



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1658

APPLICANT E Ltd

RESPONDENT M Ltd

The Tribunal orders:

The claim is dismissed.

Background

1. E Ltd (CT & ET) operates an avocado orchard in [Area].
2. E Ltd has purchased avocado seedlings from M Ltd for several years.
3. In October 2018, E Ltd purchased approximately 1700 seedlings from M Ltd, 50 of which were the variety Bold Mambo on Zutano rootstock, and the rest Hass on Zutano. The seedlings appeared to be in good condition upon delivery, as confirmed in an email from ET to M Ltd dated 31 October 2018.
4. On 18 December 2019, ET sent an email to M Ltd expressing her concern about “the number of dead, sick or declining trees that we have from our spring 2018 plant”. ET stated that 240 of the trees were affected. ET noted that she was aware that other growers had been affected with a similar problem.
5. In May 2020, M Ltd offered to replace half of the 240 trees. M Ltd stated that this offer was in line with offers that they have made to other growers (replacement of 30% - 50% of affected trees).
6. E Ltd did not accept the offer.
7. E Ltd’s claim seeks compensation of \$24,000.00 for the 240 affected trees.

Findings

8. The issues for determination are:
 - a. Does the Consumer Guarantees Act 1993 apply?
 - b. If so, were the goods supplied of “acceptable quality”?

- c. If the goods were not of acceptable quality, is E Ltd entitled to reject the goods?
- d. What consequential losses are proven?

Does the Consumer Guarantees Act 1993 (“CGA”) apply?

9. Mr T (who represented E Ltd Ltd at the hearing) argued that the CGA applies, and the seedlings supplied were not of acceptable quality.
10. Mr Q and Mr X (representing M Ltd) submitted that the CGA does not apply.
11. Section 6 CGA states that “where goods are supplied to a consumer there is a guarantee that the goods will be of acceptable quality”.
12. Section 2 CGA sets out the definition of terms used in the CGA, as follows:

consumer means a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption

goods means personal property of every kind, and includes [...] minerals, trees, and crops whether on, under, or attached to the land or not

supplier means a person who, in trade, supplies goods to a consumer

person includes a local authority, every public body, and any association of persons whether incorporated or not
13. Having regard to the above definitions:
 - a. M Ltd is a supplier.
 - b. Avocado seedlings are goods.
14. E Ltd acquired goods from M Ltd. Therefore, the CGA will apply if avocado seedlings are “goods...of a kind ordinarily acquired for personal, domestic, or household use or consumption”.
15. The focus is on the nature of the goods themselves, not the purpose for which the purchaser acquires them. In this instance E Ltd acquired the seedlings for commercial purposes, and M Ltd only supplies avocado seedlings to commercial buyers, but avocado seedlings in themselves are goods that can be acquired for domestic or commercial use.
16. In *Nesbit v Porter* [2000] 2 NZLR 465, Court of Appeal was required to consider how to interpret the words “ordinarily acquired” in the context of goods that can be acquired for dual (commercial or domestic) purposes. In *Nesbit* the goods in question were a Nissan ute. The Court held that:

We consider that “ordinary” is used in the Act’s definition of “consumer” in the sense of “as a matter of regular practice or occurrence” or “in the ordinary or usual course of events or things” [...] Mr & Mrs Nesbit’s purchase was not an unusual or uncommon event [...] they did not make an idiosyncratic choice, buying for private use a vehicle like a Mack truck, which it would presumably be unusual to devote to that purpose
17. The Court of Appeal held that the CGA applied to the sale.
18. Applying that reasoning to the goods in question here, my finding is that it is not unusual or extraordinary for avocado seedlings to be purchased for domestic or household purposes. Avocado seedlings are available for sale in most retail nurseries in [Area]. Purchasing an avocado seedling to plant in the garden at home does not amount to an “idiosyncratic choice”, like buying a Mack truck for private use.

19. Therefore, I find that the CGA applies.

Were the goods of acceptable quality?

20. Section 7 CGA states that

goods are of **acceptable quality** if they are as—

- (a) fit for all the purposes for which goods of the type in question are commonly supplied; and
- (b) acceptable in appearance and finish; and
- (c) free from minor defects; and
- (d) safe; and
- (e) durable,—

as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to—

- (f) the nature of the goods:
- (g) the price (where relevant):
- (h) any statements made about the goods on any packaging or label on the goods:
- (ha) the nature of the supplier and the context in which the supplier supplies the goods:
- (i) any representation made about the goods by the supplier or the manufacturer:
- (j) all other relevant circumstances of the supply of the goods.

21. The evidence provided to me indicates that:

- a. Avocado trees are susceptible to fungal diseases. Fungal species that are pathogenic to avocado trees are widespread in the environment.
- b. In late 2019 the industry became aware that seedlings supplied in spring 2018 were suffering significantly higher than usual rates of die-back and death.
- c. The phenomenon was significant enough to trigger an industry response, including investigation into possible causes, and offers of replacement trees.

22. M Ltd provided me with a copy of an article entitled “Young Tree Dieback – A Nursery Industry Perspective”. The article, dated October 2020, appeared in ‘Avoscene’, a journal published by the NZ Avocado Growers’ Association Inc. The article notes that in late November last year (2019), a number of growers contacted their avocado tree nurseries to report concerns about the health status of some of their new plantings (8-12 months old). NZ Avocado carried out investigations and sampling. The main conclusions of the article are:

- a. All of the leaf and stem samples tested samples were positive for anthracnose, and some were positive for other fungal and bacterial species. The root samples were positive for several “potentially pathogenic” fungal species.
- b. The potentially pathogenic species identified are “endemic in orchard soils pre-planting”. They are described as potentially pathogenic because they are “frequently detected in orchard soils from the roots of perfectly healthy trees”.

- c. Trees from three different nurseries separated by 600km and using different soil media were equally affected for the first time on the same sites in the same year.
 - d. There is not sufficient information to determine with any certainty the cause of causes of the problem, but a possible explanation is that challenging weather conditions during spring, combined with “the stress of heavy flowering” created an environment that caused one of the many fungal species in the soil to become pathogenic.
23. Per section 7 CGA, the standard of “acceptable quality” for goods is linked to what a “reasonable consumer” would expect.
24. Mr T took the straightforward view that he purchased the seedlings so that they would grow and produce avocados for his business, and because 120 of them did not do this, they were not fit for purpose.
25. However, I do not think that this view is sufficiently nuanced to be reasonable, having regard to the nature of the goods.
26. An avocado tree is not a toaster or a ballpoint pen. It is a living organism that changes in response to its environment. Avocado seedlings are vulnerable to die-back and death due to fungal / root rot types of problems. Mr Q and Mr X submitted that they would “ordinarily” expect mortality rates of around 2%-5% in that category.
27. Sometimes the exact cause of the death of a particular tree will be known or knowable (there are several pathogenic species that are well understood in the industry, such as phythopthera). Sometimes even a thorough analysis will not explain which, of the many fungal species that are almost always present in the soil, caused the death of the particular tree, or why (if that species is also present amongst healthy trees) it was pathogenic in that particular instance.
28. There is not sufficient evidence to show me that the trees supplied by M Ltd had some sort of inherent fault or weakness. The fact that trees from three large nurseries were affected by the same problem tends to rule this out.
29. If, as seems more likely, the trees were reasonably healthy and fit for purpose when they were supplied, but they have suffered an expectedly high mortality rate due to a set of circumstances that occurred after planting, then this is a risk that must fall to the consumer and not to the supplier.
30. Therefore, my finding is that it is not proven that the goods failed to meet the guarantee of acceptable quality.
31. The CGA is the only arguable legal basis for E Ltd’s claim.
32. Therefore, the claim must be dismissed.

Referee: Nicholas Blake
Date: 11 November 2020



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 28 days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.