



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 530

APPLICANT TS

RESPONDENT L Ltd

The Tribunal orders:

L Ltd is to pay TS \$5,500.00 by 1 November 2023.

Background

1. L Ltd is a boat broker base in [City 1].
2. TS resides in [City 2].
3. TS was interested in buying a [boat], principally for his son's use.
4. L Ltd had a 1979 [boat] listed for sale [online].
5. The listing described the boat as:

5.5m [boat] 1979 [...]

2000 Mercury 90hp four-stroke has just been serviced, with service history, plenty of compression on all cylinders. New water pump, drive shaft seal replaced new oil filter, new spark plugs. Engine hours unknown [...]

2021 brand new best trailer, all still under warranty [...]

The boat is ready to go, it is the perfect family boat set up for fishing and with all the comforts of a modern boat, boat sold as is where is

6. TS agreed to purchase the boat for \$15,000.
7. TS' son took delivery of the boat on 13 May 2023.
8. The first time that he used it, the boat lurched violently to the right when he applied the throttle. The boat could only be steered straight with heavy pressure to the left. It was also noted that the motor was "running very rough".
9. TS informed BS (L Ltd) about the issues.
10. TS' son attempted a second launch, but the problems persisted.

11. After a discussion with BS, it was agreed that TS would take the boat to [Boat Mechanic] for inspection and assessment.
12. [Boat Mechanic] discovered that:
 - a. The engine mounts were broken. This was the cause of the steering problem.
 - b. Water had entered into the motor including the cylinder head. It appears that someone has attempted to remove the powerhead in a careless way, causing separation between the powerhead and mount case. That person then attempted to glue the components back together. The seal was not perfect, and water has got into the motor.
 - c. The motor was partially seized.
13. The motor is not economically repairable.
14. TS seeks compensation of \$5,500.00.
15. The hearing took place by phone on 26 September 2023.

Findings

16. L Ltd act as a broker, marketing and selling boats on behalf of private individual owners.
17. The Consumer Guarantees Act 1993 (“CGA”) applies if a person who is in trade supplies goods of a type that are ordinarily acquired for domestic of household use.
18. In *Walters v Taylor Marine Ltd*¹, a case involving a claim against a boat broker, the High Court held that the broker had obligations to the purchaser under the CGA, even though the broker was acting on behalf of the ‘actual’ seller, who was not a person in trade.
19. I also note that the listing for the boat did not indicate that L Ltd was selling the boat on behalf of another person. L Ltd advertised the boat, entered into negotiations with TS, drafted and signed the sale agreement (which names L Ltd as the seller), and received payment.
20. I am satisfied that L Ltd supplied the boat to TS. The CGA applies.
21. Section 6 CGA states that where goods are supplied to a consumer there is a guarantee that the goods must be of “acceptable quality”. Goods are of acceptable quality if they are as:
 - fit for purpose; and
 - acceptable in appearance and finish; and
 - free from minor defects; and
 - safe; and
 - durableas a reasonable consumer would expect, having regard to the nature of the goods, the price paid for the goods, and several other factors².

¹ [2010] 2 NZLR 656. Another boat broker, Gulf Group Marine Brokers Ltd, subsequently brought proceedings seeking a declaration that the CGA does not apply to boat brokers/agents. The claim failed at the High Court for technical reasons (*Gulf Group Marine Brokers Ltd v Ministry of Business, Innovation, and Employment* [2021] NZHC 85)

² Section 7 CGA

22. If there is a breach of a guarantee, the consumer may require the supplier to remedy the breach by repairing the goods, replacing them (with goods of an identical type), or providing a refund.
23. If the supplier fails or refuses to remedy the breach, the consumer has various remedies against the supplier.
24. L Ltd initially rejected TS' claim on the grounds that:
- a. TS had the opportunity to inspect the boat prior to purchase but he declined to.
 - b. The listing stated that the boat was sold "as is where is".
 - c. The sale and purchase agreement stated that there is no warranty on the boat.
25. However, none of these considerations are relevant because the CGA applied to the sale. A supplier can only contract out the CGA in certain limited circumstances.
26. BS submitted that the boat was in good condition when he carried out a sea trial with another prospective purchaser, not long before the sale to TS. BS submitted that it is possible that the engine mounts may have broken after TS purchased the boat, perhaps when it was being transported, and that TS' son may have carried out the attempted repair that is discussed in the [Boat Mechanic] report. BS noted that at one point when the steering problem issue was raised, TS said that his son would look at it and see if there was any basic repair that he could do.
27. I acknowledge that BS's successful sea trial is difficult to reconcile with the fault being present at the time of sale. However, I am satisfied that the balance of evidence supports a finding that the fault was in fact present at the time of sale, having regard to the following:
- a. [Boat Mechanic]'s report notes the failure of the glue, the presence of corrosion, and partial seizure of the motor. That extent of deterioration would not be present if the engine damage occurred at the hands of TS' son sometime between 13 May and 19 June.
 - b. I accept TS' statement that the steering issue and the engine 'running rough' manifested the first time that his son used the boat, about a week after purchase. TS' communication with BS at the time is consistent with this.
 - c. TS' comment about his son 'having a look' at the steering was in the context of the problem possibly being related to the steering rod, which runs along the exterior of the hull.
28. My finding is that the presence of this problem at time of sale meant that the boat was not of acceptable quality. The motor does not operate safely and effectively. It cannot be economically repaired. A reasonable consumer, having regard to the nature of the goods and the information provided by L Ltd would expect wear and tear consistent with the age of the boat and the age of the motor, but would also expect (per L Ltd' advertising) that the boat was "ready to go".
29. TS gave L Ltd the opportunity to remedy the breach of the guarantee of acceptable quality.
30. L Ltd offered TS a 1997 75hp 2-stroke Mercury outboard, which TS declined. As noted above, a supplier can remedy a breach of a guarantee by replacing the defective goods with goods of an "identical type". I acknowledge that L Ltd was attempting to find a practical resolution to the problem. However, TS was entitled to reject the offer of the 75hp Mercury. It is a different, and lesser, motor than the 90hp 4-stroke that came with the boat.
31. Therefore I find that:

- a. The CGA applies.
 - b. There is a proven breach of the guarantee of acceptable quality.
 - c. The breach has not been remedied.
32. TS' claim seeks \$5,500.00 on the grounds that if he was purchasing the boat without a motor, it would have a market value of no more than \$9,500.00.
33. The CGA allows for this type of claim. Section 18(3)(b) CGA states that in some circumstances a consumer may "obtain from the supplier compensation for any reduction in value of the goods below the price paid by the consumer".
34. TS submitted that he looked at numerous [boat]s for sale when he assessed the amount of his claim. He also noted that:
- a. A reasonable assessment of the value of the boat is two-thirds in the hull and one-third in the motor.
 - b. The cost of purchasing a replacement 2000 90hp 4-stroke Mercury outboard in good working order would be at least \$5,500.00.
35. I agree that \$5,500.00 is a fair and reasonable assessment of TS' loss, whether it is calculated on the basis of loss of bargain, or on the basis of the cost that TS must incur to put himself back to the position that he should have been in if the motor had been of acceptable quality.
36. The claim is proven.

Referee: Nicholas Blake
Date: 10 October 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>.