



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2022] NZDT 27

APPLICANT QS

RESPONDENT DD Limited

The Tribunal orders:

Ownership of the 2005 [vehicle] reverted in DD Ltd as of 9 November 2021; and

DD Ltd is to pay \$3869.75 to QS on or before 20 May 2022, plus, in the same timeframe, is to pay whatever weekly payments of \$58.64 (to the finance company) and \$13.79 (for breakdown insurance) were made by QS after the hearing on 5 April 2022; and

That all of the rights and obligations of QS under the collateral credit agreement vest in DD Ltd as of the date of this order (QS may cease all payments under the credit agreement on receipt of this order).

Reasons

1. QS purchased a 2005 [vehicle] from DD Limited ('DD') on 28 May 2021, with finance arranged through DD with GO Ltd (a collateral credit agreement). The purchase price of the vehicle was \$11,300.00 and QS paid \$58.64 weekly including interest to the finance company plus \$13.79 weekly for breakdown insurance.
2. In July 2021 QS advised DD of problems with the electric windows not opening and a bent aerial. On 3 August 2021 the vehicle broke down and was not driveable so was towed to a relative's house nearby – that problem turned out to be transmission failure. QS completed a DD claim form the following day. She received confirmation of receipt of the claim form from DD on 11 August 2022 and in that email DD advised her to have the vehicle assessed by any MTA Approved mechanic under the mechanical breakdown insurance she took out when purchasing the vehicle.
3. However 6 days later New Zealand went into a Level 4 Covid lockdown until 21 September, and did not reach Step 1 of Level 3 (where restrictions were eased to the point that the vehicle could be taken to a workshop) until 27 October 2021.
4. In mid-September QS emailed DD expressing concern about their lack of response to her phone calls and she requested a change of vehicle. In later correspondence in October 2021 QS advised DD that she did not think it worth having the [vehicle] fixed and was "strongly against having this car back after 12 weeks". In mid-November DD advised QS that they needed to have an independent inspection of the vehicle and that the process needed to be followed. By 11 November 2021 the vehicle was undergoing inspection at a mechanical workshop.

5. On 15 November 2021, QS requested a full refund from DD, having sought advice after having been asked to pay an excess by the mechanic. DD received repair estimates on 15 November and by 30 November advised QS that the repairs had been completed. However it transpired that only the transmission had been fixed at that point, and DD had overlooked the claim for repair of the windows and aerials – they did not become aware of this until some months later. Those repairs were carried out after the February hearing of this matter during an adjournment period.
6. QS seeks to reject the vehicle, cancel the contract and obtain a refund for amounts paid to date, as per the provisions of the Consumer Guarantees Act 1993 ('CGA'). She also seeks a refund for breakdown insurance payments made under the contract and alternative transport costs for the period she was without a car.
7. The issues to be determined are:
 - Was the vehicle of acceptable quality and if not, was any failure of guarantee a failure of substantial character?
 - What remedy was available to QS and does the fact that all repairs have now been carried out by DD affect that remedy?
 - What is payable on the claim?

Was the vehicle of acceptable quality and if not, was any failure of guarantee a failure of substantial character?

8. The CGA provides statutory guarantees to consumers that goods will be of acceptable quality (sections 6 and 7), the relevant aspects of the meaning of acceptable quality in this case being that the car is as free of minor defects and as 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 the nature of the goods and the price..."
9. With respect to a 16 year old vehicle, the "reasonable consumer" would not expect to be purchasing this age of vehicle in pristine condition, either cosmetically or mechanically, including the fact that parts subject to wear and tear may be near the end of their life and need repair or replacement within a relatively short time after purchase.
10. However where the CGA guarantee would entitle the consumer to a remedy when purchasing an older second-hand car is when there is a major fault that, within a short time of purchase, would make the car undriveable or uneconomic to repair (whether or not that was known about or detectable at the time of the sale) because the vehicle would not meet the criteria of durability in that case.
11. The above is the case here. The vehicle had a significant breakdown, in that it was not driveable and had to be towed, just over two months after QS purchased it from DD. I therefore find that it was not "as durable" as a reasonable consumer would expect taking into account its age and its price (\$11,300.00) and given that the transmission problem rendered the vehicle undriveable, I also find that the failure of guarantee was a failure of substantial character.
12. Mr I for DD argued that the repair itself was minor and that any failure was therefore not of substantial character (he also noted that DD paid over \$5000.00 to repair the transmission problem). However it is not a matter of how difficult or time-consuming the repair was, but of the effect of the problem, that is, the fact that the vehicle was not driveable at all and required an expensive (if simple) repair including a reconditioned transmission (that is, it was not a trivial matter that made the vehicle undriveable), makes the failure one of substantial character in that the reasonable consumer would not have bought the vehicle had they known of the nature of the problem that was to arise.

What remedy was available to QS and does the fact that all repairs have now been carried out by DD affect that remedy?

13. I find that QS was entitled to reject the vehicle once the transmission failure rendered the vehicle undriveable (section 23(1) CGA). A failure of substantial character gives the consumer a right to reject the goods. QS communicated in writing her wish to reject the goods and obtain a refund on 9 November 2021, before the vehicle was assessed and repaired.
14. Prior to that she had sought to swap the vehicle for another and at no point had she agreed to have the vehicle repaired and returned to her – she had also expressed in an October email that “I am strongly against having this car back after 12 weeks” (I do note though that the timeframe is not so much the issue here because both parties were affected by the Level 4 and Level 3 lockdown starting on 17 August). The repair of the vehicle was at DD’s instigation, DD having advised QS she would need to progress her ‘claim’ with them by involving her breakdown insurer and having her vehicle independently inspected.
15. I therefore find further that the fact that the vehicle was subsequently repaired by DD does not alter QS’s right to reject it, as she did on 9 November 2021. As per section 22(3) of the CGA, ownership of the vehicle reverted in DD at the time rejection was notified, that date being 9 November 2021. I note that as the vehicle is currently in DD’s yard, no transfer of possession is required.
16. Section 18(3) of the CGA provides that in addition to other remedies, the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure which was reasonably foreseeable as liable to result from the failure. QS’s claims for repayment of breakdown insurance premiums that she paid at the rate of \$13.79 per week and alternative transport costs fall into this category.
17. With respect to breakdown insurance, QS opted to pay for that and was liable for its costs up to the point where I find she rejected the vehicle. Payment after that date of 9 November 2021 was a loss that resulted from the failure of guarantee and the actual amount refundable is addressed below. Alternative transport costs are also a direct result of the failure of guarantee and that amount is also addressed below.

What is payable on the claim?

18. Section 23(2) of the CGA provides that the Tribunal may order that all or any of the rights and obligations of the consumer under the collateral credit agreement vest in the supplier. Where QS has the right to reject the vehicle, this is the appropriate order to make.
19. DD is therefore liable to pay QS all amounts she has paid to GO Ltd to date. As of 5 April 2022, the date of the final Tribunal hearing, that amount was \$2580.16, not including the payment that was to go out that night. Because QS was obliged to keep paying \$58.64 weekly under the credit agreement until the outcome of these proceedings was known, there will be some additional weekly amounts due to be refunded and DD should calculate those in consultation with QS and GO Ltd in order to make full payment by the due date of 20 May 2022.
20. As per finding 17, weekly payments of \$13.79 from 9 November 2021 to 5 April 2022 are payable by DD as consequential losses, being an amount of \$13.79 for 21 weeks = \$289.59. As with the payments to the finance company, further weekly amounts of \$13.79 are payable by DD to QS once she provides DD with evidence of payments after 5 April 2022.
21. QS has provided alternative transport cost evidence in the form of invoices from her daughter for the loan of her car at a rate of \$200 per month. In the event that a car has been borrowed from a friend or family member as in this case, compensation at a reasonable rate is still payable and in this case the claimed rate is far less than if QS had been in the position to pay for a rental car as alternative transport. DD is not liable for the period that QS was without a car

due to the unfortunate timing of the breakdown in relation to the August Covid lockdown, so I find that alternative transport costs of \$200.00 per month are due for the five months from November 2021 to April 2022, a total of \$1000.00.

22. In summary, DD is liable to pay \$2580.16 refund of payments made to date by QS under the finance agreement, \$289.59 consequential losses for breakdown insurance, and \$1000.00 alternative transport costs, a total of \$3869.75 (plus weekly payments made after 5 April 2022 as stated).

Referee Perfect
Date: 20 April 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 of 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>.