



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1486

APPLICANT FB Ltd

RESPONDENT NG

**RESPONDENT BJ Ltd
INSURER**

The Tribunal orders:

NG is to pay FB Ltd \$17,658.17 on or before the 30 April 2021.

Reasons

[1] On the 14 October 2020 BJ Ltd's insured NG collided with a power pole owned by FB Ltd t/a FO ("FO") forcing its replacement. NG's liability is not contested. However, there has been an unresolved dispute over the compensation claimed by FO. FO has brought a claim in the Disputes Tribunal seeking compensation of \$17,658.17.

[2] The issue to be determined is whether FO should pay an indemnity because the 14 year old pole has been replaced and as a result the lifespan has been extended to 2060 rather than 2046?

[3] The main purpose of an award of compensatory damages in negligence is to provide a monetary sum to address the losses suffered by the claimant. The guiding principle is that sum of money should place the claimant owner in the position as if the negligent act had not happened.

[4] If damaged items are repaired with new parts or an item is destroyed and reinstated, the claimant may end up in a better position having a chattel that is more efficient or of greater value than before the negligent act. Such a result is not aligned with the guiding principle for compensation and is known as betterment because paying a full indemnity is an over-compensation. The respondent party found to be negligent has the onus to prove that betterment has occurred which can be set off against the primary loss.

[5] However, the New Zealand Courts acknowledge that deducting the full value of the betterment may not address the fact that the claimant is effectively compelled to improve the chattel. Rather than disallow a deduction for the betterment the Courts follow a middle ground by acknowledging betterment but at the same time making allowances for any disadvantages caused by involuntary investment. This means that the claimant has the onus to prove both the presence and quantum of the loss flowing from the unexpected expenditure caused by the respondent's default.

[6] The overall approach is that a deduction for betterment will be made only after allowances are made for any disadvantages with the involuntary nature of the plaintiff's investment. An example provided in the leading case was interest on the premature use of capital to replace a wasting asset which would at some stage have required replacement in any event.

[7] In the leading case *J & B Caldwell Limited v Logan House Retirement Home Limited* Fisher J in posing a question stated:

“Property of a wasting asset may be replaced by property with a longer lifespan.... The unexpected improvement in the Plaintiff’s position may be usefully described as “betterment”. Plainly the plaintiff is entitled to at least the value of the original. But is it entitled to the bonus of an increment in value as well?”

In answering the question, he stated:

“If a depreciating asset would ultimately have required replacement or repair in any event, damages should be the depreciated value of the original plus the cost of making the premature investment. This means that in addition to compensation for loss of, or repair to, the original in its depreciated condition, the plaintiff is entitled to the value of the loss of its capital, or the interest upon equivalent borrowing, in order to fund the replacement or repair pending the date upon which it would otherwise have been required”.

[8] BJ Ltd argue that while not disputing that the pole needed to be replaced it could only accept liability for the indemnity value of FO’s losses, otherwise it will be in an improved position. Applying such an indemnity has been the accepted method of calculating compensation by all other power companies in these circumstances.

[9] However, FO submitted that there is no betterment because in managing its networks it will renew all power poles on a section by section basis rather than when poles individually require replacement. Thus, in its model a replacement cost is that of the whole line not the individual poles. The reasons for managing the poles in this way are several. Included is a safety concern where replacing the section involves less interference with its responsibility to have power available for critical activities and dependencies of customers such as medical services. In terms of economics there are savings with replacing lines by co-ordinating replacement works. Overall FO say this way of managing the poles is the cheapest option. Such coordinated replacements also assist with upgrades such as increasing loads through the network. Weighing such variables FO has developed its management plan accordingly.

[10] Clearly the parties have different perceptions of what amounts to a reasonable model to use with regard to whether or not indemnity should apply on the facts of this case. BJ Ltd saw the FO approach as unreasonable because the pole has a depreciating value and that has been the standard way the insurance industry deals with compensation and is acceptable to other lines companies. FO insists depreciated value approach does not apply to its circumstances.

[11] I have noted depreciated value has been the subject of discussion in leading cases on betterment. However, those cases cover the treatment of single items for depreciation. The FO model is distinguishable in treating a damaged item as part of a greater whole. Also, FO does incur a greater loss in comparison to other networks who treat replacement poles as a separate asset. This result of itself does not count against the FO approach given general principle that a person must take his victim as he finds him.

[12] However, in deciding between two approaches argued, I note it is FO who is the victim and the sufferer of the loss. It has the onus to prove the primary loss which it has done. The onus then falls to BJ Ltd to prove betterment. Using a model that does not apply to FO’s management model for its replacement power poles does not describe its particular loss. I find the loss described by FO is reasonable in the circumstances given its explanations for that approach. In that regard I find for FO and therefore award its damages claim in full.

Referee: S. P. Kane.

Date: 6 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>.