



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 684

APPLICANT D Ltd

RESPONDENT KL

The Tribunal orders:

1. The claim is dismissed.
2. D Ltd is to pay KL the total sum of \$1500.00 on or before Tuesday 30 January 2024.

Reasons:

1. KL's car had been vandalised and in lieu of write off he had settled with his insurer and was restoring it. In April 2022 he engaged D Ltd (the company) to spray paint the car and to perform some repairs, and paid \$8212.15. KL provided the second hand parts, being two front fenders and four doors.
2. The company claims \$1962.50 for legal costs.
3. KL claims \$17,212.16, increased at the hearing from \$8211.15. This comprises a refund of money paid of \$8212.15 and \$9000.00 in legal costs.
4. The issues to be determined are:
 - a. Did the company fail to exercise reasonable care and skill or did it fail to provide an outcome that was reasonably fit for purpose?
 - b. If so, what is the remedy?
 - c. Is either party entitled to recover legal fees?

Did the company fail to exercise reasonable care and skill or did it fail to provide an outcome that was reasonably fit for purpose?

5. The Consumer Guarantees Act 1993 provides certain statutory guarantees when suppliers provide services to consumers. These include an obligation to exercise reasonable care and skill (s28) and to produce an outcome that is *reasonably* fit for any particular purposes made known to the supplier and of such a nature and quality as to be *reasonably* expected to achieve any particular result made known (s29).
6. Both parties acknowledged and I accept the main scope of the work as detailed in paragraph 1. However, KL's position was that he had only agreed to conduct the interior fit out and the exterior fit out was entirely the company's responsibility. He says that instead the parts were only installed finger tight, and there were gaps between parts including the boot and rear quarter. Also he stated that the rust was painted over, and that the paint quality was poor, and this included painting over

seals on the windscreen and not removing it first, not painting the interior of the boot support, a paint chip, orange peel paint on the driver's side door, and a dull spot to the right hand of the fuel pump.

7. The company's position is that KL was satisfied with the outcome of the work at the time and made no complaint for 6 months and that no opportunity had been given to the company or the paint supplier to inspect any faulty paint to determine fault. Also, it says that the scope of works performed was very limited because KL was on a very tight budget, so it did not include a complete fit up and instead it agreed to finger tight the parts for him to complete at home; that rust repair had not been discussed and was outside scope and would have cost extra; that KL had supplied the parts (doors and fenders) which were in terrible condition; that the scope did not include a full flat and polish, and that the cause of the deterioration is unexplained and could be wear and tear as he had been seen driving the vehicle or KL had picked off paint to advance his case.
8. On balance, I accept that rust removal was out of scope, as I preferred the company's position that it would have cost more, and at the hearing KL acknowledged it had not been discussed. However, despite this, and even if the company understood there was a tight budget, I find that it failed to exercise reasonable care and skill by painting over rust it identified without first ensuring KL was aware of it, so that he could make an informed decision whether to pay more for rust removal or not. I say this primarily as the company acknowledged its normal process, for example where insurance does not cover rust removal, is to consult with the owner on whether or not they wanted to proceed with painting over it or not, and I preferred KL's evidence that no such discussion took place.
9. Also, on balance, I find that *some* of the *exterior* paint work was not reasonably fit for purpose and fell short of the nature and quality that could reasonably be expected in the circumstances for a repaint. I say this for reasons which include:
 - a. KL acknowledged that the scope was limited to exterior paint work only, so I do not accept that the inside of the boot was in scope.
 - b. Even taking into account that there would likely be some reduced quality when painting second hand parts, the age and condition of the car, and that a flat and polish was not included, I preferred KL's evidence which was supported by photos showing a number of defects in the paint which included some paint peeling off and an orange peel effect over the company's position that an orange peel effect is standard or that KL had deliberately peeled paint off.
 - c. I gave greater weight to KL's evidence that a complete exterior paint should not deteriorate within a short time, and the company also acknowledged at the hearing that it had been alerted to issues on 2 June, not 6 months afterwards. I also preferred KL's evidence that his car had been in storage in the garage without the engine and so he had only driven it for a limited period after raising the concerns, as reflected by the mileage.
10. However, although the company acknowledged that some of the re-fittings were out of tolerance, on balance I am not satisfied that the exterior fit out fell short of the particular purpose made known. I say this as I gave greater weight to the company's evidence that the agreement was only to finger tight, because this was more consistent with:
 - a. The overall context of KL undertaking his own restoration;
 - b. The company's evidence that a full refit would have required substantially more time and labour than charged and that the agreed price reflected this.

If so, what is the remedy?

11. Where there has been a failure of a guarantee, then the remedy under s32 of the CGA depends upon whether the defect can be remedied and if so, whether the company has refused or neglected to remedy it within a reasonable time, or if it can't be remedied or is a substantial character.

12. The company's position is that it was not given the opportunity to inspect the paint defects and that any faults would be easy to fix and could be done at minimal costs, and "in no way amounts to a full refund or costs of \$8000.00."
13. However, at the hearing the company acknowledged that issues had been raised in June, and also that it had responded on 18 December by email stating in part: "You got exactly what you paid for. The work done on it was worth more than the car. See you in Court." I accept that this response is entirely inconsistent with offering up any remedial solution. Furthermore, it subsequently sent *highly offensive, concerning and unprofessional* emails to KL which made it plain it was not willing to engage.
14. As I have not accepted the entirety of KL's claims about failings, and taking into account all the circumstances of this case including the substantial merits and justice, I find that compensation for the diminution in the value of the work paid for is the most reasonable remedy. To this end, I assess that KL is entitled to a \$1500.00 refund.

Is either party entitled to recover legal fees?

15. Both parties claimed for legal fees. The company seeking to recoup legal fees incurred as a result of KL making a claim in the District Court, and KL for his legal fees incurred.
16. As explained in the hearing section 43 of the Disputes Tribunal Act 1998 provides that costs are only recoverable in exceptional circumstances. Subsection 4 is the only circumstance which has any relevance in this case. This gives the Tribunal discretion to order limited solicitors costs incurred and any filing fee paid in the District Court where that party has commenced proceedings in that court; and the proceedings have been transferred to the Tribunal and that those proceedings were commenced in that court and not in the Tribunal by reason of an act or omission of any party that was intended or likely to induce the party who commenced those proceedings to believe that they were not within the jurisdiction of the Tribunal.
17. The company acknowledged and I accept that it was not the party who had commenced proceedings in the District Court, so I find that it is not entitled under this sub-section to recover its legal costs. Nor was there any suggestion by KL that the company had misled him into believing that the Tribunal lacked jurisdiction to deal with the matter. Instead I accept that KL elected to initiate proceedings in that court and to incur legal costs (which were also less than claimed) when the matter could have been brought to the Tribunal for a modest filing fee.
18. Accordingly the company's claim for legal fees is dismissed. Also the counter-claim component for legal fees is dismissed.
19. So, I order D Ltd to pay KL the total sum of \$1500.00.

Referee: GM Taylor
Date: 21 December 2023



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 at the time.

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 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, 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.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, 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. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact. Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working 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, then 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>.