EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2016-004-002307
[2019] NZDC 4660

BETWEEN	JI XIANG GARDEN DEVELOPMENT LIMITED Appellant
AND	INGHAM MOTOR HOLDINGS LIMITED T/A COUTTS Respondent

Hearing: 28 November 2018

Appearances: J Wickes for the Appellant
L Van and T Utana for the Respondent

Judgment: 15 March 2019

JUDGMENT OF JUDGE B A GIBSON

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[1] The appellant appeals a decision of the Motor Vehicle Disputes Tribunal given on 2 December 2016 in relation to its dispute with the respondent over a purported rejection of a new 2016 Mercedes-Benz TL350 Blue TEC vehicle registration [registration deleted] ('the vehicle') purchased by it from the respondent company. The appellant, then the applicant, sought both compensatory damages of $20,000 and wanted to reject the vehicle, seeking an order that the respondent replace the vehicle with one of the same make and model, but of acceptable quality, which it alleged the vehicle purchased was not.

[2] The Tribunal found against the appellant company on both issues and an appeal was brought on 14 December 2016.

[3] The Tribunal's decision of 2 December 2016 sets out the background of the dispute. The appellant purchased the vehicle from the respondent for $158,995 on 28 January 2016. The appellant's director, Mr Y Han, was the main driver of the vehicle. Towards the end of February 2016 the vehicle was returned to the respondent as there was a fault with the handbrake. The fault was corrected and returned to the appellant company.

[4] On 14 March 2016 the purchaser again complained of the handbrake fault and the vehicle was returned on 29 March 2016 when the park brake control unit was identified as causing the fault. A new park brake control unit was obtained and fitted to the vehicle on 4 April 2016. The fault was corrected but in the course of re-programming the park brake control unit the respondent's workers damaged the vehicle's comand unit, an electronic box fitted to the vehicle's dash panel which controls the radio, navigation and telephone systems as well as the screen which shows images from the reversing camera and other warning messages.

[5] On 9 April 2016 the respondent brought the damage to the comand unit to the attention of the appellant's accountant, Mr O Huang, who acted as the appellant's agent and dealt with the respondent over the various issues that arose. The appellant, through Mr Huang, requested the return of the vehicle which was then driven by Mr Han while the respondent undertook enquiries to locate a suitable replacement for the comand unit. From 29 March 2016 until 25 November 2016 the car was driven 5,703 kilometres without a functioning comand unit.

[6] On 14 April 2016 Mercedes-Benz informed the respondent that the unit was irreparable and a new unit needed to be fitted. Unfortunately there were no new units obtainable in New Zealand at the time.

[7] As a temporary solution to the issue the respondent on 18 April 2016 offered to fit a comand unit, similar in appearance, that was visually and dimensionally identical and interchangeable with the comand unit originally fitted to the vehicle. It was not the correct part number for the vehicle and was of a newer specification, but other than that the respondent considered there was little difference and the vehicle could be made fully operational pending receipt of the correct comand unit for the

model from Germany. That solution was not accepted by the appellant, and although the offer was conveyed to its agent, Mr Huang, Mr Han said he was unaware of it.

[8] On 29 June 2016, Mr T Walmsley of the respondent company telephoned Mr Huang and asked that the vehicle be returned to the respondent so the temporary comand unit, which would have restored full functionality, could be installed pending the arrival of the replacement part. Mr Huang told him he would contact him after 8 July 2016 to make a booking but phoned him on that day to say the temporary unit, or 'work around' comand unit, was not acceptable to the respondent.

[9] The respondent attempted to obtain the comand unit, initially from Singapore, and then from Germany. The correct part arrived on 25 July 2016. The respondent company then requested the appellant return the vehicle so the replacement part could be fitted. However on that day the respondent received a letter dated 21 July 2016 requiring it to replace the vehicle with an identical vehicle of acceptable quality and pay compensation for inconvenience. It was suggested that $10,000 would be an appropriate payment.

Appeals to the District Court from the Motor Vehicle Disputes Tribunal

[10] Section 82 of the Motor Vehicle Sales Act 2003 establishes a Motor Vehicle Disputes Tribunal. Section 89(1)(a) gives the Tribunal the authority to inquire into and determine any application or claim in respect of the sale of any motor vehicle, including any claim under the Consumer Guarantees Act 1993 ('CGA'). Jurisdiction is limited by s 90(2) to the total sum of the application or claim not exceeding $100,000 unless the parties consent in writing to the determination of the application or claim by the Disputes Tribunal in the event the value of the claim exceeds that sum.

[11] The provision concerning appeals is contained not in Subpart 2 of Part 4 of the Act which deals with the Motor Vehicle Disputes Tribunal, but rather in Schedule 1 which mandates the procedure of the Disputes Tribunal, and which by clause 16 provides that any party dissatisfied with a decision given by a Disputes Tribunal may within 10 working days of notice of the decision being given appeal to a District Court Judge.

[12] If the appeal exceeds $12,500 clause 16(2) provides that the appeal can be brought on either of the following grounds:

(a) that the Disputes Tribunal decision was wrong in fact or law, or both fact and law; or

(b) 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.

[13] The Disputes Tribunal is taken to have conducted the proceedings in a manner unfair to the appellant and which prejudicially affected the result if it fails to have regard to any provision or any enactment brought to its attention at the hearing and as a result of that failure the result of the proceedings is unfair to the appellant; clause 16(4).

[14] The appeal was brought alleging factual errors and errors of law in the application of s 18(2) of the CGA and a failure to apply the provisions of s 18(3) of that Act.

[15] The Adjudicator found that having regard to the faults with the vehicle's park brake control so soon after purchase, and the damage to the comand unit which occurred in the course of reprogramming the replacement park brake control unit, the vehicle was not as durable as a reasonable consumer paying close to $159,000 for a high quality European vehicle would consider to be acceptable. He found, accordingly, that the vehicle did not comply with the statutory guarantee of acceptable quality found in s 6 of the CGA.

[16] Unsurprisingly this finding was not challenged but the appellant submitted the Adjudicator had failed to consider s 18(3) of the CGA as to whether the failure was of a substantial character.

[17] A guarantee as to acceptable quality in s 6 of the CGA applies when the goods are supplied to the consumer. As at the date of supply there was a fault with the park

brake. There were two attempts to remedy that problem, which was rectified when the vehicle was returned on the second occasion in March 2016. That fault was plainly not of a substantial character in terms of the definition of the same in s 21 of the CGA, given the ability to repair the fault.

[18] The second issue was the damage caused to the comand system by a technician at the respondent's garage when fixing the park brake control unit.

[19] There was not a failure of the comand unit as to mean the goods were not of acceptable quality at the time of supply of the vehicle to the appellant purchaser. The damage to the comand unit was caused by a negligent repair when reprogramming the park brake control. It was, however, damage that could be remedied in terms of s 18(1) of the CGA so that I am satisfied s 18(3) of that Act did not apply.

[20] The issue, identified by the Adjudicator, was whether the purchaser was entitled to reject the goods in accordance with ss 20 and 22 of the CGA.

[21] As the factual narrative shows, the respondent attempted to find a temporary solution pending receipt of the replacement part. That initial proposal did not appear to have been conveyed to Mr Han in April 2016, but he became aware of it around 8 July 2016 and rejected it, his evidence being that he wanted the appropriate part for the vehicle and, having been told that a replacement part was being obtained from abroad, was concerned that the respondent would allow what was proposed as a temporary solution to become a permanent solution. He was further concerned that the insertion of the part proposed as a temporary solution could cause damage to the vehicle, although there was no evidence that he had any mechanical knowledge that might be so, or any evidence to support that conclusion.

[22] The Adjudicator considered the time to source the correct comand unit to fit in the vehicle, a period of 15 weeks, between 18 April and 25 July 2016, was too long. That, however, was mitigated by the offer to fit the temporary comand unit which would have restored full functionality to the purchaser's vehicle pending receipt of the correct comand unit. Consequently he held the respondent did not fail, refuse or neglect to remedy the fault and its failure to do so within a reasonable time was caused

by the purchaser's unreasonable refusal to allow the temporary comand unit to be fitted.

[23] Section 18(1) of the CGA refers to a failure of any goods to comply with a guarantee. The goods at issue for the purpose of the dispute was the comand unit. There was no evidence to suggest that installing the temporary comand unit would have meant the failure could not be remedied. Mr Han's opinion, without any satisfactory evidential basis that it might further damage the vehicle, was not reasonable. Further, reasonable time to remedy a failure must be considered, in part, against the supply chain difficulties the respondent had in accessing the appropriate comand unit. There is nothing to suggest there was any delay on the respondent's part in attempting to obtain the replacement part. The delay was caused by the part not being available, not something within the control of the respondent. The respondent offered a temporary solution which would have been acceptable and restored full functionality to the comand unit, but that was rejected. I do not accept that, as submitted by Ms Wickes that a minor accident which Mr Han had when reversing the vehicle in a car park in May 2016 occurred because of the failure of the comand system. There is no evidence to support that. Mr Han did not say that. The Adjudicator's conclusion that the accident was probably caused by his failure to keep a proper look out while reversing the vehicle,and ignoring its PDC warning signal, is plainly correct. The accident was caused by poor driving on the part of the driver, not the absence of a comand system.

[24] Overall, I agree with the Adjudicator's conclusion that there was no failure on the part of the respondent to remedy the fault and to the extent there was a failure to do so within a reasonable time, that was caused by the appellant's unreasonable refusal to allow a temporary comand unit to be fixed.

[25] The appellant also claimed $20,000 damages. In the appellant's solicitor's letter dated 21 July 2016 a figure of $10,000 was suggested as the appropriate payment for compensatory damages. There was nothing in the material available to the Adjudicator which would suggest why either $10,000 or $20,000 was appropriate as compensation. The appellant had the use of the car after it was returned at the appellant's request in April 2019 and a reasonable number of kilometerss were driven

in it over the course of that year. When the Adjudicator asked Mr Han how the $20,000 was quantified he was unable to say how, stating that the appellant did not prepare for that and its solicitor did not "tell us". Even had the appellant's claim for remedies against the respondent succeeded, a claim for damages under s 18(4) still had to be quantified appropriately on the basis they were reasonably foreseeable. If the appellant itself was unable to see how the damages claimed were made up then it is difficult to see how the respondent could have foreseen them, and so the decision of the Adjudicator to dismiss that claim as the appellant failed to provide evidence of loss is plainly correct.

[26] Accordingly the appeal is dismissed. The respondent is entitled to costs pursuant to scale 2B of the District Courts Rules 2014 together with disbursements as fixed by the registrar.

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B A Gibson DCJ