



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 344

**APPLICANT
(FIRST RESPONDENT
TO COUNTER-CLAIM)** H Ltd

**(SECOND
RESPONDENT TO
COUNTER-CLAIM)** NB

RESPONDENT QU

**APPLICANT'S
INSURER** X Ltd

**RESPONDENT
INSURER** Q Ltd

The Tribunal orders:

1. QU and his insurer Q Ltd are to pay X Ltd a total of \$10,324.80 on or before Friday 4 August 2023. Of this sum X Ltd is to pay the first \$500.00 to H Ltd.
2. H Ltd and its insurer X Ltd and NB are jointly and severally liable to pay QU a total of \$1794.00 on or before Friday 4 August 2023.

Reasons:

1. On 26 December 2021, there was a collision at sea, [location], between a 5 metre [bowrider boat] owned by H Ltd and skippered by its Director, NB, which was anchored, and an 11 metre [catamaran] owned and skippered by QU that was sailing out of the harbour towards [location 2]. The starboard bow of [catamaran] collided into the port side of the [bowrider boat] causing damage to the [bowrider boat]'s gunwale and windscreen, and damage to the front starboard hull of [catamaran].
2. H Ltd (the company) and its insurer X Ltd claim \$13,756.29 from QU, comprised of:
 - b. Insured losses of \$12,406.29, namely \$11,406.29 for the boat damage and \$1000.00 for lost contents including a fishing rod, 2 vapes and [brand] sunglasses; and
 - c. Uninsured losses of \$1350.00 comprising the \$500.00 excess and \$850.00 for uninsured contents.
3. QU counter-claims \$8,970.00 from the company for damage to [catamaran].

4. At the hearing, pursuant to s25(2) and (3) of the Disputes Tribunal Act 1988, I joined NB, the skipper as a second Respondent to the counter-claim because I considered he had a sufficient connection with the counter-claim and that it was necessary to enable the Tribunal to effectually and completely determine the questions in dispute or to grant the relief that might arise. NB had been present throughout as the company representative and waived his right for an adjournment to be served notice.
5. The issues to be determined are:
 - a. Who was responsible for the collision and was there any contributory negligence?
 - b. If NB was responsible for the collision, is the company vicariously liable?
 - c. What are the reasonable costs associated with the collision, and if there was contributory negligence how should the costs be apportioned?

Who was responsible for the collision and was there any contributory negligence?

6. Under the law of negligence, a person has a duty to care to other persons so closely and directly affected by his or her acts or omissions, to exercise reasonable care so that its act or omissions do not cause reasonably foreseeable damage. Just as a driver of a car has a duty of care to other road users, so does a skipper of a vessel to others on the sea. In particular Part 22 of the Maritime Rules which gives effect to the Convention on the International Regulations for Preventing Collisions at Sea, 1972 applies. This Part provides the steering and sailing rules (rules of the road) for ships. Rule 22.5 provides that every vessel must at all times maintain a proper lookout.
7. There was no dispute that the [bowrider boat] was at anchor when the collision occurred and QU accepted some responsibility for the collision as his vessel was underway. However his position is that the [bowrider boat] was largely responsible as it was anchored in a "No anchoring zone," that he had briefed the 2 people on the foredeck to keep watch and that the low profile and size and colour of the [bowrider boat] made it more difficult to see.
8. On balance, I find that QU, as skipper was negligent and failed to take all reasonable precautions in the circumstances to keep a proper look out. I say this for reasons which include:
 - a. I gave weight to the Police occurrence report that the skipper of [catamaran] failed to keep a proper lookout and so failed to see the [bowrider boat];
 - b. QU acknowledged that his vessel was underway and that as skipper he had a duty of care to keep a proper lookout;
 - c. QU acknowledged and I accept that his visibility on the helm was limited;
 - d. QU acknowledged and I accept that he was very much reliant on his passengers on the foredeck. While I accept that he may well have briefed them to keep a look out, he acknowledged and I accept that they were not experienced;
 - e. I find that had the passengers/QU been keeping a more prudent watch, they would have seen the [bowrider boat]; and
 - f. I preferred NB's evidence that his boat was not just blue against the sea, but blue and white and that its profile was not so low that it could not reasonably have been seen by an approaching vessel had a reasonable watch been in place, especially when a skipper has a responsibility to all vessels on the water, large or small.
9. However, on balance I also accept that as skipper of the [bowrider boat] NB contributed to the cause of the collision and subsequent damage by anchoring in a no anchoring zone and failing to display at anchor shapes. I say this for reasons which include:
 - a. In assessing the positioning, I gave greater weight to QU's evidence because it was supported by plots recorded from GPS navigation tools against the nautical charts over the visual assessment of the [bowrider boat]'s crew; and
 - b. NB acknowledged and I accept that he was personally liable as skipper; and

- c. NB acknowledged that he had not yet displayed at anchor shapes, however I did not accept his position that there was no opportunity to do so as he had just anchored because I preferred the evidence that the crew had time to cast fishing lines into the water.

If NB was responsible for the collision, is the company vicariously liable?

10. I find that the company is vicariously liable for NB's contributory negligence as there was no dispute that it owned [catamaran] and it acknowledged and so I accept that NB was not undergoing any frolic of his own but as skipper was acting in connection with his role as company director.

What are the reasonable costs associated with the collision, and if there was contributory negligence how should the costs be apportioned?

11. Under section 3(1) of the Contributory Negligence Act 1947 (CNA), where any person suffers damage as a result partly of his own fault and partly the fault of another, the claim shall not be defeated by reasons of his own fault, but the damages recoverable shall be reduced to such an extent as the court thinks just and equitable having regard to the claims share in the responsibility for the damage.
12. There was no dispute and so I accept that starboard bow of [catamaran] collided into the port side of the [bowrider boat], or that the damage caused to the [bowrider boat]'s gunwale and windscreen was reasonably foreseeable. QU also did not dispute the costs to repair this damage of \$11,406.29. Likewise there was no dispute that 5 insured contents items, worth a total of \$1000.00 were lost, and that under its insurance there was a \$500.00 excess. At the hearing, the company withdrew its claim for the uninsured contents. So, I accept that the reasonable losses totalled \$12,906.00
13. Also, neither the company, its insurer, or NB disputed that the estimated cost to repair [catamaran] of \$8,970.00 was reasonable.
14. In assessing the apportionment of costs, I had regard to the causative potency of the parties conduct and the risks taken by each. For the reasons outlined in paragraphs 6-9, I find that the principal cause of the collision was the failure to keep a proper look out, with the contributing factor the [bowrider boat] being anchored unlawfully. In these circumstances, my assessment is that QU is responsible for 80% of the damages, with the company and NB jointly responsible for 20%.
15. So, I find that:
 - a. H Ltd is entitled to 80% of its total loss of \$12,906.00 as described in paragraph 12, namely \$10,324.80 and
 - b. QU is entitled to 20% of his loss identified at paragraph 13 of \$8970.00, namely \$1794.00.

Referee: G.M. Taylor
Date: 14 July 2023



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

You can only appeal outside 20 working 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>.