

BETWEEN

AAQ

APPLICANT

AND

ZZJ

RESPONDENT

AND

ZZK

SECOND RESPONDENT

AND

ZZL

THIRD RESPONDENT

Date of Order:

16 April 2010

Referee:

Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZZK Ltd [the insurer] is to pay to AAQ the sum of \$8,576.26 on or before Friday, 7 May 2010.

Facts

[1] At approximately 10:45 a.m. on 16 November 2009, a 2003 Landcruiser (EKT666) owned by AAQ Ltd was filled up with 52 litres of diesel from ZZJ Ltd [a petrol station] (owned by ZZL Ltd [a petrol supplier]). Within a few kilometres of leaving the petrol station, the Landcruiser's engine failed due to a fundamental breakdown in the fuel injection system in the vehicle.

[2] AAQ Ltd has brought a claim against ZZL Ltd and ZZJ Ltd for the cost of repairs to the engine, being \$12,251.80. AAQ Ltd believes that the engine was damaged by contaminated fuel purchased at ZZJ Ltd immediately prior to the engine failure.

Law

[3] The Consumer Guarantees Act 1993 applies, as diesel is a "good" that is ordinarily purchased for personal, household or domestic use. The diesel was sold in trade by ZZL Ltd as a "supplier". ZZL Ltd is a "manufacturer" as that term is defined in the Act, as the definition includes an importer or distributor of foreign manufactured goods.

[4] The Act implies into the sale of the diesel a statutory warranty that the diesel is of "acceptable quality", and "reasonably fit for purpose", as those terms are defined in ss 6–8 of the Act. If the diesel was contaminated beyond acceptable industry limits, then it would not meet these standards. If this was established, then AAQ Ltd could obtain from both ZZL Ltd as the supplier (s 18(4) of the CGA) or ZZJ Ltd as the manufacturer (s27(1)(b)) compensation for any loss or damage resulting from the failure which was reasonably foreseeable as liable to result from the failure.

[5] However, AAQ Ltd would have no right of redress against ZZJ Ltd as "manufacturer" if any fuel contamination occurred through:

- i. an act or default or omission of any person other than ZZJ Ltd (e.g., the fuel was contaminated through the fault of ZZL Ltd) (s 26(a)(i) of the CGA); or
- ii. a cause independent of human control, occurring after the goods have left the control of ZZJ Ltd (s 26(a)(ii) of the CGA).

[6] Similar liability would also exist under general principles of the law of negligence, but as the Consumer Guarantees Act has direct application, the former need not also be addressed.

Issues

[7] To succeed in its claim, AAQ Ltd must establish on the balance of probabilities that:

- (i) the fuel it purchased from ZZL Ltd on 16 November 2009 was not of acceptable quality or fit for purpose in breach of the statutory guarantees in the Act;
- (ii) it has suffered a loss;
- (iii) the loss was reasonably foreseeable as liable to result from the failure; and
- (iv) the loss was in fact caused by the failure.

[8] In relation to the claim against ZZJ Ltd, ZZJ Ltd could defend the claim notwithstanding proof of the above matters if it can establish that the failure was caused by ZZL Ltd or a cause independent of human control occurring after the diesel had left its control.

Findings

Was the fuel that AAQ Ltd purchased from ZZL Ltd on 16 November 2009 contaminated in breach of the statutory guarantees in the Act?

[9] Having heard extensive evidence from all parties and their witnesses over two hearings, I find it established on the balance of probabilities that the fuel that AAQ Ltd

purchased from ZZJ Ltd shortly before its Landcruiser broke down was contaminated. I have reached this conclusion for the following reasons:

- (i) The engine in its Landcruiser failed minutes after filling up as a result of a fundamental failure in the vehicle's fuel system.
- (ii) The vehicle was sent to RE [a car dealer] in [place name], where the mechanics found water in the fuel system and that the fuel pump and injectors had been damaged beyond repair. Mechanics from RE [a car dealer] were clear in their evidence that the tests they ran on the engine as soon as the vehicle arrived established to its satisfaction that the cause of the breakdown was diesel contaminated with water.
- (iii) There were two other factors which on their own would not establish the case for AAQ Ltd but which added to the overall weight of evidence against the respondents.
 - a. First, it was established that ZZL Ltd only undertook approximately six dipstick tests for water contamination in his tanks between October 2005 and November 2009, contrary to ZZJ Ltd's weekly testing, thus creating opportunity for unknown contamination. The latest test prior to the incident showed water levels 1mm away from maximum guidelines.
 - b. Tests undertaken by Independent LS [a laboratory] dated 17 December 2009 show that there was excessive microbiological growth in all parts of the tank except the nozzle, and that there was excessive water and diesel bug at the bottom of the tank. The storage tanks were therefore not meeting all guidelines after the incident despite the dispenser being on grade at that later time.
- (iv) There were four other factors which were discussed at length during the hearings but which in the end I do not consider were established as supporting AAQ Ltd's case. As I am satisfied that their case has been established without this evidence, this did not compromise the claim. However, these factors are listed here for completeness:

- a. First, AAQ Ltd asked me to infer that the diesel they had purchased was contaminated because another person had allegedly purchased contaminated diesel two weeks later from the same service station. This evidence was relevant, but it was prejudicial to the respondents and of limited probative value. The respondents accepted that two vehicles had been affected, but exactly what occurred was never established. I have disregarded this event in determining whether the applicants have established their claim on the balance of probabilities.
- b. Secondly, the applicants argued that the tests of the diesel from the Landcruiser tank undertaken by HA [another laboratory] in Wellington showed high levels of water contamination in the fuel. This was so of the first test, but the insurance assessors acting for ZZK Ltd then undertook a second test which came out clear. There was a conflict of evidence between RE [a car dealer] and the [place name] insurance assessor about how the diesel was stored. It was also unclear about which container the first and second test came out of, and whether the contamination that showed in the first test could have come from another source. It was also unclear why and in what way two tests had been done. In short, the testing procedure was confused, and it was clear that I could not rely on either test as being accurate. As a result, these tests cannot be relied on by either party to assist their case, and I have disregarded them.
- c. Thirdly, the applicants argued that as a tanker was filling the station tanks at the time they drew their fuel, this created an opportunity for water at the bottom of the tanks to be stirred up and drawn into the pump delivering the fuel to the Landcruiser, thus creating an opportunity for contamination. However, whilst this remained a possibility, it was not established as a probability. The tanker driver had signed a certificate 35 minutes prior to the purchase of the diesel, suggesting he had finished delivery by that time. This was not necessarily the case, given that alleged departure and arrival times between [town 1] and [town 2] were tight to say the least. It is possible having regard to these that the tanker driver wrote down the wrong time, or wrote down the time he started his delivery, not the time he

finished. However, even if the tanker had been simultaneously refuelling, it was not established that this could cause disruption in quality to fuel supply at the nozzle. It is an everyday practice in New Zealand and around the world for station tanks to be filled at the same time as customers are filling up and there was insufficient evidence of a connection between the two. This was a matter which invoked considerable debate, but in the end, the matter simply remained in balance: it may have contributed, but it may not have. I do not consider that anything turns on this, as I am satisfied that AAQ Ltd has established its case without having to establish whether simultaneous refuelling may have caused or added to the contamination. The cause of water in diesel tanks is a complex science, and how that water may find its way to the nozzle is a matter of some conjecture. The fact that the intake pipe from where diesel is drawn out of the storage tanks is placed well above usual acceptable limits of water does not in this case establish that no contamination occurred, particularly in light of all the other evidence in support of AAQ Ltd's claim.

- d. Fourthly, AAQ produced a jar of diesel drained from its fuel filter after approximately 12 more fills from LLJ Ltd after the Landcruiser engine has been rebuilt. This showed a large amount of contaminant in the bottom. This contamination has shown up after only 7,000 kms. I did not take this evidence into account in finding that the diesel purchased in November was contaminated. The evidence was not analysed scientifically, and admits of more than one explanation. I cannot infer that because the filter is collecting that sample in a short space of time that the specific tank of diesel that was purchased in November was contaminated.
- (v) I have had regard to the respondents' evidence that the breakdown was caused by poor maintenance (the vehicle having missed a fuel filter change which was due every 30,000 kms by somewhere between approximately 8,000 and 15,000 kms). However, whilst I have treated this matter as relevant in looking at contribution to loss, I do not consider it detracts from the likelihood, given the matters set out in paragraph (a) – (c) above, that the

cause of the breakdown was contaminated fuel. In reaching this conclusion, I have had regard to the following factors:

- a. the evidence established that the lateness of the filter could have been no more than 7,751 kms (the exact lateness being unknown due to a failure by ZZJ Ltd to write down the odometer at the time of the change); and
 - b. RE [a car dealer] gave evidence that fuel injection problems arising from late filter changes would not cause such a sudden and fundamental failure in the injection system as occurred here, but would evidence itself in the failure of one or two injectors first, giving reduced performance over time.
- (vi) I have had regard to the respondents' evidence that AAQ Ltd only purchased 52 litres of diesel, and therefore that there could have been up to 38 litres of diesel already in the tank from somewhere else. This is possible, but we will never know whether this is the case, as the tank may not have been completely filled. Even if there was some diesel in the tank, it was only after, and immediately after, the fill from ZZJ Ltd that the Landcruiser failed.
- (vii) I have had regard to the respondents' evidence that the breakdown could also have been caused or contributed to by the sensitivity of [the car brand]'s common rail injection systems to New Zealand diesel. This sensitivity appears to create a need for extra vigilance and responsibility in fuel filter changes. Again, I consider any failure on the part of AAQ Ltd to change the fuel filter as being relevant in assessing contribution, but does not affect the establishment on the balance of probabilities that the fuel purchased from ZZJ Ltd was contaminated. Whilst there may well be an industry wide issue about whether some of the fuel injection systems being imported can run adequately on New Zealand diesel, it was not established that this Landcruiser failed because its engine was unsuitable for running on New Zealand diesel. There are too many other vehicles with these systems filling up with New Zealand diesel every day. This vehicle failed suddenly and fundamentally after refuelling at ZZJ Ltd and RE [a car dealer]'s engine tests were consistent in its

view with a tank full of contaminated fuel. I cannot discount this evidence, and, in light of all the factors listed above, consider that this proves the case, if only on the balance of probabilities.

- (viii) I have had regard to the respondents' evidence that the fuel injectors were sent to FM [a fuel injection centre] in Wellington for assessment and were found to be scored and rusted. ZZK Ltd [the insurer] was of the view that this suggested pre-existing damage from poor maintenance and that the engine failure was therefore a maintenance issue, not a diesel issue. However, DL, the service manager who assessed the parts, said that this scoring and rusting could have occurred either from one event of contamination or from damage over time, and that he could not tell which had occurred in this case. The presence of scoring and rust therefore did not add to, or detract, from either party's position.
- (ix) It follows from the findings made above that the fuel supplier, ZZL Ltd, is not liable for the fuel contamination. It has been established as more likely than not that the fuel contamination occurred through excessive water in the tanks at ZZJ Ltd. ZZJ Ltd does not have control over the storage of diesel once it has delivered it to a station. There was no evidence to establish that the fuel that ZZL Ltd delivered to [town 2] that day or on any prior day was already contaminated.

Has AAQ Ltd suffered a loss?

[10] It was not disputed that AAQ Ltd has suffered the loss claimed, being \$12,251.80.

Was the loss reasonably foreseeable as liable to result from the failure?

[11] It was not disputed that it is reasonably foreseeable that sale of contaminated fuel would cause the loss suffered to the fuel pump and injectors (which cost \$12,251.80 to repair). The original claim was for \$11,007.40 plus unquantified legal and rental costs.

[12] However, the claim was amended at the first hearing to include only the repairs, with these clarified as being \$12,251.80.

Was the loss in fact caused by the contaminated fuel?

[13] I find that the loss to AAQ Ltd has been primarily caused by the purchase of contaminated diesel. However, I have reduced the compensation payable for this by 30% (to \$8,576.26) for the following reasons.

[14] Given the weight of evidence listed in paragraphs 9(i), (ii) and (iii) above, I am satisfied that the failure of the Landcruiser's fuel system would never have happened if the Landcruiser had not filled up with a tank of contaminated diesel from ZZJ Ltd on the day in question.

[15] Thus, ZZJ Ltd must be seen as primarily responsible, and thus more than 50% responsible, for the damage suffered.

[16] I have had regard to ZZK Ltd's belief that the primary cause was poor maintenance, but more evidence was heard about the servicing of the vehicle at the hearing than had been understood by the insurance assessors at the time they looked at the matter. In the end the evidence did not support a finding that such a fundamental failure would result from the late filter change. The Landcruiser had travelled successfully some distance since that change. RE [a car dealer] did not consider this the late filter change could be responsible and I cannot discount this evidence. It accords also with common sense.

[17] However, I cannot disregard altogether the late filter change, and the possibility that there was some pre-existing engine damage from the late filter change that has either contributed to the extent of the damage from the contamination, or at least created a degree of betterment from early replacement of the fuel system. In making a 30% reduction for this causation or betterment, I have taken into account the following factors:

- (i) The Landcruiser was relatively new, and had only done approximately 80,000 kms. The fuel system would be expected to last far in excess of this. The

investment in a new system was significant, unplanned and caused primarily by the purchase of contaminated fuel.

- (ii) Neither party will ever be able to establish the true position on the effect of the late filter change, but it is noted that the vehicle travelled some distance after the late filter change with no difficulty. There was no suggestion of degradation in performance or partial failure of one or more injectors, which RE [a car dealer] were confident, would have existed had there been any meaningful pre-existing damage.
- (iii) In fact, it remains possible that there was no pre-existing damage at all, and that this event was caused solely by contaminated fuel in a vehicle with no pre-existing damage. On the other hand, I would never be able to find on the evidence that the converse was true.
- (iv) Decisions were originally made by ZZK Ltd on liability (and declinature under AAQ's policy, ZZK Ltd being the insurer for both applicant and respondent) without full knowledge of the only moderate lateness of the filter change. Its assessor had originally been led to believe that the vehicle had travelled approximately 53,000 kms without a service. Evidence at the hearings established that the vehicle was in fact regularly serviced, and that its fuel filter could have been as little as 7,700kms late.
- (v) All of these factors lead me to assess that the primary factor, and the major factor of AAQ's loss, was contaminated fuel. In reducing AAQ's compensation by as much as 30%, I am satisfied that any uncertainty in this matter has been resolved in the respondents' favour.

[18] For these reasons, I find that ZZK Ltd is liable to pay AAQ the sum of \$8,576.26 by the date stated in the Order.