IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-004-000777
[2019] NZDC 14559

BETWEEN	JIE QIN YANG ANDY ZHOU Appellants
AND	EVI LIMITED TRADING AS METRO AUTOMOTIVE Respondent

Hearing: 26 July 2019

Appearances: Appellants appear in Person
No appearance by or for the Respondent

Judgment: 26 July 2019

ORAL JUDGMENT OF JUDGE M-E SHARP

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[1] Jie Qin Yang appeals a decision of the Motor Vehicle Disputes Tribunal, dated 15 April 2019. The respondent, EVI Limited trading as Metro Automotive, has not appeared today or made any submissions in writing. I take it, therefore, that it is not opposing or defending the appeal.

[2] Section 16 Motor Vehicle Sales Act 2003 governs appeals from decisions of the Disputes Tribunal and says that any party who is dissatisfied with the 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. 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 in 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] Subsection 3 governs situations where the amount of the claim does not exceed $12,500. For the purposes of this appeal, given that the initial application, which is reinforced in this appeal, was that the respondent be forced to take back the car in question and refund the purchase price to the appellant, I take it, and am dealing with the matter as if the appeal is brought under s 16(2), where the amount of the claim exceeds $12,500.

[4] The appellant is represented today by her husband, who is not a lawyer. His name is Mr Zhou but he has asked that I allow him to speak, given that his wife speaks no English and he spoke on her behalf at both of the former hearings before the Motor Vehicle Disputes Tribunal. I have therefore allowed him an unusual accommodation by allowing him to make submissions to me today on her behalf.

[5] Essentially, he has placed before me three new receipts which he says were not before the Disputes Tribunal at the time that it last considered this matter but which, he says, demonstrate that the decision of the Tribunal was, in fact, wrong in fact and in law.

[6] I am not sure that he is correct when he asserts that the matters referred to in the invoices are either new or that they were not before the Tribunal at the time that it last heard the matter, given that the matters to which they refer, or the work that was done by Continental Cars BMW Takapuna is referred to in the last decision of the Tribunal. However, I have read them and taken them into account when dealing with this matter.

The law

[7] Appeals such as this are by way of rehearing. By r 18.20 District Court Rules 2014, the Court has full discretionary power to rehear all or any part of evidence taken before the decision maker. Rule 18.20(2) states that the Court must rehear the

evidence of any witness if the Court has reason to believe that any note of the evidence of that witness made by direction of the decision maker is or may be incomplete in any material particular, and r 18.20(3) states that the Court has full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit; thus I have allowed Mr Zhou, effectively, to give further evidence.

[8] In the matter of *McBride Street Cars Limited v Loach*, His Honour Judge Harrison discusses the jurisdiction of the Court to entertain an appeal from any decision of a Disputes Tribunal, at paras (4) through (8) inclusive.[1] At para (6) he repeats r 18.19 District Court Rules 2014 that the appeal is to be by way of hearing, and r 18.24 of the same rules, which states that the powers of the Court on appeal are to either make any decision that the Court thinks should have been made or to direct the decision maker to re-hear the proceedings concerned, or to consider or determine any matter that the Court directs, or to enter judgment for any party to the proceeding that the Court directs. In the alternative, make any order the Court thinks just, including any order as to costs, but the Court must state its reasons for giving a direction under subclause (1)(b).

[9] At ss 3 of that rule, the Court may give the decision maker any direction it thinks fit relating to re-hearing any proceedings directed to be reheard or considering or determining any matter directed to be considered or determined.

[10] At para (7), which I endorse, Judge Harrison said, "This decision on appeal from the Tribunal is an appeal against the decision of a specialist body." He referred to Judge McIlraith's decision in *Dallimore Motors Limited v Gourley*, and adopted what that Judge said when he adopted 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."[2]

[11] I consider this appeal by reference to those remarks of both my brother Judges, and thus I approach it on the basis that this Court has an overall reluctance to interfere

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[1] *McBride Street Cars Limited v Loach* [2017] NZDC 10758
[2] *Dallimore Motors Limited v Gourley* [1997] DCR 681

with the discretionary decision made by the Tribunal, and I will be slow to differ from the Tribunal on the facts. The findings of this Tribunal on this appeal are the exercise of a discretion, and that is the way in which I deal with the matter.

[12] I also deal with this appeal on the basis of evidence presented to the Tribunal and on the principles set out in the case of *Austin, Nichols & Co Inc v Stichting Lodestar*.[3] That is:

(a) The appellant has the onus of satisfying this Court that it should differ from the Tribunal's decision.

(b) That this Court should only interfere in the Tribunal's decision if it considers that the Tribunal's decision was wrong.

(c) This Court may or may not find the reasoning of the Tribunal persuasive, but this Court has a responsibility of arriving at its own assessment on the merits of the case.

[13] Strictly speaking, the appeal that I hear today is only in respect of the Tribunal's decision of 15 April 2019, and not against the previous decision of the Tribunal. It is on that basis that I approach it.

[14] I note that the history of the matter is set out at Adjudicator Carter's introduction to his decision, recording that on 27 January 2018 Jie Qin Yang purchased a 2007 BMW X5 for $22,610 from Metro Automotive. It had an odometer reading of approximately 81,000 kilometres at the time of sale. Ms Yang rejected the vehicle in late 2018, alleging that it had several faults since purchase which Metro Automotive had failed to rectify within a reasonable time.

[15] The Tribunal considered Ms Yang's claim in respect of those alleged faults during hearings on 17 December 2018 and 29 January 2019. In a decision dated 20 February 2019, Adjudicator Carter concluded that Ms Yang had proven that the vehicle did have five minor defects, but it was his decision to dismiss Ms Yang's

[3] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103

application to reject the vehicle on the basis that those faults did not amount to a failure of a substantial character under s 21 Consumer Guarantees Act 1993. He did, however, order Metro Automotive to replace the vehicle's radiator.

[16] At the second claim before the Tribunal, Ms Yang again applied to reject the vehicle. She placed new evidence to prove many of the faults that she alleges existed when the matter was previously heard by the Tribunal and also alleged that new faults had been identified.

[17] The Tribunal dealt with this second claim on the basis of, first, determining whether the Tribunal had jurisdiction to hear Ms Yang's claim in respect of the faults that it had previously considered and, then, whether the recently identified faults breached the acceptable quality guarantee in s 6 of the Act.

[18] I say again that I do not consider I have the jurisdiction to look again at the previous decision of the Tribunal because that is not under appeal here, but even were it to be so I could not find fault with it, either by way of a mistake of law or of fact.

[19] Dealing with the Tribunal's decision that it did not have jurisdiction to hear Ms Yang's second claim in respect of previously considered faults, I can also not identify any mistake of law which has given rise to the Tribunal's decision.

[20] Adjudicator Carter was completely correct when he stated at para (18) that the Tribunal has no express jurisdiction to rehear matters in its constituting legislation, the Motor Vehicle Sales Act 2003, nor an inherent jurisdiction to rehear matters. Consequently, I agree with Adjudicator Carter's judgment that the Tribunal had no jurisdiction to rehear the aspects of Ms Yang's claim that related to faults considered by the Tribunal at the previous hearings covered by the decision of 20 February 2019.

[21] I turn now, therefore, to the balance of the Tribunal's decision of 15 April 2019 as to the then new alleged faults, and whether they breach the acceptable quality guarantee. I agree with Adjudicator Carter inasmuch as I am unable to see that there is any mistake of fact or law which caused him to exercise his discretion improperly or unfairly.

[22] All, really, that Ms Yang, through her husband Mr Zhou, is attempting to do is to relitigate the matters which were before the Motor Vehicle Disputes Tribunal. Even though I have accepted new evidence in, that new evidence is only in relation to the same matters which were presented as new evidence, then, of faults, considered by the Disputes Tribunal at the hearing on 2 April 2019. I cannot see that there is anything new.

[23] The invoices that I have are dated 6 March, 11 June and 13 June. In its decision of 15 April 2019, the Tribunal dealt with the following claims related to, at that time, new evidence. Firstly, a fault with the vehicle's rear control arms and, secondly, a fault that causes the ABS warning light to illuminate.

[24] The Tribunal found that there was contradictory evidence from Continental Cars BMW and that, because the rear control arms passed the warrant of fitness inspection, it was not satisfied that Ms Yang proved that the rear control arms required replacement but, even if they should require replacement because worn, it was not satisfied that the condition of the rear control arms breached the acceptable quality guarantee in s 6 of the Act.

[25] In particular, it was cognisant of the fact that the motor vehicle was 11 years of age, it had travelled 81,000 kilometres at the time of sale, and that particular alleged defect was identified in March 2019, more than 13 months after purchase, by which time the vehicle had travelled more than another 9000 kilometres.

[26] The Tribunal was also in possession of evidence that the rear control arms in a vehicle of that age and mileage would commonly require replacement because rubber components degrade over time.

[27] Accordingly, the Tribunal was not satisfied that evidence proved that the acceptable quality guarantee in s 8 Consumer Guarantees Act had been breached.

[28] When it considered the issue of the ABS lights, the Tribunal found that in the absence of evidence proving that the ABS fault was related to any other defect, it was not satisfied that the now-appellant had proven that the ABS light was indicative of

any new defect with the vehicle, although it may be evidence of the existence of a fault with the four wheel drive transfer case, which had been considered during previous hearings.

[29] I cannot fault his logic, and thus identify any mistake of fact or law in respect to those particular matters. When I look at the new invoices, they seem to relate to the same matters all over again. The invoice of 6 March 2015 talks of a slight play in rack and steering, two four by four lights on a transfer case binding, and the checking of a fault memory finding multiple faults stored. It talks of recommending replacing the control unit and servo motor, and of a water leak into boot.

[30] As I understand it, all of those matters were considered by the Tribunal at the first hearing. The invoice for 11 June is about the fault code for the transfer case servo motor but it was removed and a new control unit and code to the vehicle, at not very great expense, was replaced; fault codes were cleared; there was a top-up of oil; a road test; as well as adjustment to wheel aligning and the like. There is nothing in there which could not relate to fair wear and tear and/or which was not considered by the Tribunal.

[31] The most recent invoice is for 13 June, which talks of the vehicle shuddering and misfiring on cylinder six. When checked, cylinder six was swapped with coil cylinder five, which was cleared and re-checked and the fault had moved, so they replaced cylinder six coil, cleared the fault and the road test was all okay.

[32] So, it seems to me that either everything that has been done since the last hearing was already the subject of consideration by the Tribunal, on one or both occasions, or indeed, perhaps in respect of the invoice of 13 June, was a simple matter that did not cost very much to fix and only related to fair wear and tear; $289, in fact.

[33] It would have been perhaps helpful to the appellant if some better evidence than just the provision of invoices had been provided to the Court but, even so, as I have already explained, there is really nothing here before me from which I could or should disagree with the Tribunal's decision. There is and was no identifiable mistake

of law or fact and the appeal must therefore fail, the appellant having failed to discharge the onus upon her.

[34] The appeal is therefore dismissed.

M-E Sharp
District Court Judge