



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2022] NZDT 64

APPLICANT GC

RESPONDENT DM

SECOND RESPONDENT PO Ltd

The Tribunal orders:

1. PO Ltd is to pay the sum of \$404.00 to GC on or before Thursday 23 June 2022.
2. Once payment has been made, PO Ltd (or its agent) may collect the outboard motor from GC at a mutually convenient time. If the outboard motor has not been collected by 7 July 2022, GC may keep or dispose of it as he sees fit.

Reasons:

1. On 2 February 2021, GC (the consumer) purchased an outboard motor from PO Ltd (the seller) on Trade Me for \$345.00 plus \$59.00 freight with a twelve-month warranty. After a few months, the throttle cable broke. The seller (at least initially) denied any liability, and the consumer took the motor to NN Ltd for repair, but it needed a new part. The consumer claims that the motor was not of acceptable quality and that the seller, which is also the importer of the goods, failed to supply a replacement part for the repair within a reasonable time.
2. On 5 February 2022, the consumer filed this claim for \$804.00, comprising a full refund of \$404.00 plus \$400.00 for damage to his dinghy due to being unable to control his speed coming into the marina. The claim is against the seller and its director DM.
3. The issues to be determined are:
 - a) Was the motor of acceptable quality?
 - b) Did the seller fail to take reasonable action to ensure the supply of parts?
 - c) Was the consumer entitled to reject the motor?
 - d) What sum, if any, is payable?

Was the motor of acceptable quality?

4. Section 6 of the Consumer Guarantees Act 1993 (CGA) provides that where goods are supplied to a consumer, there is a guarantee that the goods will be of acceptable quality. Section 7 defines acceptable quality to include being as durable and fit for common purposes as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable. Factors taken into consideration include the nature of the goods, the price, any statements on the packaging, any representations by the supplier or manufacturer, and other relevant circumstances.
5. Section 7(4) of the CGA provides the supplier with a defence where the consumer is responsible for the failure. The first requirement for this defence is that the goods have been used in an unreasonable manner or to an unreasonable extent. The second requirement is that “the goods would have complied with the guarantee of acceptable quality if they had not been used in that manner or to that extent”.
6. The seller submitted that the motor was of acceptable quality, but the throttle cable broke due to corrosion caused by poor maintenance. He played a recording of a conversation with someone from NN Ltd, who agreed that corrosion was the problem and that this could “possibly” be due to maintenance issues. When contacted during the hearing, NQ (the owner of NN Ltd) and UE (the worker who dealt with the motor) both confirmed that lack of maintenance was a factor in the corrosion (which had caused a faulty stop switch and broken internal wires as well as the broken throttle cable). Based on this evidence, I find that the first requirement of the CGA s 7(4)(a) defence is satisfied. Using a motor without adequate maintenance is a clear instance of unreasonable use.
7. However, I am unable to find that the second requirement of the defence is satisfied. The witnesses both said that the quality of the materials was also a factor in the corrosion. In particular, they said that wiring for marine purposes ought to be tinned to prevent it corroding so quickly, whereas this motor’s wiring was not tinned.
8. The seller commented that NN Ltd services high quality brands as well, implying that only more expensive brands would use tinned wiring. It is true that the issue is not whether tinned wiring is superior, but whether a reasonable consumer would regard a motor with non-tinned wiring and a represented RRP of \$579.00 as acceptably durable in all the circumstances. One relevant factor is that the Trade Me listing represented the motor as being suitable for salt-water use, stating “being air-cooled less damaged [sic] caused by salt water”. It is telling that the seller’s comment in a text about the corrosion was, “Engine has been used in salt water”. The consumer responded, “So your outboard is only for fresh water?” but received no response.
9. I am unable to find that the motor would have complied with the guarantee of acceptable quality if it had been properly maintained, as I am not satisfied that the materials were acceptably durable for the purpose of salt-water use. For this reason, the CGA s 7(4)(a) defence does not apply, and I conclude that the motor was not of acceptable quality.

Did the seller fail to take reasonable action to ensure the supply of parts?

10. As the importer of the motor, the seller in this case doubles as the manufacturer of the goods as well as the supplier. CGA s 12 requires the manufacturer to “take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are so supplied”.
11. The seller accepted that it was obliged to have parts reasonably available for the motor, but claimed that a part was indeed available. According to the seller, it offered to take the required part from another motor in its stock and sell it to the consumer, but the consumer refused to pay.
12. However, the consumer denied that such an offer was ever made, and the seller did not produce any supporting evidence of the offer. I find that the evidence of written communications between the parties is more consistent with the consumer’s version: that the seller told him it would need to order a part from China, which did not arrive until March 2022, after he had filed his claim. I therefore find that the seller failed to have parts reasonably available.

13. This failure would entitle the consumer to seek damages from the seller in its role as manufacturer for the reduced value of the motor. However, given the consumer wishes to reject the motor rather than to claim damages for reduction in value, the significance of parts not being available is that the motor could not be repaired within a reasonable time, which is relevant to the next issue.

Was the consumer entitled to reject the motor?

14. Since the seller refused to remedy the corrosion issues at its own cost, or could not do so within a reasonable time due to unavailability of parts, I find that the consumer is entitled to reject the goods under s 18(2)(b) of the CGA.

What sum, if any, is payable?

15. The consumer rejected the motor by filing this claim. The effect of rejection is that the consumer is entitled to opt for either a refund or replacement of the goods (CGA s 23(1)). The courts have held that a consumer who opts for a refund is entitled to a full refund without any deduction for the period of use before rejection.

16. The consumer is also entitled under s 18(4) of the CGA to recover damages for reasonably foreseeable consequential losses. However, the consumer did not provide evidence to support his claim that the malfunctioning motor caused damage to his dinghy, so has not proven any consequential losses.

17. The sum payable is therefore \$404.00.

Referee: E Paton-Simpson

Date: 7 June 2022



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 20 working 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 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside 20 working 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>.