IN THE DISTRICT COURT
AT WELLINGTON

CIV-2017-085-000376
[2017] NZDC 18174

BETWEEN	PAULA MARSHALL Appellant
AND	TRADE IN CLEARANCE LIMITED Respondent

Hearing:	16 August 2017
Appearances:	Ms Marshall, together with Mr Marshall, for the Appellant Mr E J Collins for the Respondent
Judgment:	17 August 2017

RESERVED JUDGMENT OF JUDGE S M HARROP

Introduction

[1] Ms Marshall appeals against a decision of the Motor Vehicle Disputes Tribunal at Wellington dated 28 April 2017 in which the Tribunal dismissed her claim for $8,322.89.

[2] On 4 June 2016 Ms Marshall purchased a 2007 Mazda CX-7 vehicle for $13,995 from the respondent ("TICL"). About two months after the purchase the vehicle began to lose power under acceleration. An initial repair was carried out at Tawa Motor Repair ("TMR") at a cost of $135.12. Ms Marshall decided not to take the vehicle to TICL at that stage because it seemed to be a minor issue. However the problems continued and on 14 September 2016 Ms Marshall took the vehicle back to TMR which engaged an auto electrician. Worn spark plugs and the number 4 coil pack were replaced at a cost of $594.64.

[3] Unfortunately this did not fix the problem either and Ms Marshall returned the vehicle to TMR. On 22 October 2016 they advised her that the engine was beyond repair and needed replacement. Ms Marshall and her husband then made various efforts to contact TICL.

[4] When they finally made contact, Mr van de Velde of TICL discussed the vehicle's problems with TMR and expressed surprise that they suggested installing a second-hand engine for around $8,300. He then contacted Custom Works Automotive, an engine re-conditioner, which advised that the cost of replacing the timing chain and VVT actuator would be about $2,000. Mr van de Velde suggested this option to TMR which, he said, seemed hesitant to consider it. Mr van de Velde made arrangements to have the vehicle uplifted on a tow truck with Ms Marshall's agreement but Mr van de Velde found that TMR seemed reluctant to release the vehicle.

[5] When the tow truck did not arrive on either Thursday 10 November or Friday 11 November 2016 as had been agreed, Ms Marshall instructed TMR to go ahead and install the engine on Saturday 12 November and they did so. Their mechanic Mr Jing gave evidence by telephone to the Tribunal. He did not recall Mr van de Velde asking him to stop work on the vehicle but he said by the time TICL had become involved he had almost completed work on the vehicle so he was reluctant to allow it to be taken away from his workshop. Although he said he was not sure that the engine needed to be replaced, equally he was not sure that replacing the timing chain and VVT actuator would have fixed the problem.

[6] In its decision the Tribunal applied the relevant provisions of the Consumer Guarantees Act 1993. It found that the vehicle's engine problems within the first three months after purchase meant that TICL was in breach of the statutory guarantee under s 6(1) of the Act that the vehicle was of "acceptable quality".

[7] The Tribunal however decided that Ms Marshall's claim could not succeed because she had not followed the correct procedure for requiring a trader to remedy the vehicle's defects in accordance with s 18 of the Act.

[8] The Tribunal's decision and supporting reasons on this issue were as follows:

"[22] Where a vehicle has a defect that can be remedied and is not of a substantial character, s 18 of the Act requires the purchaser to allow the trader an opportunity to remedy the failure within a reasonable time. It provides, as far as is relevant:

> **18 Options against suppliers where goods do not comply with guarantees**
>
> (1) Where a consumer has a right of redress against the supplier in accordance with this Part in respect of the failure of any goods to comply with a guarantee, the consumer may exercise the following remedies.
>
> (2) Where the failure can be remedied, the consumer may:
>
> (a) require the supplier to remedy the failure within a reasonable time in accordance with section 19:
>
> (b) where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so, within a reasonable time:
>
> (i) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
>
> (ii) subject to section 20, reject the goods in accordance with section 22.

[23] The High Court has confirmed that when a defect can be remedied and is not of a substantial character:

(a) the purchaser must follow the requirement in s 18(2) to allow the trader an opportunity to remedy the failure within a reasonable time;

(b) the self-help remedy in s 18(2)(b) is only exercisable if the trader refuses, neglects or fails to remedy the failure under s 18(2)(a);

(c) the stepped procedure in s 18(2) and the related provisions in s 19 (which details how the trader may meet its obligations under s 18(2)(a)) indicate this approach is not "purely optional".[1]

[24] In the present case, the Tribunal must determine whether the purchaser gave the trader an adequate opportunity to remedy the failure before getting her own repairer to fix the vehicle. The difficulty for Ms Marshall is that she left it until November 2016 before alerting the trader to the problems with the vehicle. Then, she took matters into her own hands by getting the vehicle repaired before giving the trader an adequate opportunity to remedy the failure.

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[1] *Acquired Holdings Ltd v Turvey* (2008) 8 NZBLC 102, 107 (HC) at [11]

[25] In Mr Binding's and my view, Trade In Clearance can be criticised for acting too slowly. It needs to review its practices to be more responsive to customers with defective vehicles. Ms Marshall made several attempts to bring the problem to the trader's attention in person and by phone, but it was not until she emailed the trader that it made any useful response. Notwithstanding these criticisms, however, we do not consider that the trader was given adequate opportunity to evaluate Tawa Motor Repair's diagnosis of what was wrong with the vehicle and what repairs were needed, and to make its own arrangements for Custom Works to carry out those repairs.

[26] The evidence is that Ms Marshall and Mr van der Velde came to an arrangement for the vehicle to be collected from Tawa Motor Repair and taken to Custom Works for assessment and repair. I accept that Ms Marshall may have understood that the vehicle was to be collected on 10 or 11 November 2016 and it was not. However, in my view, before instructing Tawa Motor Repair to replace the engine, she should have attempted to follow up non-collection of the vehicle with the trader and make a fresh arrangement for the vehicle's collection.

[27] Having agreed with Trade In Clearance that it was entitled to take the vehicle and have it repaired at Custom Works, I do not consider that Ms Marshall was entitled to change her mind and have the work carried out by Tawa Motor Repair. Mr Jing's evidence was that he was reluctant to allow Trade In Clearance to take the vehicle away, having already invested time and effort in attempting to fix the problem. Tawa Motor Repair's reluctance to allow the vehicle to be removed from its premises may have influenced Ms Marshall's decision to allow it to complete the repairs it had recommended. Ultimately, this case illustrates the dangers for purchasers who proceed to take matters into their own hands, with their own repairers, without adequately allowing the trader to become involved.

[28] Mr Binding considers that Tawa Motor Repair may have been too hasty in deciding to replace the engine. In his view, careful and methodical diagnosis may well have led to less drastic repair ·work being carried out at a much lower price. Because the nature of the problem and what work was required to fix it remain in dispute, it is not possible for the Tribunal to conclude that the vehicle's failure was of a substantial character.

Conclusion

[29] I conclude that Ms Marshall did not give Trade In Clearance an adequate opportunity to remedy the failure. She proceeded to the self-help remedy in s 18(2)(b) too soon. The evidence does not show that the trader had refused, neglected or failed to remedy the failure under s 18(2)(a).

[30] Unfortunately for Ms Marshall, she did not follow the stepped procedure in s 18(2) of the Act and, in this case, that means she is not entitled to a remedy."

Grounds for Appeal

[9] Ms Marshall filed a typed notice of appeal clearly and succinctly setting out her complaints about the Tribunal's decision and she made oral submissions at the hearing in further support of the appeal.

[10] In summary Ms Marshall was adamant that, as indeed the Tribunal had noted, she and her husband made numerous attempts to contact TICL by telephone, by visits to the car yard and by emails when they were first aware of a major problem with the engine. The Tribunal was therefore wrong, she submitted, to conclude that she had not given TICL an adequate opportunity to remedy the problems before getting her own repairer to do so.

[11] Further, Ms Marshall submitted, particularly by reference to the breach by TICL of the acceptable quality guarantee, that in any event the Tribunal should have concluded on the information before it that the engine failure was of "substantial character", entitling her to recover the costs of repair without first resorting to TICL. The Tribunal was, she submitted, wrong to conclude that, because of the nature of the problem and the work required to fix it remaining in dispute, that it was not possible for the Tribunal to conclude that the vehicle's failure was of a substantial character. She pointed out that TICL did not call any expert mechanical evidence and that the only such evidence before the Tribunal was that which she called from the TMR mechanic Mr Jing. His evidence was affectively therefore unchallenged and should have formed the basis for the Tribunal concluding that the vehicles failure was of substantial character.

[12] Returning to the issue of whether there had been a reasonable opportunity provided to TICL to repair the vehicle, Ms Marshall noted that she and Mr van de Velde had agreed to a timeframe but no tow truck had arrived to collect the vehicle within that time frame. She submitted she should not be penalised by way of the finding that TICL was not given adequate time, when it was TICL's failure that saw its clear opportunity missed.

[13] As to the procedure related to the hearing, or more accurately preceding it, Ms Marshall noted that both parties were given an opportunity to provide a written submission to be lodged no later than 21 March 2017. Ms Marshall complied but TICL did not. Although it appears TICL's response was filed on 30 March 2017 Ms Marshall did not receive it from the Tribunal registry until the day before the hearing or perhaps the day before that. This, she said, reduced the time she had to consider and counter the claims contained within it, especially Mr van der Velde's belief that the engine fault was minor when he, or his mechanic, had not inspected the engine. She submitted there should have been some censure or penalty visited on TICL by the Tribunal and that in considering his submission letter despite its lateness the Tribunal allowed the hearing to be prejudiced in TICLs favour.

[14] For TICL, Mr Collins succinctly submitted the appeal had to be dismissed because of the need for an appellant, in a case where the amount of the claim is less than $12,500 to demonstrate procedural unfairness which prejudicially affected the result. He submitted there was no procedural unfairness and that virtually all of Ms Marshall's complaints were as to the substance or merits of the Tribunal's decision. In relation to the point about submissions being filed late, he noted that Ms Marshall had confirmed in her oral submissions that Mr van de Velde's letter of submission was simply a response to her points, rather than raising new matters. Accordingly there could not have been any unfairness in Ms Marshall having to deal with the contents only shortly before the hearing.

Discussion and Decision

[15] As Mr Collins' submissions highlight, correctly understanding and applying the jurisdiction the Court is exercising on this appeal is pivotal. Clause 16 of Schedule 1 to the Motor Vehicle Sales Act 2003 provides:

> **16 Appeals from decision of Disputes Tribunal**
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> (1) Any party who is dissatisfied with a decision given by a Disputes Tribunal may, within 10 working days after notice of the decision is given to that party, appeal to a District Court Judge.
>
> (2) 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 proceedings.

(3) 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 proceedings.

(4) For the purposes of this section, the Disputes Tribunal is taken to have conducted the proceedings in a manner that was unfair to the appellant and prejudicially affected the result if—

(a) the Disputes Tribunal fails to have regard to any provision of any enactment that is brought to the attention of the Disputes Tribunal at the hearing; and

(b) as a result of that failure, the result of the proceedings is unfair to the appellant.

(5) The District Court's decision given under this clause is final.

(6) To avoid doubt, nothing in this clause affects the right of any person to apply, in accordance with law, for judicial review.

[16] As will be seen if the amount of the claim exceeds $12,500 then the appeal may be brought either on matters of merit and substance or procedural unfairness. However, if as it is here the amount of the claim did not exceed $12,500 it is only the latter which applies.

[17] The appellate jurisdiction set out in sub-clauses 16(3) and (4) is very familiar to District Court Judges exercising the Court's civil jurisdiction because it is materially identical to that set out in s 50 of the Disputes Tribunal Act 1988.

[18] It is settled law in relation to the Disputes Tribunal appeals that s 50 appeals are limited to consideration of procedural unfairness, rather than the merits of the claim[2] By procedural unfairness is meant, for example, that a party has not been given a proper opportunity to present their case, or a proper opportunity to ask questions of witnesses. Subject to s 50(2)(a) the Court cannot hear appeals on the basis that the Disputes Tribunal referee exceeded jurisdiction or made an error of law[3].

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[2] *NZI Insurance Limited v Auckland District Court* [1993] NZLR 453
[3] *Mellow v Tsang* [2004] NZAR 537,544

[19] Section 50(2)(a) specifically provides that a ground for appeal would arise if the Disputes Tribunal referee failed to have regard to any provision of any enactment that is specifically brought to the referees attention and relied on by one of the parties. Even then though, it must be shown that as a result of the failure to rely on the statutory provision, the result of the proceedings is unfair to the appellant. This aspect is replicated in clause 16(4) of Sechedule 1 to the Motor Vehicle Dealers Act.

[20] It can be seen therefore the mere fact that a Disputes Tribunal referee, or the Motor Vehicle Disputes Tribunal, may have overlooked or ignored some provision in a contract or some general principal of law, or misapplied one, does not provide a basis for an appeal.

[21] In summary, if the Tribunal hearing is fair or even if there is unfairness not affecting the result, there cannot be a successful appeal, no matter how objectively erroneous the decision on the merits may be. To put it another way, in respect of appeals in cases where the claim is for less than $12,500 Parliament has permitted the Motor Vehicle Disputes Tribunal, provided it conducts a fair hearing, to make errors on the merits and on the law without there being any ability for the disappointed party to challenge them on appeal.

[22] Leaving aside the question about the late submission filed by TICL, all of the points made by Ms Marshall, primarily as to the adequacy of the opportunity given to TICL to repair the vehicle and as to the failure being of a substantial character, relate to the merits of the Tribunal's decision and not to procedural fairness. Unfortunately for her, even if the Tribunal was completely wrong in its findings on those issues, as she submits it was, there is simply no ability to appeal against those findings.

[23] There can be no suggestion that there was any unfairness about the hearing conducted by the Tribunal on 10 April 2017. The transcript shows that a full opportunity was given to everyone present to have their say. Further, the decision clearly shows that the Tribunal understood Ms Marshall's points. Having seen her conduct the appeal in a structured and articulate way, I have no doubt that she made the Tribunal well aware of her position on the relevant issues.

[24] As to the late service of TICL's submission, I do not accept this amounted to procedural unfairness, assuming Ms Marshall complained to the Tribunal about it. The submission is not lengthy and I am sure that Ms Marshall would have had no difficulty responding to it despite only being served with it a day or two before the hearing. This was not a situation where some censure or penalty ought to have been applied to TICL; at best if the Tribunal was aware of Ms Marshall's concern, an opportunity for adjournment might have been given. However, even if there was some unfairness in this, I see no basis for concluding that it prejudicially affected the result. Clearly Ms Marshall was able to present her case fully including arranging for her mechanic to give evidence by telephone and to respond to TICL's case.

[25] In summary, I accept Mr Collin's submission that the essence of Ms Marshall's appeal is that she disagrees with the Tribunal's decision on the key questions of whether she gave TICL an adequate opportunity to repair the vehicle and whether there was sufficient information for the Tribunal to have concluded that the vehicle's failure was of a substantial character. The Tribunal clearly gave careful consideration to s 18 of the Consumer Guarantees Act and applied it. Even if it did so in an incorrect manner (on which I make no comment) then that would not provide a ground of appeal.

[26] I was supplied by Ms Marshall with a number of other Tribunal decisions but these do not assist in light of the narrow appellate jurisdiction being exercised.

[27] In conclusion, I am not satisfied that Ms Marshall has established any unfairness in the conduct of the proceedings by the Tribunal, let alone any procedural unfairness which clearly prejudicially affected the result.

[28] The appeal must be and is therefore dismissed.

[29] TICL is entitled to costs, having been legally represented on the appeal.

[30] Having regard to the brief and straightforward nature of the submissions in response to the appeal (for which Mr Collins is to be commended, not criticised) and to the relatively short hearing, I award costs in the sum of $650 to TICL against the

Ms Marshall. Although Ms Marshall may not be aware of it, I can assure her that a considerably greater award of costs would often be made on this kind of appeal.

S M Harrop
District Court Judge