

**BETWEEN**

**ABR Ltd**

APPLICANT

**AND**

**ZYN Ltd**

FIRST RESPONDENT

**AND**

**ZYM Ltd**

SECOND RESPONDENT

Date of Order:

20 May 2013

Referee:

Referee Edison

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that ZYN Ltd shall pay ABR Ltd the sum of \$5,442.56 by 4pm on 3 June 2013. The claim against ZYM Ltd is dismissed.**

## **Facts**

[1] LG owns and runs a dairy in [a place] with his wife. The business is operated through their company, ABR Ltd. On Wednesday 12 December 2012, the business premises were forcibly broken into and stock was stolen. The burglar went to three locked cupboards underneath the cigarette cabinet and took out all the cigarettes and tobacco. The burglar did not take anything else. ABR Ltd made a claim on its material damage policy with ZYN Ltd [an insurance company]. The claim made was only for cigarettes and tobacco, and estimated the loss at \$6,000.00. A loss adjuster was appointed, CX of ZYM Ltd [a loss adjusting services company]. The loss adjuster investigated the circumstances of the loss.

[2] In its first report of 14 December 2012, ZYM Ltd said that ABR Ltd had estimated the loss at \$6,000.00, but noted that a list of stock taken and evidence of cost price still needed to be provided. The report also stated:

“His point of sale system does not record stock in and sales out and therefore the list will only be an estimate on his behalf. We would comment though that we have viewed the [video] footage and would confirm that all of the trays which were pulled out did appear to be full. We are aware that there are 9 trays each with 6 rows and each row [is] capable of holding 10 standard sized packets of cigarettes. Naturally there was more than just 20 pack cigarettes. There was also 25 and 30 packs and also roll your own tobacco”.

[3] The second report, dated 20 December 2012, attached ABR Ltd’s schedule of loss. The report stated (in part):

“Please find attached to this report the Schedule of Loss which the Insured has completed. This sets out their cigarette loss at \$6,442.56 GST inclusive. We have reviewed the cost price invoicing to support this...the Insured’s estimate is fairly accurate according to them and we would also conclude that based on the video footage we viewed the offender has certainly removed the contents of 9 full pull out trays. Whilst we can’t zoom in we are unable to tell the exact number stolen, however we believe that the Insured’s list is fairly accurate”.

[4] The claim was accepted by ZYN Ltd. However, subsequent negotiations between ZYN Ltd and ABR Ltd did not result in agreement as to the value of the loss. ZYN Ltd's final offer to pay \$5,500.00 including GST (less policy excess) was rejected. ABR Ltd now seeks payment of its losses in full under its insurance policy. ZYN Ltd disputes the claim.

### **Issue**

[5] The issue in the case is whether ABR Ltd has proved its loss with evidence that would satisfy a reasonable insurer.

### **Law**

[6] The relevant law is the law relating to insurance contracts. Whether reasonably sufficient proof of loss has been given depends on all the circumstances, including the information available. The phrase "full particulars" of the loss used in a policy wording has been interpreted to mean "the best particulars the assured can reasonably give". In *Challenge Finance Ltd v State Insurance General Manager* [1982] 1 NZLR 762, the Court of Appeal referred to a statement from *Halsbury's Laws of England*:

"The particulars [of loss] required necessarily vary according to the nature of the insurance. They must be furnished with such details as are reasonably practicable. Whether the details given are sufficient or not is a question of degree, depending partly upon the materials available which, particularly in the case of a fire, may be scanty, and partly upon the time within which they have to be furnished. In any case, the assured has not performed his duty adequately unless he had furnished the best particulars which the circumstances permit".

### **Decision**

[7] I find that ABR Ltd has proved its loss. There was no doubt in this case that the claim related to a risk insured under the policy: there was evidence of a forcible break-in and video evidence showing the thief taking cigarettes and tobacco from the cupboards underneath the cigarette cabinet. There was no suggestion from ZYN Ltd that ABR Ltd failed to comply with the claims conditions (s 7 of the MD policy wording). ZYM Ltd was permitted to

investigate the loss and came to the conclusion that ABR Ltd's estimate of the losses was reasonably accurate.

[8] ZYM Ltd was also able to review the cost pricing of the items said to have been stolen and check those prices were correct. Further, ZYM Ltd was able to assess from the video evidence the approximate level of stock that might have been held in the cupboards and compare that against the stock claimed. There were nine trays each with six rows (54 rows in total) and each row could hold ten standard-sized packets of cigarettes. This means the cupboards could hold approximately 540 packs of cigarettes. The loss adjuster's reports indicate that these trays were full; however, the schedule of loss appended to the second report itemises 310 packets of cigarettes and 49 pouches of tobacco. This does not suggest to me any grounds for belief that the claim had been inadvertently exaggerated by ABR Ltd, or otherwise wrongly estimated. If anything it suggests an undervaluation of the loss. The claim form stated that each of the three cupboards could hold \$4,000.00 worth of stock.

[9] The loss adjuster raised no substantive concerns about any aspect of the claim, although ZYM Ltd did recommend that insurers negotiate a settlement figure. I consider that, having accepted the claim, and absent agreement with its insured, ZYN Ltd was obliged to pay the amount sought in full unless the particulars provided by ABR Ltd were considered insufficient, on reasonable grounds, to prove the loss. I can see nothing in the evidence to justify that view.

[10] I have considered ZYN Ltd's view that ABR Ltd's point of sale system did not record stock in, but only scanned stock out as it was sold, so that the schedule of loss provided by ABR Ltd could only be an estimate. ZYN Ltd relied on this difficulty when seeking to negotiate the claim with ABR Ltd. In its letter of 3 January 2012 to ABR Ltd on behalf of the insurers, ZYM Ltd stated:

“Your Point of Sale system does not scan stock into the system and as we understand it only scans sales out. The only accurate method for determining the amount of stock which had been stolen would be if your stock recording system kept track of all stock that comes in and goes out and if a full stock-take of cigarette stock was undertaken at the time of the discovery of the burglary. This would be the only true method of an accurate record”.

[11] However, it was virtually impossible logistically for ABR Ltd to provide an accurate assessment of its loss as opposed to a reasonable estimate. The business had not done a stock-take immediately prior to the burglary. Indeed the last stock-take was probably about nine months earlier (at the end of the previous financial year). In my view, ZYN Ltd could not reasonably have required ABR Ltd under the policy terms to work backgrounds and trace all the stock in (from stock receipts) and stock out (from the point of sale system) from the last stock-take to arrive at an accurate assessment of the lost stock. The task would be too onerous.

[12] In my view the inadequacies of the point of sale system do not provide sufficient grounds to reduce the claim. ABR Ltd had provided insurers with all the information it reasonably could, and the best particulars and proof of the loss from the information it had available, and did so, it seems to me, in good faith based on LG's knowledge of his business, trading volumes and stock levels. LG told me he had reviewed the stock lists from the most recent delivery on Monday 10 December, just a few days before the burglary, assessed what had been sold and wrote down what was missing. While I understand the commercial motivation for negotiation, ZYN Ltd's settlement proposals to ABR Ltd were also just estimates. I do not see any justification for saying they were more accurate than LG's.

[13] For these reasons I have come to the conclusion that ZYN Ltd must pay the claim in full.

[14] The claim against ZYM Ltd must be dismissed. ABR Ltd's claim is properly under its policy with ZYN Ltd and not against its insurer's agent.

[15] My understanding is that there is an insurance excess of \$1,000.00 to be deducted from the claim of \$6,442.56 including GST. Therefore, the amount payable under the insurance is \$5,442.56.