



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1307

APPLICANT **BK**

APPLICANT **LK**

APPLICANT **U Ltd**

RESPONDENT **G Ltd**

The Tribunal orders:

The claim is struck out.

Reasons:

1. BK, LK and U Ltd as trustees of the ABC Trust (**Trustees**) entered an agreement with G Ltd to manage the harvesting of trees on their land (**Management Agreement**). The Trustees say that a road that was constructed to extract harvested logs is not fit for purpose and that they are entitled to a refund for the cost of the road. G Ltd say that matters relating to this contract have previously been determined by the Disputes Tribunal. In addition, they reject the contention that the road is not fit for purpose and say to the extent there is any defect it is due to the road being incomplete.
2. BK, LK and U Ltd as trustees of the ABC Trust claim \$30,000.00 from G Ltd in relation to the cost of constructing the road.
3. There are two preliminary jurisdictional issues to be addressed before the substantive matter may be determined.
4. The first is whether the Trustees have divided a cause of action into 2 or more claims in order to bring them within the jurisdiction of the Tribunal. This must be addressed at the outset because if that is the case, then the Disputes Tribunal has no jurisdiction to hear the matter and any decision of the Tribunal would be void. Actions of a Tribunal undertaken without jurisdiction are a nullity and have no effect.
5. The second is whether the Trustees are precluded from bringing the claim due to the doctrine of res judicata, whereby a matter that has already been determined by the Tribunal cannot be re-litigated.

Have the Trustees divided a cause of action into 2 or more claims to bring them within the jurisdiction of the Tribunal?

Law

6. Section 15 of the Disputes Tribunal Act 1988 (**DTA**) states that a cause of action shall not be divided into 2 or more claims for the purpose of bringing it within the jurisdiction of the Tribunal. Section 14 of the DTA provides that an applicant may abandon any sum claimed beyond the Tribunal's limit of \$30,000 in order to bring it within the jurisdiction of the Tribunal. Together these two provisions regulate how claims for more than the amount of the Tribunal's jurisdictional limit are to be addressed.
7. The Courts have found there to be separate causes of action where:
 - a) Repeated damage had been done to neighbouring stock annually (each event being a new cause of action) (*Nash v Nelson District Court* [2000] 3 NZLR 702);
 - b) An insurer failed to pay under the policy, and then subsequently failed to provide for accommodation allowed for under the policy (the subsequent act being a new cause of action) (*Tower Insurance Ltd v Disputes Tribunal at Nelson* (2000) 14 PRNZ 338);
 - c) A service contract at two different locations made up two independent contracts (*Brown v Christchurch Disputes Tribunal* (2000) 14 PRNZ 554); and
 - d) A claim was brought for an invoice that had not fallen due under a contract at the time of the earlier proceedings (*Trotman v Disputes Tribunal* [2020] NZHC 2040).
8. Conversely, the Courts have determined that a cause of action has been divided where:
 - a) The same defamatory statements have been used as grounds for more than one cause of action (*Black v Huffman* (HC Dunedin, AP54/89, AP55/89, CP98/89 22 November 1990)); and
 - b) An electrician claimed against a developer where the contract covered services to multiple properties in one development. There was no need to treat each property as constituting a separate contract and cause of action. Due to time, place and circumstance, they were regarded as one transaction (*Waitoto Developments Ltd v Disputes Tribunal* HC Whangarei CIV-2007-488-19, 15 August 2007.)
9. Section 15 applies not simply where a cause of action has been divided into two or more claims, but when that has occurred "for the purpose" of bringing a claim within the Tribunal's jurisdiction. The question then is whether the claim has been divided so as to bring it within the jurisdictional limit. That requires an assessment of why the subsequent claim has been brought separately.
10. In the recent High Court case of *Trotman v Disputes Tribunal* [2020] NZHC 2040 it was found that the Tribunal had been correct to treat a second claim between two parties as a continuation of the first claim and allow a party to recover additional amounts up to the prescribed limit. In that case, both decisions of the Tribunal were orders exercising the power to grant relief under the Consumer Guarantees Act 1993.

Application to Claims by the Trustees Against G Ltd

11. The Management Agreement encompassed harvesting a northern block and a southern block. Trees had been harvested in the northern block when the contractor harvesting those trees went into liquidation, which meant the harvested trees were left on the ground for a period during which they deteriorated and lost value. A road to the southern block was constructed, but no trees had been harvested from this area.

12. A Disputes Tribunal claim was lodged by the Trustees against G Ltd regarding the loss in value in the deteriorated trees. A finding was made by the Tribunal in relation to that claim in March 2020. The Trustees now bring a separate claim, relating to the same parties and the same contract, but this claim being in relation to the construction of the road to the southern block.
13. It is necessary at this stage to outline some of the facts relating to the two events of the felled logs and the road construction (the following being information provided by the parties):
- a) Harvesting of the trees in the northern block took place in November and December of 2018.
 - b) One of two haulers operating broke down in December 2018.
 - c) The contractor that went broke while harvesting the northern block left the site with very little notice and G Ltd found it difficult to find a new contractor to carry out the work;
 - d) It is understood that in or around February 2019 LK began to express his frustration with the situation on social media (n.b. limited evidence was presented regarding the social media campaign);
 - e) A new contractor was engaged to clean up the harvested northern block and they commenced work in or around April 2019;
 - f) G Ltd say it was only able to engage the new harvesting contractor to work on the northern block, as the contractor had taken time from another site to help with the felled logs, and so was not able to also harvest the southern block (it appears LK may not have been aware of this limitation at the time);
 - g) G Ltd also says that LK's social media campaign included photos of the new contractor (though LK says he is on good terms with that contractor) and that having photos of their branded equipment in a negative social media campaign by LK meant they and other contractors wanted to remove themselves from the site;
 - h) Separately, during March and April 2019, a digger driver working on the construction of the road to the southern block had caused some damage to LK property (e.g. to fence posts and a Taranaki gate). G Ltd says that LK verbally abused the driver to the point where the driver was physically shaking. LK also sent email correspondence to G Ltd in April 2019 regarding the matter that included highly abusive and threatening language, such as "I would expect you to rip off his head and sh*t down his throat... You can be sure that I will be doing exactly that, the next time I lay eyes on that dishonest c#!."
 - i) G Ltd says the road was all but complete and was being used by it and other contractors but had not received the final cut necessary for logging trucks to use it to extract the logs from the southern block. With no contractor available to harvest the southern block, G Ltd began to wind down the site, though it says at this stage it was planning to leave equipment at the site and continue with the contract when it could procure contractors for the Trustees who could finish the job.
 - j) LK says he saw the 'shut down' process and understood that G Ltd were planning to leave the site and abandon the contract. In an attempt to thwart that outcome, he issued a Trespass Notice (served 22 May 2019) against the person he mistakenly believed was the only person who could drive the hauler off the site. In fact, that individual was the mechanic contractor who serviced the equipment on site for G Ltd, the logging company finishing the northern block and the digger company. LK says he attached a map to the Trespass Notice that specifically showed where the individual could and could not go on site so as not to impede operations. Nevertheless, the issuing of the Trespass Notice appears to have been a final straw in the relationship between the parties and G Ltd say it raised operational and compliance issues for all contractors that created something of an impasse in the implementation of the Management Agreement.

k) In the end, G Ltd did remove its hauler from the site and both parties now agree the contract is at an end, though they have differing interpretations of where responsibility for that outcome lies.

14. The Trustees submit that this claim relates to a separate set of facts and breach of contract and therefore constitutes a new cause of action, independent of the earlier proceedings. G Ltd contends that the contract should be viewed in its entirety and any claims for breach of contract should have been heard together. It says that as the matter has already been before the Tribunal, it is unable to hear this claim.
15. The prior claim stemmed from a contractor going broke and a resulting loss in the value of felled trees that lay too long. The loss of the logging company and the inability to find a replacement is also the main reason why the operations wound down onsite (the hauler breaking down may also have contributed to the events). Had the original logging contractor not walked away from the job, it is doubtful that G Ltd would have taken steps to 'wind down' the site and that LK would have undertaken his social media campaign and issued a Trespass Notice. I am satisfied that the failure to complete the road was also a direct consequence of the first logging contractor leaving the job, because operations were wound down when there was no one to harvest the southern block.
16. There is no splitting of a cause of action where there is a series of separate and distinct acts. Conversely, there may be a splitting of a cause of action where the series of acts is not distinct and separate. In this case, the same set of circumstances led to separate alleged damage in the same contract between the same parties.
17. Therefore, I am persuaded that the prior proceedings and these proceedings encompass the same cause of action.
18. As noted above, what is really prohibited by s 15 is the division of claims to avoid the jurisdictional limit. That brings us to the assessment of why the subsequent claim has been brought separately.
19. The claim in the first proceeding was for \$30,000. The claim in this proceeding is also for the same amount, being the Tribunal's jurisdictional limit. It is not known whether the Trustees abandoned a sum in order to come within the jurisdictional limit in the first proceedings, but it has done so in these proceedings. The Trustees claim they are due the full cost paid to G Ltd for the road, being \$47,128 (plus GST), but they have abandoned the sum claimed beyond the Tribunal's limit of \$30,000 in order to bring it within the jurisdiction of the Tribunal.
20. When the Trustees first notified G Ltd of the road dispute it was in an email from LK in November 2019 that said, "Please accept this email as notification of a sixth dispute, as per our harvest agreement." It was clear in the proceedings before me that both parties expected the Trustees to issue further proceedings in the Disputes Tribunal regarding this contract.
21. Given that both claims are at the Tribunal's limit, were known at the time of the first hearing, and there appear to be more claims to present, I am satisfied that the purpose of presenting these multiple claims to the jurisdictional limit of the Disputes Tribunal equates to an attempt to circumvent the limits of the Tribunal in order to come within its jurisdiction.
22. Given the value of the alleged damage arising from the events it would have been appropriate to bring them in one proceeding in the District Court. The Trustees chose to bring proceedings in the Disputes Tribunal and in doing so should have included all matters in one proceeding and abandoned any sum above the jurisdictional limit.
23. I therefore find that the Trustees have divided a cause of action into 2 or more claims for the purpose of bringing it within the jurisdiction of the Tribunal.

24. In *Trotman* the High Court approved the further proceedings being treated as a continuation of the first (with the overall award across the two decisions not exceeding the jurisdictional limit), though it was noted (at [50]):

It is easier to see that this is the appropriate outcome in the present case given that in both decisions the Tribunal was making orders under s 39 of the Consumer Guarantees Act in relation to a cancelled contract, and to recognise what each party had obtained under that contract, the remaining amounts owing, and compensation for deficiencies in the contractual performance. They all became wrapped into the assessments under s 39.

25. In *Trotman* the later claim related to an invoice that had not fallen due at the time of the first proceedings, which also supports that it was less likely that the latter claim was motivated by an intent to come within the threshold. The second Tribunal decision also did not depart from the findings of the first decision, invoked under the same statutory powers. The Court appears to have specifically limited its approval of the continuation of the claim (with the award available across both claims limited to the jurisdictional threshold) to that specific set of circumstances.

26. In this case it is difficult to see how the Tribunal can proceed to determine a case where a finding has been made that a cause of action has been divided into 2 or more claims for the purpose of bringing it within the jurisdiction of the Tribunal, in contravention of s 15 of the DTA.

27. As I am satisfied that the claim is outside of the jurisdiction of the Tribunal, there is no need to consider whether the applicant is estopped from bringing the claim under the doctrine of res judicata, nor any scope for the Tribunal to determine the substantive matter.

28. For these reasons, I am satisfied that the claim is outside of my jurisdiction and should be struck out.

Referee: T Baker
Date: 16 April 2021



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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.