IN THE DISPUTES TRIBUNAL **[2013] NZDT 118**

BETWEEN	**ACO**
	APPLICANT
AND	**ZXQ Ltd**
	RESPONDENT

Date of Order: 17 September 2013

Referee: Referee Hannan

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim is dismissed.

Facts

[1] The Applicant purchased a motor vehicle, a 2002 [vehicle] from the Respondent on 4 February 2011. This agreement is evidenced in writing and includes 24-month [insurer] warranty cover.

[2] The Applicant claims that a term of this agreement of sale and purchase was that the Respondent would repair at its own cost any subsequent fault with the vehicle for 12 months after the sale. The Applicant further claims that the vehicle failed twice within this 12-month period, once in April 2011 when the window regulator failed and again on 25 July 2011 when the alternator failed. She seeks the cost of these repairs from the Respondent, $720.16 plus her costs of $102.00.

[3] The Respondent denies that it is liable for this amount, claiming that whereas it agreed to provide, at its own cost, the [insurer] warranty cover, the Applicant has misunderstood the terms of the warranty. The Respondent claims that the Applicant was entitled to claim these costs from [the insurer] not itself directly. Further, the Respondent denies that it misrepresented the vehicle or the terms of sale and that these repairs are really general maintenance that is to be expected in the normal course of vehicle ownership.

Law

[4] The relevant law is the law of contract and the Consumers Guarantees Act 1993 (CGA).

[5] A contract is a legally binding promise or agreement; an act in law where two or more persons declare their consent as to any act or thing to be done or forborne by one side for the benefit of the other side. A promise or agreement is not legally binding and enforceable as a contract unless the requirements for contract formation, including certainty of agreement, and consideration, are satisfied.

[6] The essence of contact is "offer and acceptance". Judges have adopted an "objective approach to contract formation": that is, they have assessed whether the dealings between the parties, viewed as a whole and objectively from the point of view of reasonable persons on both sides, show a concluded bargain, a concluded agreement.

[7] The transaction is also governed by the CGA because the good supplied by the Respondent to the Applicant was of a kind ordinarily acquired for personal use. In terms of the CGA, goods supplied to a consumer must be of acceptable quality, fit for the purpose for which goods of this type are commonly supplied, acceptable in appearance and finish, free from minor defects, safe, and durable.

[8] The CGA provides an implied guarantee that goods supplied must be reasonably fit for any particular purpose that the consumer makes known to the supplier at the time of the making of the contract. (This does not apply where the circumstances show that the consumer does not rely on the member's skill and judgement to ensure that the purpose is achieved or that it is unreasonable for the consumer to rely on the member's skill or judgement.)

[9] Further, the Act provides that where the consumer has a right of redress against the supplier, he/she must provide the supplier with an opportunity to remedy the failure within a reasonable time. It is only after the supplier has failed to remedy that the consumer is entitled to have the failure remedied elsewhere and obtain from the suppler all reasonable costs incurred. For the consumer to be able to reject the goods, the fault must not be able to be remedied or of a substantial character.

Decision

[10] I have carefully considered this matter. I have also taken some time to try and explain the legal situation to the parties at hearing. The Applicant insists that she was given two warranties at the time of the vehicle purchase in February 2011 and it is up to her which one she accesses. I am satisfied that the Applicant did understand and accept the terms of the [insurer] warranty cover despite admitting that she did not read the documents before she signed them, due to her "lack of time". Further, I accept the

Applicant's claim that she does not have to make her claim though her insurance if she chooses not to. That is her right, and in light of the $350.00 excess applicable for each claim, an excess the Applicant is clearly well aware of, a reasonable action. However the Applicant then claims that this decision not to claim on her insurance gives the Respondent an obligation to pay the entire cost of the repairs directly.

[11] Her claim must fail. Firstly, to succeed against the Respondent the Applicant must persuaded me that the vehicle sold was not fit for the purpose for which goods of this type are commonly supplied, acceptable in appearance and finish, free from minor defects, safe, and durable. The Applicant's own evidence does not support this. The Applicant had an extensive examination of the vehicle undertaken two weeks after purchase and the minor defects identified do not alter my view that this vehicle was of acceptable quality commensurate with is age, type and purchase price. That the windows may have been noisy at the time of sale may be a point for negotiation before the sale, but is not a guarantee that the Respondent would fix them if they subsequently failed.

[12] Secondly, the Applicant has an obligation to give the Respondent an opportunity to remedy. This is not optional, but mandatory under the CGA. It is clear on the evidence of the parties that the Respondent may well have repaired the windows at no cost to the Respondent had she approached the Respondent in the right way, but simply mailing them an invoice once the repairs are completed does not met the requirements of the CGA. I am not persuaded by the Applicant's claim that the window repair was an emergency. I accept that the Respondent could have responded to the Applicant's concerns within a reasonable time if asked. This view is supported by the fact that the Respondent had already, at its own cost, provided some repairs, repairs that in my view it was not obliged to provide, two weeks after the sale. As the Applicant has not given the Respondent an opportunity to remedy, she is precluded from seeking the cost after the repairs have been carried out.

[13] The reasoning above applies to the window repair in April 2011 and even more so to the alternator repair in July 2011. This part failed some five months and 8,000 km after purchase. There is nothing in the evidence of the Applicant that would lead

me to conclude that the alternator failed due to some latent fault present at the time of sale.

[14] I have also considered the Applicant's claim that the Respondent told her that it "would fix anything that went wrong with the vehicle for 12 months". I do not accept this. I accept that the Respondent provided free of charge a 24-month warranty and that the Applicant was told this would cover mechanical repairs that arose during this period, but I do not accept that the Respondent contracted to carry out any repairs or maintenance the vehicle may require over the next 12 months at its own cost. There is no evidence to support this claim and it is simply not credible. I prefer the view that the Applicant fully understood the terms of the warranty at the time of sale but having incurred two repairs under or close to the [insurer] warranty excess of $350.00 attempted to get the full cost covered by the Respondent. This attempt must fail. The claim is dismissed.