



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court

[2020] NZDT 1367

**APPLICANT** CJ

**FIRST RESPONDENT** HQ Ltd

OQ Ltd

**SECOND RESPONDENT**

**The Tribunal orders:**

1. OQ Ltd is to pay to HQ Ltd the sum of \$304.80 on or before 30 June 2020, calculated as follows:

Refund of postal fee paid by CJ	\$54.80
Maximum liability for package	<u>\$250.00</u>
	\$304.80

2. CJ is not liable to HQ Ltd for the cost of the cookware set (\$4,755.00) purchased in June 2018.

**Reasons**

1. In June 2018, CJ purchased a titanium cookware set from HQ Ltd. As a result of a dispute over the form of payment for the cookware, CJ returned the cookware by courier to HQ Ltd in August 2018, but it never arrived, and is now lost.
2. CJ seeks an order that she is not liable for the amount she agreed to pay for the cookware (\$4,755.00). HQ Ltd seeks an order that CJ pay for the cookware on the grounds that there was no right of return, or if there was, that the cookware was not returned. The Tribunal joined OQ Ltd to the claim on the basis that the cookware was sent back to HQ Ltd but not delivered to the correct address.
3. The issues to be resolved are: (a) Did CJ have a right of return? (b) If so, did she comply with her duty to return the cookware? (c) Does OQ Ltd have any liability for the missing package?

**Did CJ have a right of return?**

4. HQ Ltd sells home cookware. On 2 June 2018, CJ attended a cooking demonstration in a customer's home that was run by a salesperson for HQ Ltd. That night, CJ agreed to buy a starter set, and to host a cooking demonstration herself. CJ seeks to enforce a right of return on the start set. I find that she has this right for the following reasons:

- (a) Unless payment is made in full, the purchase is funded by finance through a business called GD, which acts as a payment gateway for a finance company called FG.
- (b) The Fair Trading Act 1986 applies to this arrangement. At the point of purchase, CJ was advised by the salesman that she could pay using the finance offered by credit card instalments. The GD website also stated this. HQ Ltd later advised that such payments were not able to be accommodated for those who agreed to pay by finance. The salesman therefore made an error that, whilst being unintentional, was relied upon by CJ in making her purchase. This would be a breach of s28 of the Consumer Guarantees Act 1993 and s10 FTA.
- (c) It is also noted that the starter set was sent to CJ after she had made it clear that credit card payments were her only option for payment, and after the salesperson had been advised of the difficulty with this by HQ Ltd. She therefore had grounds for believing that the payment issue had been resolved in her favour when the set arrived. However, once she realised there was no way around the payment issue, she cancelled the transaction, with valid grounds to do so.
- (d) I have had regard to HQ Ltd's view that there was no cancellation in June, as CJ continued to receive phone calls asking for bank details, and did not return the cookware. HQ Ltd states that CJ did not return calls that were made to her, and retained the set without paying for it. HQ Ltd believes the set was used during this time. When the salesman finally suggested in August that payments could be made to HQ Ltd directly by credit card, this offer was declined, and the cookware was sent back in a box that was not the original packaging. The loss of the original packaging would have made the set less saleable, if it had been received. HQ Ltd believes that CJ has had a change of mind, having used the set, and has therefore cancelled on spurious grounds. I accept that the delay in returning the set has led to understandable suspicion about CJ's intentions. However, those suspicions do not amount to evidence upon which I can base findings. It is clear that an error was made at the point of sale about a matter of importance to the contract. The cookware set was not sent until three weeks after purchase. Upon receipt of this, CJ had grounds to believe the dispute was resolved, and it took another 6 weeks to realise this was not the case. Now that the cookware is lost, I cannot ever know whether it was used. I can, however, make a finding that there was a right of return as a result of the error made in the payment method incorrectly advertised at the point of sale.
- (e) It also appears that the delayed payment format for the cookware creates a consumer credit contract. Such a contract exists where credit is provided for household goods in circumstances where there is interest or credit fees involved. Whilst no interest or fees appear in the contract, the price of the cookware could suggest these are bundled into the price. If this was the case, the disclosure rules that apply to these contracts do not appear to have taken place, potentially giving rise to an independent right to cancel the arrangement under the provisions of the Credit Contracts and Consumer Finance Act (2003). However, this avenue need not be considered given that an alternative right to cancel exists as a result of the mistake made about credit card payments.

#### **Did CJ comply with her duty to return the cookware?**

- 5. CJ paid OQ Ltd to have the item couriered to HQ Ltd (tracking number [redacted]). OQ Ltd confirmed delivery was completed.
- 6. Whilst it was not in the original box, a consumer who did not expect there was an ongoing issue with the contract would not have opened the original box in a way that retained its usefulness for a return of the product at a later date. Had the set been returned, it would therefore have been a loss to HQ Ltd that the original box was lost, but at least it would have had an unboxed set to sell at a discount to another customer to recover the wholesale cost, or more.
- 7. I am satisfied that the steps taken by CJ to return the product were intended to comply with her duty to return the set, and that she has not had a hand in the loss of the goods at the point of delivery.

8. As is discussed below, CJ chose to return the cookware by OQ Ltd tracked parcel, rather than by DR, which is a courier service. The OQ Ltd pamphlets, and User Guide, which are on display at OQ Ltd shops, state that the maximum liability for tracked parcels is \$250.00, and any item of value over this sum is not to be sent in that manner. The safer method would therefore have been to send it by courier, which has a \$2,000.00 limit. Whilst the cookware was worth more than this at retail (\$4,755.00), it was in all likelihood worth less at wholesale (<\$2,000.00). It is the *wholesale* value of the unit to HQ Ltd that is relevant once the contract had been rightfully cancelled by the consumer. HQ Ltd was invited to provide evidence of the unit's wholesale value, but declined to do so for commercial reasons.
9. HQ Ltd invited the Tribunal to infer that the wholesale value was \$2,000.00, but a legal process cannot guess at a price. HQ Ltd needed to make an election, which was made clear at the two last hearings, whether to show proof of the wholesale value, or not be able to recover this.
10. It could be argued that CJ ought to have known to send the item by courier rather than tracked parcel. Despite the pamphlets on the wall at OQ Ltd shops, and despite the Users Guide being online, I do not consider customers would generally be aware of the difference in liability limits between a tracked parcel and a courier, and much turns on this given the significant differences between the services. A customer has some duty to consult the advertising material, but consumer law also requires unusual terms to be adequately brought to the attention of the customer. OQ Ltd suggested that an item outside the value specified for the service was "prohibited", but this is not the case in terms of the pamphlet wording. Items that are prohibited are items that are dangerous to send. Items that are not covered by OQ Ltd's liability cover are simply at owner's risk, in effect, beyond the value limit. However, I need not make any finding about whether there was a failure to make this clear in its contract with CJ, or any negligence on the part of CJ in not studying the OQ Ltd pamphlets before sending the package, as, without HQ Ltd providing proof of the wholesale value, no order can be made for any sum other than the basic amount for a tracked parcel, which is \$250.00. This is discussed further below, in relation to OQ Ltd's liability.

#### **Is OQ Ltd liable for the missing package?**

11. It was established during the proceedings that the package was lost by OQ Ltd. The package was not delivered to the correct address, but to another property, upstairs from HQ Ltd (email of 4 February 2019 from OQ Ltd contact centre to CJ).
12. OQ Ltd claimed that there was an arrangement for deliveries to that address to deliver the packages to a woman in an upstairs business, who would then advise HQ Ltd to pick it up. The HQ Ltd office was often not manned. HQ Ltd denies there was such an arrangement. Despite enquiries to the upstairs business, the cookware set has never been found.
13. OQ Ltd confirmed that its tracked parcel had been delivered to the address on the package, but it was never received. In the absence of better proof of an authorised delivery to a third party who was happy to receive this on behalf of HQ Ltd, I am unable to find that the package was delivered.
14. I have had regard to the submissions from OQ Ltd that the item was "prohibited" due to its value. As discussed above, OQ Ltd had a limit to its liability for the service that was provided, but cannot say that the item was prohibited according to its own definition of that term. I have no evidence as to the wholesale value, and given the set was unboxed, it was a set of pots and pans that had limited value. The contract for the sale of the cookware had a retail value of \$4,755.00, but once the contract had been validly cancelled, the cookware was only worth HQ Ltd's replacement value, the amount of which is unknown.
15. The OQ Ltd pamphlets state that it will refund the cost of the postage for lost items, and that it can be liable for up to \$250.00 in value for tracked parcels. CJ paid \$54.80 for the postage. The combined total of these figures is \$304.80. I consider that OQ Ltd should be liable for this maximum sum as per its terms and conditions.
16. OQ Ltd notes that its contract was with CJ, and that it has no liability to HQ Ltd. This is technically correct. However, CJ has a duty at this point to pass on any refunds to HQ Ltd, which has suffered

the loss. The substantial merits and justice of the case therefore requires one direct payment from OQ Ltd to HQ Ltd, albeit only at the maximum sum OQ Ltd could have been liable to pay to CJ in the absence of better evidence of lost value.

## **Conclusion**

17. There are no winners here. CJ became caught in a misunderstanding about payment after her purchase and has been involved in many weeks of dispute after the purchase, followed by a dispute that has dragged on for years about whether she used the cookware, and where it ended up.
18. OQ Ltd was then brought in to try and find out, a long time after the event, where the cookware went, and did well to initiate an enquiry that gave some answers as to what had happened.
19. Meanwhile, HQ Ltd has been left out of pocket for the substantial sum for which it sells the cookware, but unable to recover this due to the error of its salesperson. I can fully understand why it might not want to disclose its wholesale costs, but in the absence of this evidence, the claim reverts to a nominal loss only, being the original postage paid to return the set and the maximum amount OQ Ltd could be liable for a tracked parcel.

## **Referee:**

**J Robertshawe**

**Date: 16 June 2020**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available or a mistake was made.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 28 days of the decision having been made. If you are outside of time, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

### Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, and serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

### Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

### Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.