IN THE DISPUTES TRIBUNAL **[2016] NZDT 944**

BETWEEN	**DK** APPLICANT
AND	**DKD INSURANCE LIMITED** APPLICANT'S INSURER
AND	**VP LIMITED** RESPONDENT
AND	**VPV** RESPONDENT'S INSURER
Date of Order:	6 April 2016
Referee:	Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that VP Limited is to pay the sum of $2,475.16 directly to DKD Insurance Limited on or before 27 April 2016, and the claim is dismissed against VPV.

Facts

[1] In early 2015, DK left his car, a Toyota Prius, at VP Limited's airport parking facility. When he returned to pick it up, he found it had been damaged. All parties agree that the damage occurred while VPV, a VP Limited employee, was moving the car.

[2] The damage to the car has been repaired at a cost of $2,275.16, which was paid by DK's insurer, and they claim jointly with him for that amount.

[3] VPV is no longer employed by VP Limited and did not attend the hearing. DK did not attend the hearing either, having attended the original hearing, prior to the rehearing being granted. This order is made in the absence of both these parties.

Issues

[4] Is DK a consumer for the purposes of the Consumer Guarantees Act 1993 (CGA)?

[5] Do VP Limited's terms and conditions exclude their liability for this type of damage?

[6] Has VP Limited provided parking services to DK with reasonable care and skill?

[7] If not, what remedies are available and were the consequential losses claimed reasonably foreseeable?

Is DK a consumer for the purposes of the Consumer Guarantees Act 1993?

[8] I find that DK is a consumer as defined by the CGA because the services he acquired from VP Limited were of a kind "ordinarily acquired for personal, domestic, or household use or consumption".

Do VP Limited's terms and conditions exclude their liability for this type of damage?

[9] I find that the terms and conditions are valid and binding to the extent that they are agreed with any particular customer and involve damage that would not be subject to the

guarantees of reasonable care and skill contained in the Consumer Guarantees Act (or any other relevant guarantees in that Act).

[10] However, as this damage was caused while an employee of VP Limited was behind the wheel of the car, in the process of moving it, the terms and conditions do not apply because section 43 of the Consumer Guarantees Act 1993 prohibits contracting out of the Act, where the customer is not a business, and VP's terms and conditions recognise this at clause 10.

[11] DK is a consumer as above and there is no evidence to suggest he was 'in trade' at the time he engaged VP Limited to park his car. Even if he was, I note there is nothing on the booking form provided by VP Limited that records that he is 'acquiring the service in trade'. Any contracting out agreement where both parties are 'in trade' is required to be in writing and no such agreement has been formed in this case.

[12] Because an employee was driving the vehicle when the damage was caused, and no contracting out of the CGA is possible, the relevant issue is whether or not VP Limited has provided its service with reasonable care and skill.

Has VP Limited provided parking services to DK with reasonable care and skill?

[13] VP Limited's director, AA, attended the hearing and stated that the reason their employee lost control of DK's car, crashing it into another parked car, was that his car was electric and she had never driven one before. She therefore didn't realise it made no noise when turned on, so was caught unawares when it leapt forward, and in her rush to respond, her foot slipped from the brake to the accelerator. He contends that this is a straight-forward genuine mistake, and not a failure of reasonable care and skill.

[14] I accept that mistakes are not necessarily failures of reasonable care and skill. However, in this case driving was not incidental to the service, it was an integral part of the service provided, therefore a high standard of driving is reasonably required and expected.

[15] Further, the reasons given by AA are hearsay evidence as the driver herself did not attend the hearing and no statement was provided from her. There is therefore insufficient evidence that the fact that the car was electric was what led directly to the damage. The driver could simply have been paying insufficient attention while putting the car into gear, or have misjudged the space she had to move in, and I note that gears are what was discussed at the first hearing, as evidenced by the first order.

[16] I find that a parking service crashing a customer's car must, on the face of it, be a failure of reasonable care and skill, except in extraordinary circumstances beyond the supplier's control (such as a medical event). As facts of what precisely led to the impact in this case have not been sufficiently established, and what hearsay evidence exists as to cause relates to the operation of the vehicle, not something outside the driver's control, I find no exception to this has been established and that VP Limited is therefore in breach of the CGA guarantee.

What remedies are available and were the consequential losses claimed reasonably foreseeable?

[17] DK and his insurer are entitled to remedy for breach of the guarantee under section 32 of the CGA. They have not claimed for a reduction in value of the service (the $25 parking charge), so I therefore consider only the consequential losses claimed, being the repair cost of $2,275.16.

[18] There was no dispute about the quantum of the repair cost and I find it to be reasonably foreseeable given that the failure of reasonable care and skill involved impact with another vehicle. The claimed amount is therefore awarded under section 32(c).