(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 598

APPLICANT **K Ltd**

RESPONDENT **V Ltd**

The Tribunal orders:

1. V Ltd is to pay K Ltd $19,999.00 by Monday 18 December 2023.
2. Upon payment of the $19,999.00 to K Ltd, ownership of the [truck] is to immediately be transferred to V Ltd.
3. V Ltd can arrange for collection of the [truck] from [city 1], at their cost.

Reasons:

1. K, representing K Ltd and Q, representing V Ltd, both attended the hearing by teleconference.
2. K bought a [truck] for commercial use for his business from V Ltd in April 2022. After purchasing the truck, on the drive from [city 2] back to [city 1], the truck had problems with the gearbox. On arrival in [city 1], K took the truck straight to a mechanic. He told V LTD about the truck's issues, and said he asked them to repair it, which he understood they agreed to. The mechanic liaised with V LTD about the repairs, but the truck was said to be uneconomic to repair. K claimed $29,270.00, which included the purchase price of the truck, interest on capital, travel from [city 1] to [city 2] costs, time for dealing with the failure issues and 14 months of storage fees for equipment dedicated to the truck.

Was there any misleading or deceptive conduct by V LTD?

3. K said he was led to believe the truck would be in good working condition, and that V LTD's employee had told him the truck had just been driven to [city 3] and back before he bought it. He felt V LTD had misrepresented the truck's condition.
4. Q said the truck was in good working condition when it left them with K, that it had been recently drive to [city 3] and back and had obtained a Certificate of Fitness ("COF") just before purchase. He maintained the defects only became apparent once K reached [city 4], about 200 kilometres from [city 2].
5. Given this evidence, I find there is insufficient evidence to prove that V LTD was misleading or deceptive in its conduct about the truck with K prior to the sale.

Does the contract contain an exclusion or limitation clause?

6. The parties signed a Vehicle Offer and Sale Agreement dated 26 April 2022, with V LTD as the seller and KQ Ltd trading as KE Ltd, listed as the purchaser, for the purchase of the truck. KQ Ltd changed its name to KC in September 2022.
7. The agreement contained a clause signed by K, acknowledging the truck supplied was acquired in trade and that the parties accordingly agreed the provisions of the Consumer Guarantees Act ("CGA") would not apply and that it was fair and reasonable that K's business was bound by that clause.
8. Clause 9.1 of the agreement purported to limit any liability of V LTD for any consequential, indirect or special loss, damage or injury of any kind arising directly or indirectly from any breach of V LTD's obligations under or cancellation of the agreement or negligence, misrepresentation, or other act or omission on the part of V LTD or its employees. Clause 9.2 also limited any liability found for such claims to, in aggregate, not exceed the total purchase price of the vehicle.
9. Clause 10 of the agreement provided that "except as otherwise provided in this agreement and subject to the Motor Vehicle Sales Act 2003 and the Consumer Guarantees Act 1993, no warranty condition will be implied against MVT by any statue, at common law or otherwise and no representation, express condition or variation of the agreement will be binding on MVT unless it is in writing and signed by MVT."
10. K said these clauses contracting out of the CGA, excluding warranty condition implications, and limiting liability, were not brought to his attention when he signed the agreement, so he was unaware of what he was signing. Q said that V LTD's employee who dealt with Kat the time of sale was trained to and regularly explained these clauses to their customers.
11. As the clauses outlined above were incorporated in the terms which were signed prior to the supply of the truck, and the truck was supplied on the basis of that contract, I find those clauses formed part of the contract between the parties.
12. In a commercial context, the general rule is that, in the absence of fraud or misrepresentation, a party is bound by a clause even if he or she has not read it. A signature conveys a representation that the person who signs has either read and approved the contents of the document or is willing to take a chance of being bound by those contents, whatever they might be. There is no requirement that the other party must show that due notice was given of the terms of the contract.
13. As a result, the clause contracting out of the CGA, the exclusion clause and limitation clause apply to the supply of the defective truck.

Does the contract protect V LTD against this claim?

14. A party who seeks to rely on an exclusion clause such as that contained in the contract, must be able to show not only that the clause formed part of the contract, but that the effect of the clause is not negated by statute, and that the wording of it is sufficiently clear that it covers the events that have happened.
15. Considering section 43 CGA as regards contracting out of the CGA, both parties were in trade, the truck was for commercial use, and both parties agreed to contract out of the CGA. In terms of whether it was fair and reasonable that the parties are bound by this provision in their agreement, K said that he felt obliged to accept V LTD's terms in their standard contract and

that he had not had legal advice before signing it. However, K is in business, said he had bought several similar second-hand trucks for commercial purposes before and has been involved in his business for quite a while. Given this, the evidence was that K was an experienced businessperson who was not new to commercial deals. He could have chosen to negotiate the contract terms with V LTD and obtain legal advice, but he did not. In the circumstances, I find it is fair and reasonable for the parties to be bound by this clause contracting out from the provisions of the CGA.

16. As this was not a consumer contract, there is no statutory bar to the exclusion clause. Parties are free to contract out of the rules that would otherwise apply under Part 3 of the Contract and Commercial Law Act 2017 ("CCLA") (section 197).

17. I must next consider whether the clauses were sufficiently clear to negate liability.

18. Words in a contract are to be given their natural and ordinary meaning, if this can be ascertained from the words used. However, given that an exclusion clause will enable a party to escape liability for a breach, it will be assumed that a party will not have intended to limit liability unless clear and unambiguous language is used. The more valuable the right being abandoned, or the more significant the departure from obligations imposed by law, the clearer the language needs to be. Where the contract is governed by sales legislation, such as the CCLA, the courts have traditionally taken the view that any attempt to contract out must make direct and clear reference to the statutory conditions being negated. If there is an ambiguity, exclusion clauses will be read *contra proferentum*, meaning that any ambiguity is to be construed against the interest of the party seeking to enforce it.

19. However, it should be noted that courts have drawn a distinction between exclusion clauses and limitation clauses, applying a stricter approach to the interpretation of the former given the higher likelihood of confusion in ascertaining their meaning.

20. Applying these rules of construction, I find that clause 10 is not sufficiently clear to be relied on by V LTD to deny liability for the defective truck, for the following reasons:

    a. Clause 10 notes that no warranty condition will be implied against V LTD by any statute, at common law or otherwise. There is no direct reference to contracting out of the implied conditions of the CCLA, and the CCLA does not prohibit contracting out. Clause 10 expressly mentions the Motor Vehicle Sales Act 2003 and the CGA, but not the CCLA. V LTD expressly contracted out of the CGA in the contract, in a separate clause, but has not expressly contracted out of any implied conditions in the CCLA.

    b. The literal wording relied upon in clause 10 by V LTD is asking a customer to take all risk of a defective truck. Under that interpretation, V LTD can supply a defective product and be paid for it. It is open to V LTD to state in plain English exactly what it is contracting out of, including the Act it refers to, and that it is consequently not standing behind its product, or any loss associated with it. This would be very unusual terms. Without reference to the CCLA, the wording is not clear enough to achieve that end.

21. However, I find that clause 9.1 of the agreement that limits liability for consequential loss as claimed here, and clause 9.2 of the agreement, which limits the liability of V LTD in respect of all claims for loss, damage or injury, however arising, to, in aggregate, not exceed the purchase price of the vehicle, are both simple and effective as limitation clauses. I find that they formed part of the contract signed and contain no ambiguity. For the nature of the contract between these parties, such clauses are not unusual.

22. Given I have found that clause 10 purporting to exclude any implied warranties or conditions is not sufficiently clear, I consider next whether the implied conditions in sections 138 and 139 CCLA regarding fitness for purpose and merchantable quality, apply.

Was the truck fit for purpose? Or merchantable quality?

23. Section 138 CCLA provides that there is an implied condition in the contract of sale that the goods are reasonably fit for a purpose made known to the seller by the buyer, to show the buyer relies on the seller's skill and judgement and where the goods are of a description that it is in the seller's business to supply.

24. Despite K's evidence that he told V LTD's employee he needed the truck for pipe lining, I find the truck was not selected by either V LTD or K on this basis, K did not appear to rely on V LTD's skill or judgement in this regard, nor was the truck specifically adapted by V LTD for this purpose. I find it was a truck purchased for general normal commercial use. As such, I do not find there is an implied condition in the contract for sale that the truck be fit for purpose.

25. Section 139 CCLA provides that there is an implied condition in a contract of sale that the goods are of merchantable quality if the goods are bought by description from a seller who deals in goods of that description. However, if the buyer has examined the goods, there is no implied condition with respect to defects that the examination ought to have revealed.

26. Any examination of the goods by the buyer will not prevent the application of section 139 CCLA completely, but only prevent the buyer from relying upon defects which the examination ought to have revealed. This leaves the buyer able to rely upon latent or secret defects. The courts have also noted the buyer must be competent to carry out such an examination of the goods.

27. Q acknowledged the parties completed the sale based on the general description of the truck in the contract of the type and model of vehicle, registration number and so on, and that both parties understood that KC wanted the truck to be in good working condition. Q said the truck was in good working condition when it left V LTD's premises with K, that he travelled some distance and that anything could have happened to the truck on the journey, to create the truck's problems. He emphasised that K examined the truck and took it for a test drive, and the truck passed a COF.

28. However, K said he only conducted a cursory examination of the truck at the time of sale, which included checking for oil leaks, checking the wipers and lights and giving it a short test drive in the local area. He maintained there was not way he could have detected the internal gearbox issues that resulted in the truck's problems, at the time he looked the truck over. Further, he said he is not a mechanic and so is not qualified to conduct a proper assessment of a vehicle such as this truck. I note the truck's internal issues were not picked up on the COF just prior to purchase, nor by V LTD. As such, I find the issues with the truck were unlikely to have been revealed by any examination of the truck by K and that K was not competent to discover such defects in an examination of the truck.

29. As such, I find there was an implied condition in the sale contract that the truck was of merchantable quality. Simply put, this means that the truck was to be in reasonable working condition for a second-hand truck, in a condition in which it could be sold generally.

30. K said the truck's gearbox was removed to assess the issues and sent to a gearbox specialist, X. K provided a report from U Ltd, the [city 1] mechanic, who excerpted X's report on the truck, which said they could normally supply a new gearbox for $10,000.00 but this gearbox is not the same as it is an import. There was evidence of several attempts by Y, at V LTD, liaising with, and providing instructions to,U Ltd to attempt to repair the truck's transmission, all without success. Finally, V LTD requested U Ltd to send the truck to their [city 2] repairers, at which point U Ltd said they required payment for their repair services before this would be done. U Ltd, in their report said V LTD told them they would pay for the repairs but have not done so.

31. Given the internal gearbox issues found with the truck that became apparent on the same day of the truck's purchase, and that the truck has not been in working condition at all since K first brought it back to [city 1] in April 2022, nor has it responded to any attempts to repair it to date, and that the truck remains at the premises of U Ltd in limbo, I find the truck was not of merchantable quality.

What remedy, if any, is appropriate?

32. Section 132 CCLA provides that a breach of a condition in a contract of sale may give rise to a right to treat the contract as repudiated.

33. I have found the truck was not of merchantable quality. As such, V LTD has breached this implied condition.

34. I have also found the limitation clause in the agreement that limits any liability of V LTD for consequential loss and to a sum not exceeding the purchase price of the vehicle was valid. Therefore, I award KC the purchase price of the truck, which is $19,999.00.

35. KC claimed $1,900.00 for interest on capital, $455.00 for a flight from [city 1 to [city 2], $95.00 for a transfer from the airport in [city 2] to [suburb], $220.00 for diesel fuel from [suburb] to [city 1], $1,900.00 for a return driving trip, labour and time dealing with the failure issue (20 hours @ $95.00/hour) and $4,600.00 for 14 months storage fees for equipment KC had to store that was specialised equipment bought for the truck. K was unclear as to whether the amounts claimed for consequential losses included GST or not.

36. As all these claims are for consequential loss, and I have found the clause limiting liability for consequential loss was valid, I dismiss the claims for consequential loss. For the avoidance of doubt, these claims would have been dismissed in any event, due to insufficient evidence provided to prove them, even if consequential loss had been allowed under the contract.

37. V Ltd is to pay K Ltd $19,999.00 by Monday 18 December 2023. Upon payment of the $19,999.00 to K Ltd, ownership of the [truck] is to immediately be transferred to V Ltd. V Ltd can arrange for collection of the [truck] from [city 1], at their cost.

Referee: C Price
Date: 27 November 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 enqV Ltdry) 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 enqV Ltdries, please phone 0800 233 222.

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