

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV-2016-004-001460
[2017] NZDC 1687**

BETWEEN LONDON CALLING LIMITED
Appellant

AND EMMA KAY
Respondent

Hearing: 24 January 2017

Appearances: T Nesbitt a Director of the Appellant Company
E Kay in Person

Judgment: 1 February 2017

JUDGMENT OF JUDGE B A GIBSON

[1] London Calling Limited, which trades as Flogit, is a licensed motor vehicle dealer. On 16 March 2016 it sold a 2005 Volkswagon Passat motor vehicle to the respondent, Mrs Kay, for \$4,900. At the time the odometer reading on the vehicle was 115,306 kilometres.

[2] Shortly after purchasing the vehicle the respondent found its safety restraint system (SRS) and central locking systems failed. Consequently she alleged the vehicle did not comply with the guarantee of acceptable quality in the Consumer Guarantees Act 1993 and claimed for the cost of repairing the systems, the failure being one of a substantial character. She sought to reject the vehicle and recover the purchase price but was refused that relief by the Motor Vehicle Disputes Tribunal by a decision given on 25 August 2016 as she had failed to notify the appellant of her decision to reject the vehicle but she did, instead, recover damages of \$3,336 being the amount estimated as the cost of repairing the SRS and central locking system. The dealer appealed the Tribunal's decision.

[3] The right to bring an appeal against a decision of the Motor Vehicle Dealers Tribunal is contained, unusually, in a schedule to the Motor Vehicle Sales Act 2003 ('the Act'). Paragraph 16 of the first schedule provides that a party dissatisfied with the decision given by the Disputes Tribunal may within 10 working days appeal to a District Court Judge. As the amount of claim does not exceed \$12,500 the appeal can only 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; Clause 16(3) of Schedule 1 of the Act. Clause 16(4) provides that 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.

[4] Mrs Kay, the purchaser, maintained before the Tribunal that the vehicle purchased from the appellant company was not one that met the guarantee of acceptable quality in the Consumer Guarantees Act 1993. The Tribunal agreed and held that Mrs Kay was not in 'trade' but acquired the vehicle for personal use. This finding of fact was disputed by the appellant through Mr Nesbitt, the director who appeared and argued the appeal on its behalf. He contended that Mrs Kay was purchasing the Volkswagon motor vehicle for her company, and not for herself.

[5] The difficulty for the company is that the Tribunal made a clear finding of fact on the issue, and as the amount of claim was under \$12,500, an appeal cannot be brought on the grounds that the decision was wrong in fact or law or both.

[6] At the hearing before the Tribunal a letter was produced by Mr Nesbitt's wife in which she stated that Mrs Kay had told her she was purchasing the vehicle for her business. Mr Nesbitt, at the appeal, also claimed that Mrs Kay had phoned him on the morning the vehicle was purchased saying she wanted it for a business vehicle.

While Mr Nesbitt raised that issue on appeal, it was not evidence given in the hearing before the Tribunal. However the Tribunal made very clear findings that while the vehicle was supplied in trade by the trader “ *London Calling Limited ... it was not acquired in trade by the purchaser, but acquired for personal use by the purchaser. Duwell Limited was not the purchaser, Mrs Kay was the purchaser of the vehicle named on the receipt signed by the parties*”.

[7] Mr Nesbitt’s argument was that as Mrs Kay had not acquired the vehicle in trade then she was bound by the terms of the agreement reached between the parties, which was that the vehicle was sold without warranties. However s 43 of the Consumer Guarantees Act 1993 provides that there cannot be contracting out of the terms of the Act unless the parties are in trade and agree to contract out of the provisions of the Act. I agree with the Tribunal that the parties did not agree to contract out of the provisions of the Act, the Act was not addressed in the agreement reached between the parties. It would, it seems to me, need to be specifically mentioned as well as for it to be fair and reasonable for the parties to be bound by the contracting out clause. However the issue does not arise because of the finding of the Tribunal that Mrs Kay was not in trade, and in any event the Tribunal, for reasons with which I agree, has found that in the circumstances of the particular transaction, it would not be fair and reasonable for Mrs Kay to be bound by any contracting out clause, even if the words “*sold with no warranty given or implied*” could be deemed to be an actual contracting out of the terms of the Consumer Guarantees Act 1993 without any mention of the Act, which I doubt.

[8] Mr Nesbitt further submitted he did not see the evidence of Mr Pretorius, a witness called for Mrs Kay who had provided her with an estimate of the amount to repair the vehicle, which the Tribunal subsequently directed the appellant to pay. Mrs Kay disputes that. She maintains Mr Nesbitt had the evidence in sufficient time for the hearing, but in any event Mr Nesbitt accepts the issue was not raised before the Tribunal and he did not seek an adjournment because of any claim that he was prejudiced by late receipt.

[9] Overall, therefore, I am unable to find that the Tribunal conducted the proceedings in a manner unfair to the appellant and in a way that prejudicially

affected the result. It had regard to the provisions of the Consumer Guarantees Act 1993 which Mr Nesbitt drew to its attention. It simply did not agree with him that Mrs Kay was in trade and made findings of fact accordingly.

[10] Consequently the appeal is dismissed.

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B A Gibson, DCJ