

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CIV-2017-009-002116
[2018] NZDC 7786**

BETWEEN CAMBELT KING LTD (S SYMES)
Plaintiff
AND KATIE BOYD
Defendant

Hearing: 17 April 2018
Appearances: S Symes appears in Person
K Boyd appears in Person
Judgment: 17 April 2018

ORAL JUDGMENT OF JUDGE T J GILBERT

[1] On 23 June 2017, the Motor Vehicle Disputes Tribunal heard a dispute between Katie Boyd and Cambelt King Ltd, which trades as Car King. This arose out of Car King selling Ms Boyd a 1993 Toyota Starlet for \$5,000 which she took possession of on or about 6 March 2017.

[2] A week following the hearing, the Tribunal issued a decision ordering Car King to pay Ms Boyd \$5,169 immediately, following which she was to make available the Toyota, so that Car King might reclaim possession of it. It also made an order for Tribunal costs of \$600 on account of Car King's conduct in the proceedings.

[3] Car King now appeals the Tribunal's decision, the sole ground being that its director and representative for the purposes of this case, Mr Symes, "could not attend the original hearing as [he] was ill."

Law

[4] Under Clause 16 of Schedule 1 to the Motor Vehicle Sales Act 2003, appeals from decisions of the Tribunal are limited in scope, particularly when the amount at issue does not exceed \$12,500. In such cases, and this is one, an appeal may only be brought on the grounds that the proceedings were conducted by the Tribunal in a manner that was unfair to the appellant, and they prejudicially affected the result of the proceedings.

[5] In this regard, the limited scope of appeal largely mirrors that which the District Court commonly deals with in relation to the Disputes Tribunal. What is clear is that attempts to relitigate the merits of a case are not permitted and that appeals (where the amount does not exceed \$12,500) are limited to what might be called procedural unfairness. This is a reflection of the fact that the Tribunal process is designed to be a quick and inexpensive way of resolving relatively low-level disputes.

[6] There is no further right of appeal beyond the District Court, so that any decision I might make is, effectively, final.

Proceedings

[7] This appeal first came before the District Court on 29 September 2017. At that time, Judge MacAskill confirmed that the sole ground of appeal was in relation to Mr Symes' purported illness. Judge MacAskill timetabled the appellant to "file and serve any evidence relating to Mr Symes' illness within 28 days" i.e. by late October. The matter was then relisted for call on 11 January 2018 at which time I was the presiding Judge.

[8] No evidence was filed until 9 January 2018 at which time the customer service centre received from Mr Symes a letter dated two months previously on 9 November 2017. This purports to be from his doctor, a Dr Erin Moran. I am not sure whether that was served on Ms Boyd, but in any case, it was both obtained, and then filed, well outside the timetable set by Judge MacAskill.

[9] The letter itself simply states,

I advise this patient attends my practice for medical care. He was unwell on 23 June 2017 and we were unable to provide an appointment at short notice. He has consulted me since. At the time, we should have issued an off-work certificate. Please accept this letter as notification of unwellness on that date.

[10] When the matter came before me on 11 January earlier this year for a directions conference, Ms Boyd was not here. In discussions with Mr Symes, I observed that the letter he filed was out of time. However, I set the matter down for hearing today and allocated one and a half hours.

[11] I also advised Mr Symes that more robust evidence of illness would likely be helpful, given the bland and non-specific nature of the letter from his doctor.

[12] I timetabled any further evidence to be filed by 28 February. Nothing further was received and Mr Symes has arrived to Court today and has nothing further to offer in that regard.

Decision

[13] The decision that is at issue is in fact a comprehensive and very careful analysis by the Tribunal which was sitting with the assistance of an expert assessor. It is difficult to fault the reasoning which, despite Mr Symes' non-attendance, found certain matters in his favour, and others in Ms Boyd's favour.

[14] Paragraphs [43] to [45] are especially relevant to the current appeal and explain why the Tribunal took the relatively unusual step of making a costs order against Car King. The Tribunal noted that Car King had failed without reasonable excuse to take part in settlement discussions. It is clear that the Tribunal had specifically directed the appellant, Car King, to discuss the case with Ms Boyd, and to make a written report to the Tribunal on the outcome of those discussions.

[15] That report was due by 16 May 2017. No report was received by that date and as a result the Tribunal reminded the appellant, Car King, and issued a revised timetable requiring the report by 9 June 2017. The appellant was told that the failure

to provide the report may result in a costs award against him. Mr Symes was also reminded the day before the hearing that the Tribunal had not received Car King's report and it never eventuated.

[16] It is also clear that the Tribunal formed the view that the appellant's failure to attend the Tribunal hearing was without good cause. The decision itself notes that the day before the hearing, Mr Symes advised that he was not feeling well and that there was a possibility that he might not attend on 23 June.

[17] The Adjudicator, no doubt, with antenna up due to the prior frustrations in the Tribunal processes, then directed Mr Symes to provide a doctor's certificate confirming that he was unable to attend the hearing. The Tribunal's case manager advised Mr Symes that unless a doctor's certificate was provided, the hearing would proceed as scheduled. Mr Symes did not provide the doctor's certificate and did not attend the hearing.

[18] The Tribunal's clerk telephoned him to confirm that the hearing would continue without him. Neither he, nor any other representative of the appellant, attended. It was as a result of this that The tribunal awarded \$600 costs against the appellant.

[19] In my view, the appellant, Car King's current assertion that Mr Symes, as its representative, could not attend on grounds of ill health, needs to be seen against this background of non-compliance and disengagement from the process.

[20] It is clear that the appellant, which is driven by Mr Symes who appears to be its controlling mind, did not engage in the process appropriately. It has only been on receipt of an adverse decision, that the appellant has sought to essentially have the matter restarted from scratch.

[21] Of course, the Court was prepared to entertain this possibility because a trader has both a natural justice and a statutory right to attend Tribunal hearings. In the event that solid evidence was provided of illness to such an extent as to prevent attendance at the hearing, that may well (but not necessarily) have justified a re-hearing of the

matter. That explains Judge MacAskill's original direction to file evidence and my comments to Mr Symes suggesting that he ought to provide something more robust than the letter from Dr Moran, dated 9 November. Despite that, nothing else has materialised.

[22] I am not satisfied on the basis of the letter apparently penned by Dr Moran a long time after the event that Mr Symes was in fact unwell to such an extent that he was unable to attend the hearing. It is clear that he did not see a doctor at that time, so quite how Dr Moran can assert such incapacity is not clear. It is unacceptable that, despite specifically being informed that he was to obtain a doctor's certificate by the Tribunal, one was not provided until November, and then only after an appeal had been lodged and following judicial direction to do so.

[23] I note it is also unacceptable that any evidence sought was obtained outside of the timetable set by Judge MacAskill. Even accepting, for the moment, that no one in Dr Moran's practice was able to see Mr Symes prior to the hearing, the least he ought to have done was attend his doctor on the day or days following the hearing and provide a certificate with that explanation. That way, there would have been proper confirmation of unwellness to such an extent of an inability to participate in the hearing. Alternatively, Christchurch is replete with good after-hours medical services which permit casual patients and could have provided the doctor's certificate in the event that one was justified in being issued.

[24] In relation to the appeal, Mr Symes has provided no further evidence from his doctor substantiating his claim of unwellness. There is nothing sworn. He says that Dr Moran has now retired and that there are no further case notes or anything of that nature that might support his claims.

[25] I have to say that in the circumstances, this has all the appearances of an appellant effectively trying to game the system by first not engaging with the process mandated by the Tribunal, second, not attending the actual hearing, and third, not complying with Court timetables in relation to evidence on this appeal.

[26] I observe that this conduct is consistent, arguably at least, with Car King's general approach to obligations when it came to selling this particular vehicle to Ms Boyd. In saying this, I am careful not to impugn Car King's reputation more generally, but restrict my comments to its dealings with Ms Boyd. In this regard, I note that the Tribunal referred in its decision to TradeMe for a breach of its listing rules as a result of which TradeMe closed down Car King's account, albeit, one has been reopened subsequently. The decision was also referred to the Commerce Commission on the basis that the appellant unlawfully tried to exclude liability under the Fair Trading Act 1986. The Tribunal also observed that the vehicle was sold without the appropriate warrant of fitness requirements being met in breach of statutory requirements.

[27] So, I am not satisfied based on what has been provided to me that the ground of appeal has been made out. The appeal will be dismissed and the orders made in the Tribunal stand.

[28] I also note that I have spent some time teasing out with Mr Symes what would have been different in the event that he did attend the hearing before the Tribunal. That is because in order to bring a successful appeal, an appellant must show that any unfairness has prejudicially impacted the outcome.

[29] Mr Symes says that he has evidence that the radiator issues identified by the Tribunal as a substantial fault justifying cancellation of the contract and return of the vehicle, were in fact a non-event and that there was nothing wrong with the radiator at all.

[30] That, of course, though, was only one of two substantial failings which the Tribunal found to exist justifying cancellation. The second was in relation to oil leaks which were independently verified by two third party assessors in the form of Pit Stop and the AA. The evidence before the Tribunal was that both found oil leaks and the expert assessor for the Tribunal considered that those leaks were such as to constitute a substantial failing to comply with the guarantees inherent in the contract struck between Ms Boyd and Car King.

[31] Mr Symes was not really able to suggest anything that would have been different at the Tribunal hearing in relation to the oil leaks other than to say that he would have informed the Tribunal that he had spoken to a person he knows in the industry who indicated that, to his mind, whilst there was an easily identifiable quite substantial oil leak, it was quickly remedied and that any other oil leaks would need to be assessed once the engine was steam cleaned. That evidence, had it been called would of, of course, have sat beside the two independent assessors' evidence (AA and Pitstop) which found that there were oil leaks which the Tribunal, in turn, found drawing on its own expertise was a substantial failing.

[32] So, in that respect, and given the state of the evidence even had Mr Symes have been present, I would not have been satisfied that any procedural unfairness in conducting the hearing prejudicially affected the outcome of the result for Car King. That is an additional ground why this appeal fails.

[33] The appeal is dismissed. The orders in the Tribunal stand. The money is to be refunded and the vehicle is to be returned immediately following the refund.

T J Gilbert
District Court Judge