EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2017-004-001720
[2018] NZDC 3834

IN THE MATTER OF	AN APPEAL FROM THE MOTOR VEHICLE DISPUTES TRIBUNAL
BETWEEN	TAMAKI LIMITED (TRADING AS GRANGE MOTOR COMPANY) Appellant
AND	JEFFREY DAVID STRANGE Respondent

Hearing: 28 February 2018

Appearances: Ms S Abdale for the Appellant
Mr DJ Venter for the Respondent

Judgment: 7 March 2018

DECISION OF JUDGE G M HARRISON

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[1] The appellant (Grange) appeals a decision of the Motor Vehicle Disputes Tribunal of 30 June 2017 whereby Grange was ordered to pay Mr Strange the sum of $10,305.73 being the cost of rectifying corrosion to the chassis of a Toyota Hilux 3. OTD, purchased by Mr Strange from Grange on 22 April 2015.

[2] On 18 January 2018 Grange applied for leave to adduce further evidence at the hearing of the appeal.

[3] The further evidence sought is:

(i) The evidence of [name deleted], a specialist automotive panelbeater with over 20 years' specialist panelbeating experience;

(ii) Proof of payment by the respondent of the alleged costs of repair;

(iii) Correspondence relating to any insurance claim by the respondent and any response from the insurer.

[4] The notice of appeal of 14 July 2017 is advanced upon the ground that "the proceedings were conducted in a manner that was unfair to the appellant and prejudicially affected the result of the proceeding." It is necessary, therefore, to consider firstly the function of this court in determining the appeal and what matters may be taken into account in doing so.

The scope of the appeal

[5] Appeals to this court are governed by Schedule 1 to the Motor Vehicle Sales Act 2003. The schedule prescribes the procedure to be followed by the Disputes Tribunal. Clause 16 deals with appeals.

[6] It provides that the appeal must be brought within 10 working days after receipt of the Tribunal's decision. Subclause (2) contains important grounds of appeal. It provides:

> If the amount of the claim exceeds $12,500, the appeal may be brought on either of the following grounds:
>
> (a) That the Disputes Tribunal's decision was wrong in fact or law, or in both fact and law; or
>
> (b) 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.

[7] Subclause (3) has a notable omission. It provides:

> 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.

[8] It will be noted that this ground of appeal does not refer to the grounds specified in subcl (2)(a) that the Tribunal's decision was wrong in fact and/or law.

[9] In this case, the amount of the award was $10,305.73, which is below the threshold of $12,500.

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

[11] 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.

[12] 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.

[13] 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".

[14] 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.

[15] 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.

[16] 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.

[17] 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.
>
> [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.

[18] 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).

[19] That means that no purpose would be served by permitting the evidence sought to be introduced to be heard at the appeal. If that evidence was permitted to be adduced, the appellant would then endeavour to persuade this court to reach a finding of fact different from the Disputes Tribunal, but this court has no jurisdiction to reach a different finding of fact by reason of the authorities referred to which are binding on this court.

The discretion to admit further evidence

[20] In the course of the hearing I referred counsel to the decisions of Smellie and Fogarty JJ that I have quoted from above.

[21] Ms Abdale's response was that the District Court Rules 2014 came into effect after those decisions were decided and were therefore no longer binding on this court. I do not agree.

[22] Ms Abdale relied particularly on r 18.20(3) which provides:

> The court has full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit.

[23] That rule was preceded by r 14.18.3 of the District Court Rules 2009 which is in exactly the same terms. Furthermore, r 560 of the District Court Rules 1992 is also to the same effect. Subclause (4) provides:

> The court shall have full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit.

[24] It is clear, therefore, that throughout the period of time the decisions quoted from were delivered the rules of court applicable at the time permitted this court in its

discretion to admit further evidence. Despite that rule, the High Court has determined that this court has no jurisdiction to reach a finding of fact different from that reached by the Tribunal.

[25] The District Court Rules are general in their application to all appeals to this court from various statutory bodies and tribunals. Appeals pursuant to the Residential Tenancies Act 1986, the Immigration Advisers Licensing Act 2007 and the Building Act 2004 come to mind, but are not exhaustive. Appeals pursuant to those statutes are not limited to procedural unfairness and the discretion to admit further evidence is then open to consideration.

[26] The application to adduce further evidence is accordingly dismissed, on the basis that it would be otiose to grant the application when this court lacks jurisdiction to reach any conclusion of fact different from the Tribunal. In reaching that conclusion I do not purport to determine the appeal itself, but of course the appellant will have to consider its position regarding its pursuit of the appeal in light of the conclusion on the application.

Should further evidence nevertheless be admitted?

[27] In case I am wrong in the conclusion I have reached, I would not in any event have exercised my discretion to admit the further evidence.

[28] Grange claims it was taken by surprise at the hearing when Mr Strange produced further photographs. I do not accept that is so.

[29] On 6 June 2017, the Tribunal gave Grange five working days to file any submissions it considered appropriate on the information provided by Mr Strange. It failed to do so.

[30] In May 2016, approximately one year after the purchase, the vehicle failed a warrant of fitness inspection because of, among other faults, extensive corrosion in the chassis, cab panels and front suspension. Mr Strange contacted Grange to advise them of the issue and requested redress. On 13 May 2016 he sent an email to Grange

requesting redress, whether by way of repair, replacement or refund. Grange's response was to reject the approach on the basis that when the vehicle was sold it had a recent warrant of fitness. It sought the inference from the Tribunal that because the warrant of fitness had been issued rust could not have been present in the vehicle at the time of sale. However, the photographs produced by Mr Strange confirmed the presence of rust, and the advice of the expert assessor sitting with the adjudicator in the Tribunal was to the effect that the rust could not have occurred within the period of one year from the date of purchase.

[31] The assessor is appointed pursuant to s 82(3)(b) of the Act from a panel which s 88 requires the Minister to maintain. Such assessors are plainly experts, and their presence on the Tribunal is clearly directed towards assisting the parties and the adjudicator on technical matters associated with motor vehicles.

[32] I do not then see how, if the evidence of the expert was permitted to be adduced, this court could reach a different conclusion from the Tribunal who relied on the advice of the assessor in reaching the conclusion it did.

[33] Furthermore, the purported expert, [the expert panelbeater], is not a metallurgist but a panelbeater of experience. His conclusion was that the issue of the warrant of fitness at the time of purchase was sufficient evidence to establish that there was no rust in the vehicle at that time. However, there was other evidence of efforts made to disguise the rust, which the Tribunal referred to in its decision, leading it to conclude that the rust was present in the vehicle at the time the warrant of fitness was issued.

[34] The requirements for the admission of further evidence are dealt with in r 18.17(3) which provides:

> The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relate to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.

[35] In *Re International Insurance Brokers (Nelson/Marlborough) Limited* [1998] 3 NZLR 190, at 193, the Court of Appeal said:

> While the absence of freshness is not an absolute disqualification, the criteria for admission [of new evidence] in such circumstances must be strict. In our view, when the evidence is not fresh it should not be admitted unless the circumstances are exceptional and the grounds compelling. In addition it will need to pass the tests for credibility and cogency.

[36] The proposed evidence in this case is not fresh. It could have been called before the Tribunal. Indeed, Grange was given the opportunity of doing so and took no action. Secondly, the proposed evidence is not cogent. For it to be so it would have had to concentrate on the rust itself and an analysis of the metal it affected, the extent of it and the likely time it would have taken to have reached the state it did. None of that is available. [The expert panelbeater] merely gives his opinion that because a warrant of fitness was issued at the time of sale no rust would have been present.

[37] As to credibility, I do not see how, even if his evidence was admitted, it could be said that his evidence should be preferred to the advice of the expert assessor sitting with the adjudicator.

[38] In taking all of these matters into account, I would not therefore have granted leave for the further evidence to be admitted in the absence of the jurisdictional bar I have referred to.

[39] The same applies to the attempt to require Mr Strange to prove again the costs of repair. The repair invoices accepted by the Tribunal appear perfectly straightforward, had been supplied to Grange before the hearing, and could have been challenged at the hearing. They were accepted by the Tribunal as appropriate and I see no basis to disturb that finding by requiring Mr Strange to prove them yet again.

[40] The alleged insurance claim for which evidence is also sought was not a claim, Mr Strange receiving advice that his insurance did not cover corrosion and so no claim was submitted. How that would assist the appellant in its defence of his claim is not at all clear.

Conclusion

[41] The application is therefore dismissed. Costs should follow the event, assessed on a 2B basis, on which I invite the parties to agree. Failing agreement, I will receive memoranda.

[42] A teleconference is to be arranged as soon as practicable after the expiration of seven days from the delivery of this decision, to ascertain if directions for the hearing of the appeal are required.

G M Harrison
District Court Judge