IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-004-001673
[2020] NZDC 12239

IN THE MATTER OF	AN APPEAL FROM THE MOTOR VEHICLE DISPUTES TRIBUNAL
BETWEEN	JODEN FINANCE LTD Appellant
AND	SANHACHAI PRERSSILP Respondent

Hearing: 29 June 2020

Appearances: J Murphy on behalf of Appellant
A Fuiava for Respondent

Judgment: 30 June 2020

DECISION OF JUDGE G M HARRISON

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[1] Joden Finance Ltd (JFL) appeals to this Court against a decision of the Motor Vehicle Disputes Tribunal of 26 August 2019 whereby the Tribunal held that the respondent Mr Prerssilp was entitled to reject a 2008 Mercedes Benz S350 vehicle purchased from JFL on 10 February 2019 and that he was not precluded from rejecting the vehicle by s 20(1)(c) of the Consumer Guarantees Act 1993.

[2] The facts are set out in detail in the Tribunal's decision. Essentially, there were problems with its cooling system, and warning lights relating to the SRS (Airbag) system and the ABS and ESP system, and with the remote key.

[3] The Tribunal held that the failure was of a substantial character and that Mr Prerssilp was entitled to reject the vehicle.

[4] Appeals to this Court are by way of rehearing, although on the evidence given before the Tribunal appealed from - R 18.19 District Court Rules 2014. On a general appeal, the correct approach for an appellate body is to form its own assessment on matters of fact and law. The Court may come to a different opinion from the court or tribunal appealed from. If the original decision is wrong, the court is obliged to overturn the decision – *Austin, Nicholls & Co Inc v Stitching Lodestar* [2008] NZLR 141. An appellate court may overturn a decision even if made by a specialist body. The appellate court is not required to give any particular weight or pay deference to the views of the expert court or tribunal, though it may consider their views carefully. The appellate court is obliged to form its own assessment of the issue at hand, irrespective of if the court or tribunal appealed from is one of general or specialist jurisdiction- *Austin, Nicholls* (supra).

[5] Appeals to this court from the Motor Vehicle Disputes Tribunal, are brought by way of clause 16 of Schedule 1 to the Motor Vehicle Sales Act 2003. For appeals where the amount of the claim exceeds $12,500.00 the appeal may be brought on the grounds that the Disputes Tribunal's decision was wrong in fact or law or in both fact and law. I did not understand Mr Murphy to challenge the Tribunals findings of fact.

[6] The issue for determination on this appeal is whether Mr Prerssilp lost the right to reject pursuant to s 20(1)(c) of the Act which provides that the right to reject goods shall not apply if:

> (c) The goods were damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply.

[7] The Tribunal dealt with this issue at [47] – [51] of its decision.

[8] In [48] the Tribunal said:

> …although Mr Prerssilp accepted that this damage (to the front left tyre and a minor scrape to the wheel) had occurred after he purchased the vehicle, I am not satisfied that it is sufficient to amount to damage for the purposes of s 20(1)(c) of the Act. Rather, I consider that this damage is likely to be able to be quickly and economically repaired and is the type of minor damage that is consistent with the ordinary wear and tear of a vehicle of this age and mileage.

[9] After the conclusion of the hearing and at the Tribunal's request further photographs were submitted by Mr Prerssilp. The Tribunal determined that after carefully reviewing those photographs and others earlier produced at the hearing there was in fact no damage to the vehicle's panel work above the left rear wheel.

[10] The Adjudicator, Mr J S McHerron sat with a duly appointed assessor, Mr S D Gregory. At [50] the Tribunal said:

> Overall, in Mr Gregory's view, there was no damage to the vehicle that required any repairs apart from the ordinary wear and tear damage to which I have referred to earlier. I accept Mr Gregory's assessment of this matter. It follows that I am not satisfied that Mr Prersslip has lost his right to reject the vehicle under s 20(1)(c) of the Act.

[11] The Tribunal then directed that Mr Prersslip was entitled to reject the vehicle and obtain a refund of the purchase price of $14,995.

The appeal

[12] Mr Murphy submits that the Tribunal misinterpreted s 20(1)(c). He referred to three decisions of the Tribunal in *Mitchell v Tradin Post Ltd*[1], *Pou v Harvey*[2] and *Wright v Fortis Panmure Ltd*.[3]

[13] These were all decisions of Mr B R Carter, Barrister as Adjudicator.

[14] In the *Wright* case the vehicle in question was damaged when an employee of Home Tune reversed into it, damaging the front of the vehicle. The damage was easily and inexpensively rectified but the Tribunal held that for the purposes of s 20(1)(c) the purchaser, had lost the right to reject the vehicle.

[15] At [31] of that decision the Tribunal said:

> Ms Wright will undoubtedly consider this aspect of the decision to be harsh, given the relatively minor nature of the damage compared to the value of the vehicle. However, I have no discretion under s 20(1)(c) of the CGA. Once I am satisfied that the vehicle has been damaged while in Ms Wright's

[1] *Mitchell v Tradin Post Ltd* [2019] NZMVDT 293.
[2] *Pou v Harvey* [2019] NZMVDT 246.
[3] *Wright v Fortis Panmure Ltd* [2018] NZMVDT 159.

> possession, I have no option but to conclude that she has lost the right to reject the vehicle.

[16] Similarly in the *Mitchell* decision the same Adjudicator held that the purchaser had lost the right to reject the vehicle because it had suffered minor damage to its front bumper after the purchase. A virtually identical clause to that in the *Wright* decision, as quoted in [15], was repeated.

[17] Also, again in the *Pou* decision Ms Pou's vehicle was damaged by some miscreant and the cost of repairs was assessed at $1500. Once more the same Adjudicator held that she had lost her right of rejection and repeated virtually word for word the clause previously referred to as to the harshness of the decision.

[18] However, in another decision *Singh v Spot One Limited*[4] Mr Carter determined that because of damage to the vehicle after purchase the right of rejection was lost. At [29] he said:

> On the basis of the photographs of the damage to the vehicle and the estimated cost of repair, I am satisfied that the damage exceed the normal wear and tear that one would expect to see on a vehicle of this age and mileage, and consequently, Mr Singh has lost the right to reject the vehicle under s 20(1)(c) of the Act. His application to reject the vehicle under the Act must therefore be dismissed.

[19] In yet another decision from Mr Carter in *Featonby v Advantage Cars Limited*[5] Mr Carter again held that the right to reject the vehicle had been lost. At [47] he said:

> That is because the damage is more than the usual wear and tear that one would expect to arise from the ordinary use of the vehicle, and although the damage may have been repaired easily and cheaply, it was nonetheless damaged.

What does "damage" in s 20(1)(c) mean?

[20] The issue, it seems to me, is whether the right to reject a vehicle is lost if any damage, even of the slightest imaginable, such as a scratch to the paintwork, justifies a finding that the right of rejection is lost.

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[4] *Singh v Spot One Limited* [2018] NZMVDT 288.
[5] *Featonby v Advantage Cars Limited* [2018] NZMVDT 248.

[21] I do not accept that the legislature intended the effect of s 20(1)(c) to be so harsh. Damage is defined in "The New Shorter Oxford Dictionary" as:

> Damage 1. loss or detriment to one's property, reputation etc. 2. harm done to a thing or …physical injury impairing value or usefulness …

[22] It must be remembered that the right of rejection only arises after a finding pursuant to the Consumer Guarantees Act that the vehicle supplied had faults that breached the acceptable quality guarantee in s 6 of the Act, and that those faults amounted to a failure of a substantial character. I cannot imagine that the right to reject a vehicle is lost because after purchase insignificant damage may have been caused to the vehicle. In my view it must be established on the evidence that the damage impaired the value of the vehicle to the extent that it would be unconscionable to permit the purchaser to reject it. That will be a question of fact for the Tribunal in each case.

[23] It is clear from the decisions of the Tribunal in which Mr Carter presided that although he regarded the provisions of s 20(1)(c) as harsh, nevertheless in the latter two decisions of *Singh* and *Featonby* he was alive to the possibility that if the damage to the vehicle did not surpass its fair wear and tear then the right of rejection would not be lost. In each of the cases before him Mr Carter decided that the evidence of damage exceeded fair wear and tear.

[24] In this case however the finding of the Tribunal very clearly was that the minor damage identified was no more than fair wear and tear and that in those circumstances the vehicle had not been damaged to the extent that the right of rejection was lost.

[25] I therefore discern no conflict in the decisions of the different Tribunal Adjudicators. Each of them recognises that damage amounting to no more than fair wear and tear will not result in the loss of the right of rejection. In those circumstances factual findings will determine whether the damage exceeds fair wear and tear.

Conclusion

[26] There was no challenge to the factual findings of the Tribunal. Mr Murphy's point was that the minor damage identified had to result in the loss of the right of

rejection because s 20(1)(c) is mandatory in its terms. I do not accept that it is so harsh for the reasons given. The damage relied upon must amount to some loss of value of the vehicle or reasonably significant cost of repair justifying a finding that damage greater than fair wear and tear has occurred.

[27] That is not the case here, according to the Tribunal's findings of fact. It has not otherwise misinterpreted the law, and as a consequence the appeal is dismissed.

[28] The question of costs is reserved. I understand Mr Prerssilp is in receipt of legal aid, and leave to file a memorandum as to costs is reserved to him. Any such memoranda must be filed within 10 days of the delivery of this decision with any reply from JFL to be filed within a further 10 days.

G M Harrison
District Court Judge