(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2019] NZDT 1339**

APPLICANT **X Ltd**

RESPONDENT **K Ltd**

The Tribunal orders:

1. K Ltd is to pay to X Ltd the sum of $456.78 on or before 10 October 2019.

Reasons

1. X Ltd (X Ltd) contracted K Ltd (K Ltd) to supply bottled lubricant for resale to clients in the medical industry. As part of the supply, K Ltd was to attach pre-printed labels purchased by X Ltd from a third party to the bottles.

2. K Ltd rejected the labels supplied by X Ltd, causing a loss to X Ltd of the cost of the printing ($1,434.05). X Ltd has filed a claim seeking this sum from K Ltd on the basis that the labels were correct, and/or would cause no loss to K Ltd, and that K Ltd failed to exercise due care in the manner in which it rejected the labels. K Ltd defends the claim on the grounds that the labels put both X Ltd and K Ltd at risk, that it exercised due care in the manner in which it rejected the labels and that its terms and conditions contain a clause precluding any claim against it for damages.

3. The issues to be resolved are: (a) Did K Ltd have grounds for rejecting the labels? (b) If so, did K Ltd act with reasonable care in the manner in which it rejected the label? (c) If not, is X Ltd entitled to any compensation for the cost of printing the labels?

Did K Ltd have grounds for rejecting the labels?

4. I find that K Ltd had grounds for rejecting the labels. I have reached this conclusion for the following reasons:

   (a) The labels stated that the lubricant "*complies with USFDA*". This suggests the gel is either approved or meets defined regulatory standards. In fact, the gel is not a product that requires approval or registration, and if it did, the supplier would need to the registered with the FDA. In that sense, the product is technically "compliant", but the statement is misleading. It gives a sense of regulatory approval that is not valid.

   (b) The statement is therefore a breach of the Fair Trading Act 1986, and could also lead to fines or prosecutions by the FDA.

   (c) I accept that the gel is non-medicating, so the breach is something of a technicality. The chances of a customer being in the slightest bit concerned is minimal. X Ltd had inherited the label from a previous supplier, and there had been no issues raised in the past.

(d) However, the quality controller for K Ltd gave compelling evidence that the company has direct experience of FDA threats to prosecute for another product it was manufacturing where the client was in breach and indicated that investigations are often triggered not by a product user, but by a competitor. This risk exists even if the product is only sold in New Zealand.

(e) Given that both K Ltd and X Ltd could face significant penalties from a potential prosecution, the risk, however small it might appear, is not worth taking. It is noted that the terms of trade for K Ltd contained an indemnity from X Ltd to protect it from claims of this sort, but the existence of this in the contract does not protect against all the time, cost and potential harm to reputation that a warning or prosecution can bring.

Did K Ltd act with reasonable care in the manner in which it rejected the label?

5. I find that K Ltd failed to act with reasonable care in the manner in which it rejected the labels.

6. K Ltd requested a copy of the labels to review on 27 February 2019. This was emailed to K Ltd in mid-March. K Ltd made comments about label size but did not pick up any issue with the text. It then sent through a purchase order for X Ltd to get the labels printed. After the labels were printed but before they were applied, K Ltd emailed X Ltd in response to a query about timeframes for bottling, and advised:

> *"Hi [redacted]-*
> *Apologies for the delay in getting back to you.*
> *Packing is scheduled for Monday through Tuesday next week.*
>
> *Our Head of Quality has picked up a statement on your label – Complies with USFDA*
> *Do you have any information to support this claim? FDA registration #?*
> *Thanks*
> *[redacted]"*

7. Before any reply was received, K Ltd sent a further email:

> *Hi [redacted]-*
> *See attached letter from our Head of Quality.*
>
> *Unfortunately the label claim has potential to cause really serious issues if we apply this label and ship the product. At some point you would be looking at a full recall of the product etc. It would be a total shit-storm (for want of a better word).*
>
> *We have had to reject the labels and will return these to you….*

8. I find that K Ltd had a duty of care under the contract that would be implied by law to manufacture the product in such a manner that did not cause unnecessary loss to X Ltd. This duty was a contractual, rather than a statutory one, as the Consumer Guarantees Act 1993 was lawfully and expressly excluded and did not apply. Nonetheless, a contractual duty arises where it would be so obvious it goes without saying, and necessary to the make the deal work. In these circumstances, I am satisfied the parties would not agree to a commercial deal that exposed X Ltd to a breach of reasonable and expected standards of care.

9. The manufacture of the product includes a review and approval of the content of the label. That this is so is established by the fact that K Ltd did review, and reject, the label for its content. I have had regard to K Ltd's submission that the review of the label was only relating to its size. The evidence of the substantive review by its quality controller establishes that the right of review extends to the substance of the text. It is foreseeable that if this review does not take place before the purchase order is sent for the printing of the labels, X Ltd is exposed to a risk of loss (being the cost of a re-print, plus, potentially, the proved cost of any foreseeable delays).

10. I have had regard to K Ltd's submission that its website (under FAQ's) makes it clear that label content and artwork is the responsibility of the client. Whilst this is so and may give rise to an argument over contribution to the loss suffered, K Ltd needs to exercise its right of review over the material with due care.

Is X Ltd entitled to any compensation for the cost of the labels?

11. The labels cost $993.00 + GST ($1,141.95) to re-print. Whilst X Ltd claimed the cost of the first print ($1,434.05), the direct loss incurred was the re-print at the slightly lesser cost.

12. X Ltd spoke of the cost to its reputation of delays in the manufacture. Only part of which was related to the reprint of the labels. No damages were sought for this in the claim, and no findings could be made on the evidence presented of the extent of this loss, and whether any delays in the supply of the product amounted to a breach of contract.

13. I have had regard to an exclusion clause set out in the terms and conditions sent by K Ltd with its quote. In the second column on page 2 of the terms, there is a clause which states:

> *"K Ltd shall not be liable for any economic or consequential loss to the Customer arising out of any breach of the obligations of K Ltd and the liability of K Ltd whether in contract or pursuant to any cancellation of the contract or in act or otherwise in respect of all claims for loss, damage or injury the Customer may regard, shall be linked at the option of K Ltd to the replacement of the Goods or Services or to the price of the Goods or Services".*

14. Read widely, this broad exclusion clause states that K Ltd is not liable for any loss for any breach of any obligation, but then goes on to limit any liability to the replacement or price of the goods. Over the years, a number of principles have developed that have an impact on the applicability and interpretation of exclusion or limitation clauses.

15. First, the clause must be incorporated into the contract. This has occurred by the inclusion of it in the terms that were sent with the quote. Those terms would be deemed to have been accepted upon acceptance of the quote.

16. However, secondly, clauses of this nature are only enforceable if they have been reasonably brought to the attention of the other party. Whilst there is a presumption that signed terms have been read, this is not so of unsigned terms. X Ltd did not sign any terms. The clause is towards the end of closely written columns of terms and has no heading to draw attention to its contents. Given its breadth and importance, I am satisfied that this clause has not been adequately brought to the attention of X Ltd.

17. Thirdly, where there is any ambiguity about the meaning of such clauses, they are construed against the interests of the writer to constrain any unexpected outcome for the customer. This clause does not expressly exclude liability in negligence. Technically, this claim can only be pursued on the basis of a breach of contract, as the Tribunal has jurisdiction in negligence, but only where there has been damage to physical property. However, it is noted that given the limitation expressed in the second part of the clause, there is an argument that the opening words are not clear enough to exclude liability for negligence. Had the matter proceeded in the District Court, which would be uneconomic for both parties given the size of the claim, there would have been deficiencies in the clause to protect K Ltd in the manner that the company would have intended.

18. It is also noted that the Tribunal has an express discretion in s18(7) of the Disputes Tribunal Act 1988 to disregard any provision in an agreement that excludes or limits any liability that would otherwise have arisen. Having regard to the significance of the clause to X Ltd (at least in regard to a breach of contract), and the lack of notice, I consider that the justice of the matter requires at least the *exclusionary* part of the clause to be disregarded. In reaching this conclusion, it is noted that this does not unduly prejudice K Ltd in losing any protection from the *limitation* of any liability expressed in the second part of the clause. X Ltd has claimed only for direct loss, not consequential loss. A limitation of liability to direct losses, or the price of the goods, is common, and less likely to be open to challenge for lack of notice than an attempt to remove any liability whatsoever. In any case, X Ltd has only claimed for a direct loss incurred. Consequently, the whole claim remains within the spirit of the limitation of liability that K Ltd intended to apply.

19. It follows from the findings above that K Ltd intended to assess the content of the labels but failed in its contractual duty to X Ltd to do so before confirming they be sent to print. This leaves K Ltd responsible for the reprint cost, less any contribution to the loss caused by X Ltd itself.

20. I am satisfied that the justice of the matter requires me to consider whether X Ltd was also partly responsible for the cost it incurred, and if so in what measure. Whilst assessment of contribution occurs most commonly in claims made in tort, this claim is in a similar vein, given that the case concerns a contractual duty of care, and there was a chain of events that led to the loss which both parties had a hand in.

21. In assessing contribution, the first consideration is to determine which party is primarily liable. Often, this is determined by the order of events. In this case, X Ltd had a duty to consider the regulatory compliance of its labelling, and K Ltd's website does indicate (albeit without direct reference to regulatory compliance) that artwork, text and design are the customer's responsibility. On that basis, I am satisfied that X Ltd was primarily responsible for the error, and thus the loss that resulted. However, K Ltd's part in it was significant, given that X Ltd had asked for the label to be reviewed to ensure K Ltd was satisfied. This did not occur to the extent required by the time K Ltd sent the purchase order for the labels to be printed.

22. Having regard to all the circumstances, I find that X Ltd is 60% responsible, and K Ltd is accordingly liable for 40% of the loss.

23. On that basis, I find that K Ltd is to pay X Ltd a contribution of $456.78 to the cost of reprinting the labels.

Referee:

J Robertshawe

Date: **19 September 2019**

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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal
There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a $200 filing fee for an appeal. You can only appeal outside of 28 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, and 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.