

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CIV-2019-070-000407
[2019] NZDC 10670**

BETWEEN

DIETMAR WILHELM VOGEL
Appellant

AND

INGHAM-SEARS AUTOHAUS LTD
Respondent

Hearing: 6 June 2019

Appearances: Appellant appears in person
Respondent appears in person

Judgment: 7 June 2019

RESERVED JUDGMENT OF JUDGE T R INGRAM

[1] Mr Vogel has appealed a decision of the Motor Vehicle Disputes Tribunal given on 8 March 2019. Mr Vogel's appeal was supported by voluminous documentation, and he represented himself. The appeal hearing was conducted by addressing some 18 separate grounds of appeal outlined in a memorandum. I deal with each in turn.

[2] Firstly, Mr Vogel complains that the statements of the dealer's main witness, Mr Giffiths, were wrong or misleading or both. He points to contrary evidence provided by him to the tribunal. On this point, the assessment of the evidence of any particular witness, is a matter for the tribunal, which is convened by a qualified lawyer, who is assisted by an expert assessor from the motor vehicle industry. I did not see and hear the witnesses, and I am unable to conclude that Mr Giffiths' evidence was in any relevant part or whole, wrong or misleading.

[3] Courts and tribunals are often required to assess vast amounts of evidence in the round, and make factual findings according to their assessment of the totality of the evidence. A Court or Tribunal is entitled to accept or reject some, or all of a witness' evidence, and to make findings accordingly. One or more errors or mistakes may not render a witness' evidence unreliable or unacceptable on other points. The tribunal did not expressly rely on Mr Griffiths' evidence for any one of its findings, and I cannot assume that it did in relation to any of the points in dispute on this appeal.

[4] The second point relates to Mrs Vogel's affidavit evidence being disregarded. Firstly, I do not accept that her evidence has been disregarded at all, and certainly there is no such finding in the tribunal's comprehensive and detailed decision. Mr Vogel's claim that because his wife's affidavit has not been referred to by the tribunal must mean that her evidence has been totally ignored is simply not sustainable.

[5] In this case, the tribunal's findings and reasoning are clear, explicit and cogent. The fact that reference has not been made to particular witness's evidence does not mean that it was not taken into account. Likewise, the fact that the Tribunal has made a factual finding contrary to the substance of the evidence of a particular witness does not mean that the evidence was not taken into account. Courts and Tribunals are routinely faced with making decisions on contested factual matters, and they make findings on the totality of the evidence according to the factual and legal matrix

applicable to the case they are dealing with, as the Tribunal carefully explained in a comprehensive and detailed decision outlining the legal basis on which the Mr Vogel's claim was rejected, which is outlined below.

[6] The third point relates to the evidence of Mr Martin, who provided affidavit evidence about witnessing self-locking of the car. Again, the fact that reference has not been made to particular witness's evidence does not mean that it was not taken into account. The tribunal has given reasons for concluding that it was not satisfied about the intermittent self-locking issue, and went on to explain that because the respondent has always, and continues to, stand by its obligations under the vehicle warranty, any recurrence of the problem can and should be addressed by the vehicle being returned for repair, so no remedy or order from the Tribunal is necessary or justified.

[7] The fourth point relates to the evidence of Mr Andrew Weis, who also gave evidence about the self-locking issue. As explained above, the tribunal is not required to explicitly refer to the evidence of every single witness in giving its decision. The tribunal is required to give reasons for its decisions, which it has done. Those reasons are detailed and cogent, and the legal analysis on which it was based is impeccable.

[8] The fifth point was that the tribunal's required that witnesses be cross-examined by questions put to the tribunal, who asked the questions. That is a technique common in many statutory tribunals, which for practical reasons restrict cross-examination in that way. The benefit of that approach is to ensure that the questions put are both factually accurate and legally relevant, and do not suffer from the standard faults to be found in layman's attempts at cross-examination, which include asking more than one question at a time, and asking long rambling, multi-faceted questions which cannot accurately be answered by a witness without a particularly agile mind, an extremely good short term memory, and a lot of patience.

[9] In practice, the adjudicator controls the hearing, makes any rulings on procedure and is responsible for issuing the reasoned written decision. The adjudicator is responsible for conducting the proceeding in an orderly and efficient manner under cl 2A of Schedule 1 to the Act, and under cl 8 must conduct the proceedings in

public, and with as little formality as the requirements of the Act and the proper consideration of the matters before the Disputes Tribunal permit. I am satisfied that in general terms the Tribunal has ensured that each party had proper notice of the case against them; that each party had a proper opportunity to present their case and to respond to the other party's case; and that proper consideration was given to the legislation brought to its attention.

[10] In those circumstances, given the qualifications of the adjudicator and the expert assessor, I am satisfied that the procedure adopted was appropriate and within the spirit and letter of the legislation. Further, I am satisfied that Mr Vogel was given a full opportunity to present the tribunal with the vast array of material relevant to his complaints about the vehicle concerned, and that his evidence was carefully and thoroughly considered. The absence of personal cross-examination will not render a hearing unfair if the relevant issues are addressed. I am satisfied that they were in this case.

[11] The sixth point is a claim that the tribunal was not aware that Mr Vogel had brought a character witness with him to the tribunal. This is not a case which involved any issues of character or credibility. The tribunal made no character finding, and no credibility finding adverse to Mr Vogel. The tribunal did make some factual findings which were adverse to Mr Vogel's case, but none of those findings could reasonably be construed as a credibility finding against Mr Vogel personally, or indeed any of his witnesses. I am not persuaded that the tribunal made any determination regarding Mr Vogel's integrity, character or truthfulness. Such findings as the Tribunal did make cast no aspersion on Mr Vogel, or any of his witnesses.

[12] The seventh point is that the hearing was unfair because Mr Vogel's character witness was not called upon to give evidence. I accept that it was appropriate to refuse to hear from a character witness, as the case is not about Mr Vogel's character or integrity. Mr Vogel was not accused of being a liar, and there is no finding anywhere in the tribunal's decision that Mr Vogel has been untruthful or otherwise lacks integrity. The outcome turned on the legal matrix of the claim and the availability of a remedy under warranty, which says nothing about the character of Mr Vogel or his witnesses.

[13] The eighth point relates to a tribunal finding that the vehicle had been damaged by road chip, and the tribunal determined that it would not be appropriate to order that the vehicle be returned to the dealer following repair. Mr Vogel's argument was that the road chip damage was entirely superficial. Whilst that view was advanced, there was simply no reason why the tribunal had to accept that view of the matter. The car in question was a high-end Mercedes Benz with a list price of approximately \$160,000.00. The tribunal heard the evidence, and reached the view that the damage, even though repaired, was of such a nature that an order for return of the vehicle was not appropriate. I have no basis upon which I could fairly conclude that the tribunal could not have reached that view on the available evidence. On the information available to me, including the mileage on the odometer, I would concur with the Tribunal's view.

[14] The ninth point was an allegation that the tribunal totally disregarded an acceptance by a representative of the dealership that the intermittent faults happened. Whilst the tribunal did not accept that the evidence established on the balance of probability that some of the claimed faults occurred, the essential reason underpinning the tribunal's decision was that the vehicle remained in warranty, that the dealership had done, and undertook to continue to do, everything that they knew how to do in order to deal with the complaint of intermittent malfunctioning of computer controlled parts.

[15] In circumstances where the dealership stands behind the product, and continues to stand behind it, the question simply becomes one of the nature and extent of any losses arising. The tribunal determined that there was no evidence of any loss at all, as the dealership stood behind its warranty, and undertook to continue to provide the standard of service and care mandated by that warranty. That being so, in the absence of a quantifiable loss, and with a vehicle which had been the subject of damage and repair, the tribunal concluded that it was not appropriate to order a return of the vehicle and no monetary order could be justified where there was no evidence of a decrease in value of a vehicle still in warranty. I respectfully accept the reasoning in the tribunal's determination as legally and factually impeccable.

[16] The tenth point relates to the tribunal's alleged disregard of evidence that an employee of the respondent had witnessed a "complete electronic system block". For the reasons explained above, the fact that the tribunal has not specifically referred to a particular witness does not mean that the evidence was not taken into account, and as explained above, the case was decided on legal considerations applying to the facts as the tribunal found them. The issue was raised with the Tribunal, which accepted that the warranty cover was adequate to deal with all issues of this type.

[17] The eleventh point alleges a total disregard of evidence about a defect in the vehicle's diagnostic system for intermittent electronic failures. Again, as explained above the tribunal is not required to explicitly deal with each and every witness and each and every piece of evidence in explaining the reasons for its decision. The basis upon which the decision was reached is clear and cogent, and the Tribunal accepted that the warranty cover was adequate to deal with all issues of intermittent electronic failure, and no further explanation is required.

[18] The twelfth point alleges that the tribunal failed to take into account the possibility that external electrical interference could have been a possible cause of the intermittent electronic failures. That is a matter of evidence, and the tribunal's conclusions were explained in considerable detail. The decision itself was fundamentally explained on the basis of the applicable law, and although Mr Vogel endeavoured to persuade me that a software upgrade might be able to prevent outside electrical interference, I was completely unpersuaded by his explanation and in any event, I do not accept that this possible explanation for intermittent failure of electronic and computer controlled functions of the vehicle equipment would suffice to bring the vehicle within the relevant provisions of the Fair Trading Act and Consumer Guarantees Act. Further, it is clear that the tribunal carefully considered the issue, which is dealt with over nearly two pages of the tribunal's decision. I am satisfied that the tribunal's conclusions were properly based on the evidence available.

[19] The thirteenth point relates to an alleged disregard of a video showing what may be a malfunction of the car locking system. Again, as explained above the tribunal dealt with the evidence in the round, and made certain factual findings based on the totality of the evidence. The tribunal is not required to deal with each individual item

of evidence, or each individual witness, and the fact that the tribunal did not explicitly deal with something in its detailed decision does not mean that the evidence was not considered. The decision given was based on the applicable law and the warranty, and a conclusion drawn that the Tribunal was entitled to reach.

[20] The fourteenth point is that the adjudicator refused to accept Mr Vogel's "final word", although he acknowledges that the written document containing the submission was accepted by the adjudicator after the hearing. In circumstances where the hearing lasted several hours, and a substantial amount of material was presented, I am unable to conclude that Mr Vogel was not given a fair opportunity to put his case. The detailed explanation of this case by the tribunal in its decision has left me in no doubt that each and every aspect of Mr Vogel's case was carefully considered, and it is clear from Mr Vogel's note of the reasons for his appeal that the "final word" document was provided to and accepted by the tribunal. Having reviewed the tribunal's decision, I have reached the conclusion that the tribunal has given careful thought to the points advanced by Mr Vogel and made an unhurried, comprehensive assessment of all the material advanced for consideration.

[21] The fifteenth point is that the tribunal dismissed Mr Vogel's claim that a reference that he made to the Mercedes website led him to rely upon misleading advertising about an electronic driving support system in his decision to purchase the vehicle. In its decision, the tribunal dealt with the issue of this electronic "stop and go" system, explaining that the evidence led the tribunal to the conclusion the system is not designed for universal application on New Zealand roads, a conclusion which is solidly supported in the tribunal's analysis of this particular issue.

[22] Put shortly, the tribunal unsurprisingly concluded that an electronic driving support system designed for use on high speed German autobahns may not have much practical application on the crowded and relatively low speed New Zealand roading network. The tribunal's examination of the issue, the relevant evidence, and the conclusion reached, is detailed at length in its decision. In my view, it is simply unrealistic for a dealership, such as the respondent, to be expected to extend an umbrella of responsibility for purchasing decisions made in respect of a function which does not work well in circumstances which it was not designed to cover.

[23] There was no evidence that the system would not work adequately in the particular circumstances it was designed for, circumstances which rarely arise in New Zealand, and I do not accept that the advertising was in any material respect false or misleading. I do not accept that the tribunal ignored any of the evidence, and I accept that the tribunal's findings were available on the evidence before the tribunal.

[24] The sixteenth point amounts to a replay of the fourteenth point, being essentially an allegation that the tribunal did not allow Mr Vogel a final opportunity to make a submission attacking the respondent's witness as having made wrong and misleading statements. In circumstances of this case, I am satisfied that the tribunal extended a proper opportunity to Mr Vogel to put his case and I am satisfied that the tribunal has dealt with the points that Mr Vogel was relying upon in support of his case. The fact that the tribunal has reached conclusions contrary to Mr Vogel's case is not evidence of any failure on the part of the tribunal to give a fair, balanced and unbiased hearing to all of the evidence presented to it by both parties.

[25] The seventeenth point was that the tribunal failed to have regard to the fact that the vehicle spent some six months out of the first 18 months in the workshop for repair and/or warranty work. Again, as explained above, the tribunal is not required to cover each and every aspect of each witnesses' evidence in expressing its findings and the reasons for them. I have said that the tribunal has adequately covered the basis upon which it has reached its conclusions, and those conclusions are based on a straightforward and unexceptional view of the relevant statutory provisions. As explained above, the tribunal determined that Mr Vogel could not establish a monetary loss, and in the absence of clear evidence of diminution in value of the vehicle, or expense arising from warranty work, the tribunal simply had no basis upon which it could take any action under the legislation Mr Vogel relied upon to advance his claim.

[26] The eighteenth and final point was that the adjudicator dismissed the evidence of intermittent electronic failure and had ignored a photo of a problem which occurred on 9 May. Again, as explained above, the tribunal necessarily had to consider all of the evidence in the round. The tribunal's determination was that warranty work and investigations had been carried out, and it determined that the actions taken by the respondent to use its diagnostic tools, equipment and software met all the appropriate

standards applicable to warranty claims for this class of vehicle. That view was taken on a broad assessment of the evidence, as it must inevitably be, and I am not satisfied that the tribunal has fallen into error in making that assessment.

[27] Having seen and heard Mr Vogel's explanations, and acknowledging his engineering background, I am not persuaded that the tribunal has fallen short in any material way in undertaking its statutory task. To the contrary, I am satisfied that the tribunal has patiently considered both the substance, and the detail of Mr Vogel's complaints. The tribunal has made a thorough, careful and detailed assessment of Mr Vogel's complaints, and given comprehensive reasons for its conclusions in a 22-page decision. Mr Vogel's complaints about the tribunal's processes, assessments and conclusions, both individually and collectively, fall well short of persuading me that any error of any kind was made by the tribunal in either its conduct of the hearing, or the conclusions it drew from the evidence presented.

[28] Appeal dismissed.

Judge TR Ingram
District Court Judge

Date of authentication: 07/06/2019

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.