



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

District Court

[2023] NZDT 458

**APPLICANT** ND

**RESPONDENT** LB Ltd

**The Tribunal orders:**

1. ND is to return the shade cloth and fittings (but not the fittings attached to his property) to LB Ltd before 15 September 2023.
2. When LB Ltd has received the shade cloth and fittings it is to pay \$2,000.00 to ND within twenty days. If ND does not return the shade cloth and fittings to LB Ltd before 15 September 2023, LB Ltd is not required to pay the \$2,000.00 to ND and the matter is at an end.

**Reasons**

1. In September 2021 ND entered into a contract with LB Ltd for it to supply and fit a shade cloth to his property at [address]. The shade cloth was installed on 18 October 2021.
2. In an earlier Tribunal decision ([redacted]) ND was ordered to pay LB Ltd \$2,778.94 before 14 March 2022 for an unpaid invoice for the work. That decision also found that the shade cloth was not of acceptable quality and LB Ltd said that it would remediate the shade cloth at its own expense when it received payment. ND was entitled to this remediation under section 18 of Consumer Guarantees Act 1993 (**CGA**).
3. ND did not make payment by 14 March 2022, and rather than have the order enforced through the Collections Unit of the District Court LB Ltd employed a private debt collection firm to chase the debt. By late October 2022 ND had paid LB Ltd in full. LB Ltd took the view that as it had not received payment by 14 March 2022 as per the Tribunal order that it was not going to remediate the shade cloth at all.
4. ND claims \$2,000.00 from LB Ltd.
5. The issues to be resolved are:
  - a. Is ND entitled to a remedy? If so, which remedy does he wish to pursue?
  - b. If a refund, should LB Ltd be entitled to retain a part of the money? If so, how much and why?

**Is ND entitled to a remedy? If so, which remedy does he wish to pursue?**

6. The supply of the shade cloth comprised a mix of goods (the cloth itself plus fittings) and services (measure and install). The CGA provides guarantees to a consumer for both of these things. Section 6 of the CGA provides that goods will be of acceptable quality, and section 28 that services will be provided with reasonable care and skill.
7. The Tribunal has already made a finding in the previous hearing that the goods were not of acceptable quality. For those same reasons I find that LB Ltd did not carry out its services with reasonable care and skill.
8. When there has been a failure of a CGA guarantee, the following options/remedies are available to a consumer:
  - a. Goods: under section 18 of the CGA a consumer may require the supplier to remedy the failure within a reasonable period of time, or if it does not do so then:
    - i. Have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred, or
    - ii. The consumer may reject the goods, return them and receive a refund.
  - b. Services: under section 32 of the CGA a consumer may require the supplier to remedy the failure within a reasonable period of time, or if it does not do so then:
    - i. The consumer may have the failure remedied elsewhere and recover all reasonable costs in having the failure remedied, or
    - ii. The consumer may cancel the contract. The effect of this is that the consumer is entitled to a refund, unless a court or the Disputes Tribunal orders that the supplier may retain whole or part of the money paid.
9. I find that LB Ltd has not remedied the failure within a reasonable period of time. This is because it accepted that it has refused to do the work for the last ten months. ND said during the hearing that the remedy he wishes to pursue is a refund from LB Ltd. As per the preceding paragraph he has the right to do this.
10. I have considered LB Ltd's view that as ND did not comply with the payment date in the previous order it should be released it from its obligations under the CGA. However, it is not possible to release a supplier from its obligations under the CGA. The date in the previous order simply gave LB Ltd the right to have that order enforced through the District Court if ND did not pay by that date. It did not nullify LB Ltd's obligations under the CGA.

**If a refund, should LB Ltd be entitled to retain a part of the money? If so, how much and why?**

11. I find that it is not equitable for LB Ltd to retain all of the monies paid to it. This is because it had the opportunity to remedy the problems however chose not to do so. It would also be inequitable for ND to retain ownership of the shade cloth if he is to receive a refund as a person should not have the use of something that they have been refunded for.
12. I find that ND is entitled to a refund of \$2,000.00 if he returns the shade cloth to LB Ltd. This is for the following reasons:
  - a. I understand that ND has paid around \$3,200.00 in total to LB Ltd.
  - b. I find that LB Ltd is entitled to retain \$1,000.00 being a pragmatic assessment of the price for the part of the services that it performed competently, being the measurement and the majority of the installation of the shade cloth.
  - c. I advised the parties during the hearing that I am unable to award ND more than the amount claimed by him on his application form. This is \$2,000.00.

13. I have had regard to LB Ltd's view that a new shade cloth would likely cost around \$700.00 and that no further fittings would be required as they have already been supplied. However, the remedy that ND has chosen is not based on the cost of the materials and of someone else installing a new shade cloth, he has chosen to receive a refund. He is entitled to do this. Under sections 18 and 32 of the CGA it is ND's choice as to whether he has the work done elsewhere and recoup costs or receives a refund as LB Ltd did not put the issues right within a reasonable period of time.

### **Conclusion**

14. For the above reasons, ND is to return the shade cloth and fittings (but not the fittings which are attached to his property) to LB Ltd before 15 September 2023. When LB Ltd has received the shade cloth and fittings it is to pay \$2,000.00 to ND within twenty days. If ND does not return the shade cloth to LB Ltd before 15 September 2023, LB Ltd is not required to pay the \$2,000.00 to ND and the matter is at an end.

**Referee: L Thompson**

**Date: 15 August 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>.