

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CIV-2019-004-001387  
[2020] NZDC 11202**

BETWEEN BEACHAM PARTS & SERVICE LIMITED  
Appellant

AND DONG SHENG NIAN  
Respondent

Hearing: 16 June 2020

Appearances: Mr Beacham on behalf of Appellant  
Respondent in Person

Judgment: 18 June 2020

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**DECISION OF JUDGE G M HARRISON**

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[1] Beacham Parts & Service Limited, trading as Beacham European (BE) appeals against a decision of the Motor Vehicle Disputes Tribunal of 12 July 2019, in which the Tribunal upheld the claim of Mr Nian and declared the Agreement for Sale and Purchase of the vehicle in question to be void pursuant to the relevant provisions of the Fair Trading Act, and for the purchase price of \$39,000 to be refunded to Mr Nian who in turn was directed to make the vehicle available for uplifting by BE.

**Appeals to this Court**

[2] Clause 16 of Schedule 1 of the Motor Vehicle Sales Act 2003 provides any party dissatisfied with a decision given by the Motor Vehicle Disputes Tribunal a right of appeal to this Court.

[3] If the amount of the claim exceeds \$12,500 the appeal may be brought on either of the following grounds:

- 16(2)(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.

[4] The appeal was brought essentially on the first ground.

[5] The grounds of appeal were that BE acted lawfully under the Motor Vehicle Sales Act 2003 and provided the appropriate information by way of the Consumer Information Notice to the purchaser. BE claimed that it disclosed the vehicle was imported as a damaged vehicle which is automatically flagged as damaged at the border of entry to New Zealand, and not disclosing that the vehicle was a statutory write-off does not change the fact that the vehicle will always have, imported as a damaged vehicle, attached to its New Zealand history.

[6] Rule 18.19 District Court Rules 2014 provides that appeals are by way of rehearing.

[7] Virtually all appeals to this Court are determined on the evidence given before the body appealed from, with power to rehear as to part or whole. This Court, on appeal, makes full allowance for the fact that the decision-maker had the benefit of seeing and hearing the witnesses, and will only disturb the findings if it can be shown that the decision-maker exercised his or her discretion on some wrong principle, or disregarded a relevant consideration or took account of an irrelevant consideration – *Shotover Gorge Jet Boats Ltd v Jamieson*.<sup>1</sup>

[8] The Supreme Court in *Austin, Nichols & Inc v Stichting Lodestar*<sup>2</sup> held that on a general appeal, the correct approach for an appellate Court is to form its own assessment on matters of fact and the law. The Court may come to a different opinion

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<sup>1</sup> *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA).

<sup>2</sup> *Austin, Nichols & Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

than the Court or Tribunal appealed from. If the original decision is wrong, the Court is obliged to overturn the decision.

[9] The Court went on to hold that an appellate Court may overturn a decision even if made by a specialist body such as the Motor Vehicle Disputes Tribunal. The appellate Court is not required to give any particular weight or pay deference to the views of the expert Court or Tribunal, although it may consider their views carefully. The appellate Court is obliged to form its own assessment of the issue at hand, irrespective of whether the Court or Tribunal appealed from is one of general or specialist jurisdiction.

### **The decision**

[10] The Tribunal recorded that on or about 21 February 2019 Mr Nian purchased a 2014 Mercedes Benz A45 for \$39,000 from BE. The vehicle had an odometer reading of 90,021 km at the time of sale. The vehicle had been written off for insurance purposes in Australia and had been registered as an “imported as damaged” vehicle in New Zealand Transport Agency records. Mr Nian’s allegation was that BE had engaged in misleading conduct, and breached the Fair Trading Act 1986, by failing to disclose that information to him. He sought to return the vehicle and obtain a full refund of the purchase price. BE says that it adequately disclosed the vehicle’s history to Mr Nian and that he should not be entitled to any remedy.

[11] The Tribunal defined the issues as:

- (a) Has Beacham European engaged in conduct that breaches s 9 of the Fair Trading Act 1986 (FTA)?
- (b) If so, what remedy is Mr Nian entitled to under the FTA?

[12] The Tribunal quoted s 9 of the Fair Trading Act and the leading authority of the Supreme Court in *Red Eagle Corp Ltd v Ellis*.<sup>3</sup> It also referred to the possibility that silence or the failure to disclose a material fact can constitute misleading or deceptive conduct.

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<sup>3</sup> *Red Eagle Corp Ltd v Ellis* [2010] 2 NZLR 492.

[13] In my view the Tribunal's assessment of the applicable legal principles was correct.

### **Motor Vehicle Sales Act 2003**

[14] Section 14 of the Act requires a motor vehicle trader who offers or displays a used motor vehicle for sale to ensure that a notice containing the particulars set out in s 15(1) is attached to the vehicle in a prominent position.

[15] The Consumer Information Notice (CIN) must contain in addition all the information required by Schedule 2 to the Consumer Information Standards (Used Motor Vehicles) Regulations 2008.

[16] The CIN in this case disclosed that the vehicle was imported as damaged.

[17] The Tribunal assessed the evidence as to whether the CIN was displayed in the vehicle. Mr Luu says that it was but Mr Nian and his wife both said they were not shown the CIN or advised that the vehicle was classified as imported as damaged.

[18] The Tribunal resolved that issue as follows:

[20] I prefer the evidence of Mr Nian and Ms Wu, who I found to be consistent and credible, and I am satisfied that Beacham European did not comply with its obligation to display a CIN on the vehicle that disclosed that the vehicle was imported as damaged or otherwise tell them that the vehicle had been classified as imported as damaged. I also note that Beacham European had an obligation to obtain written acknowledgement from Mr Nian that he had received a copy of the CIN (which would have been evidence that the CIN was shown to Mr Nian). Beacham European did not obtain this written acknowledgement.

[19] Mr Beacham's case was that the CIN had been displayed in the vehicle but I am of the view that the finding of fact by the Tribunal that the CIN was not displayed is unassailable. It was for the Tribunal to assess the credibility of the witnesses and to reach an appropriate conclusion which it has done.

[20] Furthermore, even it had been established that BE had observed its obligations under the Act, that is not a complete answer to the claim against it. It remains subject

to the Fair Trading Act, and to other legislations such as the Consumer Guarantees Act, and mere compliance with the basic requirements of the Motor Vehicle Sales Act is not always an answer to a claim.

[21] The Tribunal determined that BE had engaged in misleading conduct in breach of s 9 of the Fair Trading Act by failing to comply with its legal obligation to disclose that the vehicle was imported as damaged.

[22] The second aspect to the claim was that the vehicle had been written off in Australia due to structural damage. A vehicle being written off, as economically unrepairable, is a more serious circumstance than a vehicle receiving damage that does not lead to that consequence.

[23] The Tribunal held that BE had a separate obligation to disclose that the vehicle had been written off in Australia due to structural damage. In reaching that conclusion the Tribunal relied upon a High Court decision in *McBride Street Cars Ltd v District Court* (Dunedin Registry)<sup>4</sup> on the basis that such information is material to any reasonable consumer's purchasing decision. Receiving that information enables a consumer than to make enquiries as to the future consequences of the vehicle being a statutory write-off, those consequences being important because the Tribunal held that a stigma attaches to a vehicle that has been written off, which significantly affects the resale value of such a vehicle.

[24] Nicholas Davidson J in that case held that not to have told the purchasers about the statutory write-off in Queensland of the vehicle in question in that case was misleading and deceptive in all the circumstances and was a breach of the Fair Trading Act.

[25] The Tribunal dealt with this issue as follows:

[22] Mr Luu accepted that he did not tell Mr Nian or Ms Wu that the vehicle was a statutory write-off in Australia. Further, Mr Nian and Ms Wu say that the Trade Me listing for the vehicle, which they saw before they purchased the vehicle, made no mention of the vehicle being a statutory write off (sic) from Australia.

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<sup>4</sup> *McBride Street Cars Ltd v District Court* [2018] NZHC 111.

[26] Clearly Mr Nian should have been advised of that and was not.

### **Conclusion**

[27] Mr Nian had established to the satisfaction of the Tribunal two breaches of the Fair Trading Act, namely the failure to display the requisite CIN, and to advise Mr Nian that the vehicle was imported as damaged, and secondly that he was not advised that the vehicle had been written-off in Australia.

[28] Consequently he was entitled to the appropriate remedy under the Fair Trading Act which in all the circumstances of the case the Tribunal determined was s 43(a)(ii) which entitles the Tribunal to declare a contract to have been void at all times.

[29] In reaching that conclusion the Tribunal said:

[30] ...in reaching this conclusion, I am particularly persuaded by three factors:

The fact that the vehicle is likely to be worth less because of the undisclosed damage, the significance of the damage to the vehicle that caused it to be written-off and the fact that Mr Nian was deprived of the opportunity to make an informed decision to purchase the vehicle.

[30] I can discern no error on the part of the Tribunal in reaching that conclusion, nor in its factual findings. As a consequence the appeal is dismissed and the order of the Tribunal must now be implemented with the purchase price being refunded to Mr Nian who must then make the vehicle available to be uplifted.

G M Harrison  
District Court Judge