IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-004-000346
[2019] NZDC 6778

BETWEEN	EVERGREEN ENTERPRISES (NZ) TRADING LIMITED trading as GREEN MOTORS Appellant
AND	DARRYL VICTOR TEBAY Respondent

Hearing: 10 April 2019

Appearances: Mr Wang on behalf of the Appellant
Mr Tebay by Telephone

Judgment: 11 April 2019

DECISION OF JUDGE G M HARRISON

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[1] Green Motors appeals against a decision of the Motor Vehicle Disputes Tribunal of 8 February 2019.

[2] Briefly, the facts are that on 10 August 2018 Mr Tebay purchased a 2005 Toyota Noah vehicle for $6,600 from Green Motors. About one month after purchase, the vehicle's electric sliding doors began to malfunction. Mr Tebay sought to reject the vehicle on the basis that the faults with the sliding doors make the vehicle unsafe and amount to a failure of a substantial character under the Consumer Guarantees Act 1993. (The Act).

[3] The Tribunal did not accept that the faults with the sliding doors were so serious as to amount to a failure of a substantial character and the application to reject the vehicle was declined. However, because the faults with the sliding doors breach the acceptable quality guarantee provided by s 18(2)(a) of the Act, Mr Tebay was entitled to have those defects rectified within a reasonable time. The vehicle I am informed is still at Green Motors' premises and has not been repaired in breach of the Tribunal's direction.

[4] Appeals to this Court from the Motor Vehicle Disputes Tribunal are governed by cl 16 of Schedule 1 to the Motor Vehicle Sales Act 2003. It provides that the appeal must be brought within 10 working days after receipt of the Tribunal's decision. Subsection (3) provides the basis for an appeal. It states:

> If the amount of the claim does not exceed $12,500 the appeal may be brought on the ground that the proceedings were conducted by the Disputes Tribunal in a manner that was unfair to the appellant and prejudicially affected the result of the proceeding.
>
> Because the purchase price of the vehicle in question was less than $12,500 that provision applies to this appeal.

[5] What then does the phrase "… in a manner that was unfair to the appellant and prejudicially affected the result of the proceeding" mean?

[6] It is remarkable that the ground of appeal to the Motor Vehicle Disputes Tribunal is in exactly the same terms as the ground of appeal from decisions of the Disputes Tribunal to this court pursuant to s 50 of the Disputes Tribunals Act 1988.

[7] As relevant, s 50 provides:

> **50 Appeals**
>
> (1) Any party to proceedings before a Tribunal may appeal to a District Court against an order made by the Tribunal under section 18(8) … on the grounds that—
>
> (a) The proceedings were conducted by the Referee …
>
> in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.

[8] That phrase has been the subject of extensive judicial interpretation. The first was that of Judge PJ Keane (as he then was) in *Saban v Crone* 3 DCR 541 which was an appeal pursuant to the Small Claims Tribunals Act 1976 but which, similarly to s 50, limited the ground of appeal to "procedural unfairness to the appellant".

[9] The judge said this at (p 543):

> I agree with Willy DJ in *Mete v Twohig* 3 DCR 446, at 447, that *the legislature is only concerned to allow appeals where there is some procedural unfairness*, and it is of the kind just described. In administrative law terms, it wished to make the decisions of referees final on the merits (s 17), but to give redress for any breaches of the basic natural justice principle that no man shall be condemned unheard (audi alteram partem). It did not purport to give a right of appeal on the quite separate grounds for invalidity; error of law as to jurisdiction, or error within jurisdiction on the face of the record. If that had been its intent it would have used the very words "error of law" or, given the emphasis on jurisdiction in the Act, *error of law is the jurisdiction*. To extend the words actually used, as Mr Peters is forced to say should occur, would be to deprive them of their obvious and usual meaning.

[10] Without reference to that decision, Thorp J reached the same conclusion as to the effect of s 50 in *NZI Insurance New Zealand Limited v Auckland District Court* [1993] 3 NZLR 453. At p 463 under "Summary and Conclusion" the judge said:

> 2. The legislative and parliamentary history of the 1988 Act both support that interpretation, by pointing towards a right of appeal restricted to procedural unfairness and against any intention to provide an appeal on the merits.

[11] In 1999 Smellie J came to the same conclusion in *Inland Holdings Limited v District Court at Whangarei* (1999) 13 PRNZ 661. After referring to s 50 and the New Zealand Insurance Company case, at p 669 the judge said:

> I am persuaded as Thorp J was in the NZI case that the responsibility for finding the facts is with the referee. The very limited right of appeal envisaged by the Act under s 50 precludes any conclusion that a District Court Judge on appeal should be performing that function. And it is, of course, well outside the function of a High Court Judge sitting in the review jurisdiction provided by the Judicature Amendment Act 1972. In summary then, I uphold the plaintiff's submission that the referee was the finder of fact. And, further, that the District Court Judge did not have jurisdiction to disagree with those findings.

[12] This decision was followed in 2004 by Fogarty J in *Shepherd v Disputes Tribunal* [2004] NZAR 319. At p 327 the judge said:

> [37] It is even more appropriate that this aspect of the law of res judicata should be applied to proceedings under the Disputes Tribunals Act 1988. The goal of that statute is to provide for low cost, speedy and final resolution of small disputes. To achieve that end Parliament was not interested in providing appeals on the merits of decisions.
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> [38] That may result in what might be described as rough justice from time to time. That has to be balanced against the overall goal of the Act to enable persons who could not possibly afford the very expensive litigation costs in the District and High Courts, the opportunity of taking claims before referees and getting justice. Taking into account the goals of the Disputes Tribunals Act 1988 I am reinforced in my mind that it is entirely appropriate to apply the law of res judicata in all its rigour against the applicant in this case.

[13] Appeals to this court on the sole ground that the manner in which the proceedings were conducted by the Tribunal was unfair to the appellant and prejudicially affected the result of the proceedings are therefore limited to procedural unfairness and provided the Tribunal has acted within jurisdiction there can be no effective appeal to this court on the merits or indeed on any error of law. I can see no basis to differentiate between the provisions of the Motor Vehicle Sales Act 2003 and the Disputes Tribunals Act 1988 when the sole ground of appeal in each case is provided for in exactly the same terms. This is confirmed by other decisions of this Court, namely, *Signet Wholesale (Kelston) Ltd v Dayal,* (Judge D M Wilson QC DC Auckland CIV-2009-004-001053, 17 Aug 09), and *L W Motors v Holder,* (Judge R L B Spear [2016] NZDC 26009).

[14] Mr Wang's general submission was that the Tribunal erred in its finding of facts. His first concern was a finding that the Consumer Guarantees Act applied to the sale transaction because Mr Tebay was not in business. The Tribunal dealt with that issue at paragraph [8] where it said:

> The fact that Mr Tebay twice used the vehicle to transport school children (he was employed as a caretaker at an Auckland school at the time) does not mean that Mr Tebay is in trade, that he acquired the vehicle in trade or that the vehicle has been used for business or commercial purposes. Accordingly I am satisfied that the Act applies to this transaction.

[15] Mr Wang was at pains to submit that the Act did not apply, but he could not identify a basis for that submission, his case being that because Mr Tebay had a tow bar affixed to the vehicle and that he worked as a caretaker for his local school, that somehow constituted him being in trade and using the vehicle for business or commercial purposes. Plainly that is incorrect. An employee as such is not regarded as being in trade.

[16] Mr Wang also complained that the vehicle should have been taken back to him immediately. He claimed that although he was not a mechanic he could have made an appointment with a specialist mechanic.

[17] In fact, Mr Wang himself took the vehicle to Manukau Toyota at Botany on 17 September 2018. It ascertained that the main cause of the malfunctioning sliding doors was that the door body rubbers were out of shape and holding the door shut. It also found that a cable on the driver's side door was damaged. It had to cut the cable to open the driver's side door. It provided an estimate of approximately $3,000 to rectify the faults with the sliding doors.

[18] Green Motors still must undertake repairs to the vehicle according to the Tribunal's order. At [22] of its decision, the Tribunal said:

> Certainly, as set out in *Acquired Holdings Limited v Turvey* [2008] 8 NZBLC 102, 107, where goods have failed to comply with the acceptable quality guarantee in s 6 of the Act, the consumer must first give the supplier an opportunity to remedy the failure before they can have the fault repaired elsewhere and recover the cost. However, this obligation does not extend to give the supplier the first opportunity to assess and diagnose the failure. A consumer may, as Mr Tebay has done here, attempt to diagnose the failure itself or have a third party do so, before returning the vehicle to the supplier to have any repairs performed.

That is what occurred in this case.

[19] Mr Wang's further point was that in his view Mr Tebay damaged the doors after taking the delivery of the vehicle. There was no evidence to support that. He also claimed that there were other conflicts of evidence because the timing of various events did not coincide.

[20] I do not accept that is so. The decision of the Tribunal is ordered, cogent and perfectly logical.

[21] Mr Wang has not been able to demonstrate any fault on the part of the Tribunal. Even if he had, the very limited ground of appeal explained at the outset of this decision would have precluded this Court in arriving at any different conclusion on the facts from the Tribunal. Green Motors appeal is accordingly dismissed.

[22] There was no cross-appeal from Mr Tebay regarding the Tribunal's finding that there had not been a failure of a substantial character, and so all that remains is for Green Motors now to repair the vehicle according to the Tribunal's decision.

G M Harrison
District Court Judge