IN THE DISTRICT COURT
AT AUCKLAND

CIV-2017-004-001239
[2018] NZDC 3673

BETWEEN	LIFESTYLE CARS LIMITED Appellant
AND	ANNEMIEKE JOHANN MARGARETHA DE JONG Respondent

Hearing: 9 January 2018

Appearances: P J Kennelly for the Appellant
Respondent in Person

Judgment: 28 February 2018

RESERVED JUDGMENT OF JUDGE B A GIBSON

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[1] On 8 May 2017 the Motor Vehicle Disputes Tribunal gave judgment in favour of the respondent against the appellant in the sum of $45,000 finding that the respondent failed to comply with the statutory guarantee as to acceptable quality when it sold a 1990 Toyota Cruiser motor home to the respondent. The guarantee is contained in s 6 of the Consumer Guarantees Act 1993. The appellant, as it was entitled to, appealed to this Court.

[2] The procedure governing appeals from the Motor Vehicle Disputes Tribunal is set out in Schedule 1 of the Motor Vehicle Sales Act 2003 ('the Act') which by clause 16(1) allows an appeal to be brought to the District Court, with clause 16(2) providing, where the claim exceeds $12,500 that the appeal may be brought on either the grounds that the decision was wrong in fact or law, or both, or that the proceedings were conducted by the Disputes Tribunal in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.

[3] The notice of appeal sets out a number of grounds but, as Mr Kennelly for the appellant properly conceded, the appeal essentially turned on the ground that the proceedings were conducted in a way unfair to the appellant, and which prejudicially affected the result of the proceedings, by the appellant not being given the right or opportunity to challenge evidence before the Tribunal, specifically a right to cross-examine Mr Stephen Dally of Total Autobody Rust n Resto ('Total Autobody'), a statement from whom was presented by the respondent to the Tribunal, and which detailed a number of defects in the vehicle. The Tribunal concluded that the defects as outlined by Mr Dally in his statement were such that "*by some considerable margin the vehicle has failed to comply with the acceptable quality guarantee*".

[4] Mr Kennelly submitted that the appellant was not given the opportunity to rebut the allegations made, and relied on by the Tribunal, by challenging Mr Dally's report, or Mr Dally himself through cross-examination, and further that the report was received late.

[5] In short the appellant's complaint is that it has been denied natural justice by not being given the opportunity to adequately contest the matters that led the Tribunal to its conclusion. It is, of course, trite that principles of natural justice apply to the Motor Vehicle Disputes Tribunal; s 27 New Zealand Bill of Rights Act 1990 and clause 1 of Schedule 1 of the Act, but it is by no means certain that the failure to allow cross-examination is, in the context of the manner in which a Disputes Tribunal conducts its hearings, a denial of a right of natural justice.

[6] While denial of a right to cross-examine before a Court would amount to a breach of natural justice, even in a civil proceeding, which does not have the statutory right recognised in s 25F of the New Zealand Bill of Rights Act for criminal proceedings, where the right is recognised as part of a minimum standard of criminal procedure, that does not lead to a conclusion that the absence of cross-examination in a statutory tribunal amounts to a breach of natural justice. There is no general right of cross-examination outside regular courts of law. In *T A Miller Ltd v Minister of Housing*[1] Lord Denning, M.R., said:

[1] [1968] 2 All ER 633 (CA) at 634

> Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law. … Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it … (See *R v Deputy Industrial Injuries Comr., Ex parte Moore* [1965] 1 All ER 81). The inspector here did that.

[7] So also in *Wyeth (NZ) Ltd v Ancare New Zealand Ltd*[2] McGrath J, at p 583, in giving the Court's reasons said:

> [41] Appropriate and fair proceedings for a statutory tribunal, such as the Authority, will not always equate to those of a court. Such bodies are often established for administrative reasons to provide a less formal decision-making mechanism with an emphasis on greater accessibility, less cost and greater speed in decision-making. Often, as with the Authority, they are structured to include members with expertise in relation to their special areas of jurisdiction. Legislation establishing tribunals sometimes also recognises that in reaching administrative decisions they often must take into account conflicting interests in a pragmatic way. Parliament's purpose in establishing a tribunal is often not necessarily to provide the highest standard of process but a standard that is consistent with the efficient administration of matters over which they are given jurisdiction. These features of the statutory process are all relevant to the requirements for participants to enjoy an appropriate and fair hearing.

[8] The procedure for the conduct of hearings before the Motor Vehicle Disputes Tribunal is referred to in clause 8(1) of Schedule 1 and provides that the hearing is to be conducted in private and with as little formality as the requirements of the Act and proper consideration of the matters before the Tribunal permit. Clause 8(2) reflects the common law position by enabling the Tribunal to accept relevant evidence or information whether or not the evidence or information would normally be admissible in a court of law. Clause 9 of the Schedule limits the right to appear before the hearing to the parties or an approved representative but clause 9(5) specifically forbids an Adjudicator to approve a representative who is, or has been, enrolled as a barrister or solicitor or who in the opinion of the Adjudicator has been regularly engaged in advocacy work before other tribunals. A similar provision exists in s 38(2) of the Disputes Tribunal Act 1988.

[9] The informal nature of the procedure points to parliament intending a less formal decision-making procedure of the type mentioned by McGrath J in *Wyeth (NZ)*

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[2] [2010] 3 NZLR 569 (SC)

Ltd which, together with the prohibition on barristers or solicitors appearing for parties, tells against a right to cross-examine witnesses. A right to parties to engage counsel would point to a right to cross-examination but an express prohibition on appearances by lawyers to appear on their behalf before the Tribunal suggests the opposite. Further there is no ability to compel witnesses to attend before the Disputes Tribunal and that in itself points to the absence of a right to cross-examine as an element of natural justice in these particular circumstances; see *Maclean v The Workers Union*[3] although the tribunal concerned was a private one as opposed to a statutory tribunal.

[10] Overall, however, I consider there was no breach of natural justice by denying the appellant the opportunity of cross-examining Mr Dally. The transcript of the proceedings before the Adjudicator do not suggest Mr Antunovich, who appeared for the respondent company, even sought to question or cross-examine Mr Dally who did not appear as a witness. Even had he done so there is no right to cross-examine witnesses before the Tribunal and so there is no breach of natural justice. The issue appears to have been raised by the appellant after the hearing.

[11] The other aspect of the matter is that the report from Total Autobody, which was dated 24 April 2017, three days before the hearing, was not actually given to the company until the hearing. The report had been commissioned by Ms de Jong, the applicant before the Tribunal. It is clear from the decision under appeal the Tribunal relied heavily on the report so that, for the appellant, it is contended that as a matter of procedural fairness it was denied the opportunity of adequately answering the claim and therefore the proceedings were conducted by the Tribunal in a manner unfair to it and which prejudicially affected the result of the proceedings.

[12] Mr Dally of Total Autobody had examined the vehicle over approximately four months. He did not appear at the hearing before the Tribunal but Ms de Jong had arranged for him to be available by telephone should the Adjudicator, or for that matter, Mr Antunovich, wished to speak to him. The Adjudicator chose not to but, as I have said, drew heavily on the report dated 23 April in his decision. Mr Antunovich,

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[3] [1929] 1 Ch 602, 621

for the company, did not seek an adjournment of the hearing after being given a copy of the report at the hearing. Ms de Jong said that he was aware of the nature of the defects as he had previously spoken to Mr Dally, although was forbidden to do so by her after 16 March 2017. She submitted that the defects had already been identified in various reports, correspondence and photographs which the appellant had prior to the hearing. Nevertheless the appellant did not receive Mr Dally's report of 23 April 2017 at any time prior to the hearing and in sufficient time for it to adequately prepared and address the issues before the Tribunal. He was not offered the opportunity of an adjournment. That does raise issues of natural justice. Parties have a right to attend and be heard at the hearing, reflected in the *audi alteram partem* rule (hear the other side). The company had little opportunity to respond to the principal item of evidence relied on for the purposes of the decision, namely Mr Dally's report. In *R v Deputy Industrial Injuries Comr., Ex parte Moore*[4] Willmer LJ, with reference to a Deputy Commissioner hearing an appeal from an industrial injury officer's decision, said:

> Where so much is left to the discretion of the Commissioner, the only real limitation as I see it, is that the procedure must be in accordance with natural justice. This involves that any information on which the Commissioner acts, whatever its source, must at least be of some probative value. It also involves that the Commissioner must be prepared to hear both sides, assuming that he is being requested to grant a hearing, and on such hearing must allow both sides to comment on or contradict any information that he has obtained. This would doubtless apply equally in the case where a hearing had been requested, but refused, for in such a case it would not be in accordance with natural justice to act on information obtained behind the backs of the parties without affording them the opportunity of commenting on it.

[13] In this case I am satisfied that the appellant was denied the opportunity of assessing and commenting on the principle aspect of the evidence against it which was a significant foundation for the Tribunal's decision, namely Mr Dally's report of 23 April 2017 which came into the appellant's hands at the hearing itself. As such there has been a breach of natural justice, the proceedings were therefore unfair to the appellant and the default prejudicially affected the result. The appeal must be allowed and, pursuant to rule 18.24(3)(a) of the District Courts Rules 2014, I direct the Tribunal rehear the matter.

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Gibson DCJ

[4] [1965] 1 All ER 81 (CA) at p 87