent with coming into contact with "water that was not clean fresh water."

[87] The finding as detailed in para [67] of the Tribunal's decision was that there was a "clear nexus between the misleading conduct and the purchaser's decision to proceed with the purchase of the vehicle." The Tribunal accepted the respondents' evidence that if there had been a disclosure that it was an Australian statutory write-off the vehicle would not have been purchased by them. Any carelessness on their part does not disqualify them from the decision to rescind the VOSA. There were clear findings made in para [68] of the Tribunal's decision in that regard.

[88] Mr Andersen's argument is that the lack of evidence results in the position being one in which the Tribunal failed to take into account the absence of proved loss. Again, with respect to Mr Andersen's position the findings by the Tribunal in para [67] combined with its findings in para [61] end that argument. In relation to the submissions made by Mr Andersen under the heading "Remedies" para [7] of the findings made by the Tribunal in its decision have been based on the evidence that it heard and decided upon. I do not accept the argument that loss should be apportioned between the parties.

**Conclusion**

[89] In coming to the decisions that I have, I have borne in mind throughout my judgment that the Tribunal had the advantage of seeing and hearing the parties and that is something that this Court on this appeal by way of rehearing does not have. When I consider the very carefully constructed and considered decision of the Tribunal, I consider that the appeal has to be dismissed.

[90] I note that:

(a) Leave is reserved by this Court for either party to apply for further directions in the event there is any further uncertainty as to the application of the Tribunal and orders as detailed in the Tribunal's decision at para [69].

(b) There are issues of costs. I consider that costs if the parties cannot agree upon them can be dealt on the basis of the relevant Schedules to the District Courts Act 1947, but if in fact the parties cannot come to an agreement then I direct that memoranda can be put before me and I will decide the question of quantum of costs.

K J Phillips
District Court Judge