



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 71

APPLICANT I Ltd

RESPONDENT D Ltd

The Tribunal orders:
Claim Dismissed

REASONS

Brief Details of Claim

1. I Ltd operates an hydraulic equipment supply and repair business. D Ltd operates a business that supplies hydraulic equipment to businesses such as I Ltd that on-selling the equipment. D Ltd does not sell to an end user. Transactions with D Ltd are solely business to business.
2. I Ltd has had a long association with D Ltd's salesperson, dealing over recent years with D Ltd's KN.
3. In February 2022, BU (Director, I Ltd) placed a telephone order with KN for the supply of a pump to place in stock. When the pump arrived, BU noticed that it was smaller, a 57cc rather than the usual 63. BU telephoned KN and was assured that other than the size, it was the same as the pumps previously supplied to I Ltd. BU placed the pump in stock, in the belief it was a bi-rotational pump, the same as the [pump product] I Ltd usually purchased.
4. In July 2022, I Ltd sold the pump to CI, to be fitted by CI's own mechanic to one of CI's trucks. Once the pump was fitted and started, the gearbox filled with hydraulic oil and a frost plug blew out. The CI mechanic reinstalled the old pump and found the gearbox to be leaking from the input shaft.
5. I Ltd inspected and discovered the pump was not bi-rotational and was not suitable for CI's truck. I Ltd claims that KN gave misleading and incorrect information about the pump, that I Ltd relied on that information, and the CI truck was damaged as a result. I Ltd claims under the provisions of the Fair Trading Act.
6. I Ltd has paid \$5,143.431 to L Ltd to remedy the damage, and supplied 90 litres of replacement oil. I Ltd claims \$5,869.41 to cover the above costs, plus 4 hours of CI mechanic's time, and 64k mileage for BU to travel to inspect the problem.

Issues

7. The issues for the Tribunal to determine are:
 - (a) Whether I Ltd is prevented from bringing a claim against D Ltd under the Fair Trading Act (FTA) by the terms of trade;
 - (b) If not, whether D Ltd has contravened the provisions of the FTA by making false or misleading representations and if so, whether I Ltd is entitled to compensation.

Is I Ltd prevented from making a claim under the FTA by the terms of trade?

8. BU agrees that I Ltd was aware of the terms set out in the Warning Notice/Disclaimer attached to the price list supplied by D Ltd. The Warning Notice/Disclaimer states:

“By using the attached price list you acknowledge that you have read the attached agreement, understand it and agree to be bound by its terms and condition.....

The price list, as well as all other catalogues, price lists and information provided by [D Ltd], its subsidiaries or authorised distributors, is intended to provide general product information and/or system options for further consideration by users having substantial technical expertise. It is imperative that all aspects of any intended use be analysed and all pertinent information be reviewed concerning the component or system in a current product catalogue. Due to the diversity of possible applications and operating conditions for these components and systems, the user, through its own analysis, testing and evaluation, is solely responsible for making the final selection of the products and systems and ensuring that all safety warning and performance requirements of the application or use are met.”

9. BU agrees that I Ltd was aware of the the terms of the Warranty Policy. Paraphrasing the warranty policy, the warranty offered by D Ltd is limited to repair or replacement of the product. The warranty does not oblige D Ltd to bear any cost of labour or liability for systems malfunction of items installed on equipment. Freight charges for the return of the product are not covered or incoming freight. D Ltd is not obliged for any repair or replacement of any products altered or repaired by any other parties without written authorisation. The Warranty Policy goes on to say:

“[D Ltd] products carry no warranty other than as set forth in the above warranty statement either expressed or implied.

The only warranty extended to the buyer by [D Ltd] is the above expressed warranty and there are no other warranties, expressed or implied, of merchantability, fitness for a particular purpose or otherwise, which extend beyond the face hereof. [D Ltd] shall in no event be liable for labour or freight charges or for consequential or incidental damages including, but not limited to, injury to the person or property of buyer or any others, machine down time, and losses and expenses incurred by buyer, arising from the use of this equipment or from this agreement. This warranty constitutes the entire warranty of [D Ltd] and no oral representations, warranties, or guarantees of any agent of manufacture or seller shall be binding to [D Ltd] and no part of this warranty may be modified or extended except by written agreement executed by [D Ltd].”

10. Having received the above Warning Notice/Disclaimer and Warranty Policy prior to this transaction, I Ltd is bound by the terms therein.
11. Section 5D of the FTA allows for parties to a contract to contract out of the provisions of ss 9 and 13 (being the provisions that relate to misleading and deceptive conduct and false and misleading representations, and the provisions that I Ltd seeks to rely on).
12. I am satisfied that the provisions of s 5D have been met and that the parties have contract out of the provisions of ss 9 and 13 FTA for the following reasons:
- (a) Both parties are in trade.
 - (b) The terms of trade are in writing and were well known to I Ltd before the transaction was entered into.
 - (c) The wording of both the Warning Notice/Disclaimer makes it clear that I Ltd is solely responsible for making the final selection of the product.
 - (d) The wording of the Warranty Policy makes it clear that D Ltd's only responsibility is the repair or replace product supplied.
 - (e) The wording of the Warranty Policy makes it clear that D Ltd's liability is limited to repair or replacing product supplied, and that D Ltd is not liable for any costs arising from or associated

with the supply and use of any product supplied. In particular, D Ltd makes it clear that any oral representations of any of its agents is not binding on D Ltd.

- (f) The terms of the Warning Notice/Disclaimer and the Warranty Policy were well known to I Ltd and it has been dealing with D Ltd on these terms for many years. Therefore, I am satisfied it is fair and reasonable that I Ltd is bound by the terms.
- (g) BU argued that his claim was not brought under the Warranty, but under the provisions of the FTA. However, I find that I Ltd has contracted out the relevant provisions of the FTA by accepting the terms set out in the Warranty policy.

13. I find that I Ltd is prevented from bringing a claim against D Ltd under the provisions of ss 9 and 13 of the FTA, and therefore I Ltd's claim must be dismissed.

Referee: JF Tunnicliffe

Date: 10 February 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>.