



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 424

APPLICANT **KD**

RESPONDENT **N Ltd**

SECOND **HX**
RESPONDENT

RESPONDENT **X Ltd**
INSURER
(if applicable)

The Tribunal orders:

The claim is dismissed.

Background

1. KD had his motorbike with N Ltd for a service and to resolve an electrical issue. N Ltd are located at [Address 1]. KD's bike was still with N Ltd when on 27 January 2023 [City] experienced widespread catastrophic floods caused by heavy rainfall. There was severe flash flooding and [Suburb] was one of the worst affected areas. KD's bike was among the customers and N Ltd bikes that got flooded and therefore were water damaged.
2. KD's bike was not insured. He is claiming \$14,000.00 from N Ltd which he says the bike is worth.
3. N Ltd had moved from its premises in [Address 2] to [Address 1] in late 2021. KD says the area N Ltd is located is a high risk area for flooding because it is low lying. He says therefore N Ltd owed a duty of care to him. In other words, he says N Ltd were negligent in moving to [Address 1] and as a result of that negligence his bike got water damaged.
4. He says, in his correspondence to N Ltd, that he expected his bike to be covered under N Ltd's insurance. In an email from N Ltd to KD in March 2023 they say they could not give any guarantee regarding their insurance "but we have added your bike to our list of uninsured that we will be presenting to our insurer."
5. KD says he wasn't given the opportunity to fix his bike as it was in effect "written off". He says he has lost the opportunity to remediate. KD' bike is still at N Ltd's premises.
6. KD also says N Ltd has not completed the work on the bike within a reasonable time.
7. N Ltd has:
 - a. Public liability and material damage insurance with X Ltd.

b. Commercial motor stock insurance with W Ltd.

8. N Ltd had approached W Ltd to see if the motor stock insurance policy would cover the 9 uninsured bikes that were at the time with N Ltd for repairs or servicing. However, in W Ltd's response to N Ltd they say the policy did not cover those bikes because it only covered N Ltd's bikes and bikes they were selling on behalf of customers (as bikes being sold on behalf are considered "stock").

N Ltd were left with X Ltd's policy as the public liability insurer. X Ltd requested that they be added to as a party to the proceedings as N Ltd's insurer which I had done so.

9. At the hearing HX (one of the directors and owners of N Ltd) says they have signage inside the service area saying (amongst other things) that N Ltd recommends to customers that their bikes remain privately insured while in N Ltd's care. KD says he never saw the sign as his bike was collected from his home by N Ltd to N Ltd's premises. He says therefore this was not disclosed to him and raises this an issue. I am however satisfied that KD did not see the notice. I do not however consider this to be an issue in the context of this claim.

The issues

10. The issues are:
- a. Whether N Ltd failed to complete the work on KD's bike within a reasonable time?
 - b. Whether N Ltd were negligent.
 - c. Whether the loss KD suffered is covered under X Ltd's policy.
 - d. Whether KD lost his opportunity to remediate the bike.

Consideration of the issues

Did N Ltd fail to complete the work on KD's bike within a reasonable time?

11. Under the Consumer Guarantees Act 1993 (CGA) there is a guarantee that service will be completed within a reasonable time where the time of completion cannot be determined by reference to the contract or course of dealings (s30 of the CGA).
12. Consumers are also entitled to damages for any loss which is reasonably foreseeable as liable to result from the failure to comply with a CGA guarantee (s18(4) of the CGA).
13. KD's bike was collected by N Ltd on 4 November 2022 and KD says he received a call from N Ltd saying the [Analysis Team] were looking at it. On 12 January he says he was told that N Ltd had ordered parts for the bike and that it should be ready in "no more than 4 weeks". On 10 February he got an email from N Ltd saying the bike had been destroyed in a flood.
14. He says the bike had been off the road for 6 months, 4 months of which it was with N Ltd getting serviced. I note however it was not 4 months but around 3 months with N Ltd and presumably taking into account N Ltd may have been closed over the Xmas break it may have been less. I also note the bike was not just with N Ltd for a service but also to resolve the electrical issue.
15. N Ltd says they had ordered parts from overseas which were taking time to arrive. They also say they were liaising with the manufacturer to accept a good will warranty as KD's bike warranty had expired in 2019. The final claim was submitted on 20 December 2022 and the [manufacturer] signed off on 10 January 2023. Once they got the sign off parts were ordered. Whether or not those were the reasons for the delay, the loss suffered by KD (for the purposes of s18 (4)) was not:

- a. A loss that would be directly related for any failure to not complete the service within a reasonable time. An example of a direct loss would be say, if a car was not repaired within a reasonable time then the owner of the car may be able claim things like rental costs if they had to hire a car for use (assuming the service provider was unable to provide a courtesy car).
- b. A loss resulting from any failure to complete the work within a reasonable time which would have been reasonably foreseeable by N Ltd. The loss was as a result of the 27 January floods which was not something N Ltd could have reasonably foreseen. I have discussed this further under whether N Ltd was negligent.

Was N Ltd negligent?

16. N Ltd is a bailee of its customer bikes at its premises. A bailee is liable for any loss or damage unless it is proven that the loss or damage was not caused by any lack of care (negligence) on the bailee's (in this case N Ltd's) part.
17. N Ltd says its duty to take reasonable care does not extend to anticipating flooding of its premises as a direct result of the 27 January floods. They it was not something the N Ltd could have anticipated.
18. As mentioned above KD says N Ltd were negligent in moving to the [Address 1] premises (which he says was a high risk flooding area) and as a result of that negligence his bike got water damaged as a result of the 27 January floods.
19. In evidence, KD provided a [Address 1] Network Modelling System Performance Report dated March 2008 which was prepared for (the then) [Suburb] City Council (2008 Report). It says (in relation to the [Address 1] Business District) that this is one of the largest areas of flooding as a result of its flat topography and infrastructure that was not designed to convey large flows. It says that once the engineered open channels that convey flow on each side of [Address 1] reach capacity the flow spills onto the road. It concludes that flooding in the area would be difficult to mitigate with major infrastructure changes.
20. KD referred to the maps in the 2008 Report in particular on page 3.14. He says the red circled areas are where there is a high flood risk. N Ltd are located at 10 [Address 1] and KD says that is located on the circled area.
21. N Ltd says:
 - a. The Report was prepared for the then [Suburb] City Council in 2008.
 - b. Their premises from the [City] Council's GeoMap plans is in the flood plain (in the marked light blue area) and not flood prone areas (marked in blue lines).
 - c. [Supermarket] which is also in the flood plain area was built about 7 or 8 years ago for which [City] Council granted consent. The [Supermarket] building was not built when the 2008 Report was done.
 - d. Other premises surrounding them such as [Car Dealership/s], [Hardware store] and [Supermarket] were also badly affected by the 27 January flood.
 - e. The managing director of owner (landlord) of the N Ltd property says the premises was built around the 1970's and that he was 99% sure the premises had never flooded before. N Ltd provided in evidence an email from the landlord.
22. I have considered the 2008 Report, the GeoMaps plans and the independent report (by [Consulting Business] for [City] Council ([Consulting Report])). Part of the [Consulting Report] was submitted in evidence by N Ltd. I have also looked at the full [Consulting Report] which was a review of the [City] flood response.

23. I comment as follows:

- a. I agree with N Ltd's comments above.
- b. The N Ltd premises sits to the right on the blue dashes as shown on GeoMaps. According to the key to GeoMaps the premises sits within the overland flow path. According to the [City] commentary on its website overland flow paths are routes taken by water when the man-made drainage network is overloaded. It says the overland flow paths are a vital component of [City]'s drainage. It also says that when the drains are blocked they can cause floods.
- c. The drainage (being part of the infrastructure) would have been designed taking the flooding risk into consideration.
- d. When I compare the red circle in the 2008 Report and the GeoMaps, the N Ltd premises appears to be with on the edge of the red circle area or just outside it.
- e. The [Consulting Report] says that "[t]his unprecedented event unfolded with extraordinary speed". The Metservice forecast vs actual rain from 1 January to 6 February 2023 (as shown on page 32 of the [Consulting Report]) shows that the Metservice rain forecast to actual (over a 6 hour period) were reasonably accurate up until 27 January. On 27 January the forecast was for 20mm of rain yet the actual was 140mm. Between 1 January and 26 January there was very little rain. There were a few days where the rain between around 16 or 17mm being the 4th, 10th and 17/18th of January. There was very little rain in the weeks before 27 January, with the highest rainfall before that being 17/18th of January when it was recorded to be around 16 or 17mm.
- f. Although a bailee must anticipate any hazards to which the property could be exposed, however in general the bailee is not responsible for Acts of God. This event was clearly an Act of God – something that N Ltd (or anyone else for that matter) could not have foreseen or even anticipated in the days and weeks before.

24. N Ltd says the flooding occurred after 5pm on the 27th and N Ltd's premises were closed and all staff had left for the day. Because there were no staff on site no steps could be reasonably taken to safeguard or move the bikes. They say that even if staff were still there the flood waters were rising so it would not have been reasonable to stay there.

N Ltd also refers to the [Consulting Report] in this regard. On page 45 of that report, it says:

- a. From 5pm emergency services were advising of multiple calls and evacuations were underway. Motorways were also flooding at this time.
- b. From 5:30pm on lives were potentially at risk.
- c. At 5:53pm the advice was to stay at home and another severe thunderstorm warning was issued by Metservice.
- d. By 5:58pm mass evacuations were reported with additional weather warnings.
- e. By 6:07pm people were again advised against non-essential travel.

It is clear therefore that there was nothing N Ltd could have done to safeguard or move any of the bikes. As mentioned above the event was clearly an Act of God.

25. I conclude for the reasons above that N Ltd were not negligent because they moved premises and not were they negligent for not attempting to safeguard or move KD's bike.

Is the loss KD suffered covered under the X Ltd's policy?

26. As mentioned above N Ltd's, X Ltd's policy covers public liability.
27. Public Liability insurance covers the risk of being sued by a third party in negligence or strict liability for personal injury or damage to property. Third parties include members of the public, customers or clients. Public Liability insurance can cover an accident in your work area or relating to the insured's business activities. Clause 3.1 of N Ltd's public liability cover with X Ltd refers to occurrences with the course of "the Business". This means things that occur when running a business. For example, in N Ltd's case they might have been negligent when doing repairs and servicing on a bike (being in the course of its business and repairing and servicing bikes is part of it of its business) which caused other damage to the bike. That negligence would be covered under N Ltd's public liability insurance.
28. As I have determined that N Ltd were not negligent in relation to the damage to KD' bike, his loss is not covered under the X Ltd policy.

Did KD lose his opportunity to remediate the bike?

29. As mentioned above, KD says he wasn't given the opportunity to fix his bike as it was in effect "written off".
30. KD's bike was under water. N Ltd says 60 of their customers bikes (which were also submerged in water) were written off by the customers insurer. There were 9 bikes that were not insured (including KD's). N Ltd also says that in relation to the 400 bikes that were considered "stock" by W Ltd, and therefore covered under the W Ltd commercial motor stock insurance, were also written off by W Ltd.
31. It is usual for insurer to write off vehicles which have such water damaged. This is because flooded vehicles can be a safety risk. The Insurance Council of New Zealand has said in a statement on its website dated 23 February 2023. They say:

While insurers act responsibly to get water damaged vehicles written-off, off the road and deregistered in the first instance, there is no robust system in place to ensure the safety of flood affected uninsured vehicles. Owners of such vehicles should take them to be inspected by main dealers or other appropriately qualified independent experts.

32. KD wasn't contacted until 10 February because N Ltd's servers were down. KD does not accept that. However, I am of the view that it was more likely than not that the servers were down as a result of the extreme weather event.
33. KD emailed N Ltd twice on 10 February saying he expected his bike to be covered by N Ltd's insurance and that N Ltd needed to "keep the pressure on your insurance underwriters". He insisted N Ltd are liable at law and ethically.
34. N Ltd's service administrator and relations manager responded (again on the same day) saying they did not have all the answers at that point regarding insurance but noted that their insurance company said the event was an Act of God and therefore N Ltd was not liable and told KD to contact his own insurance company. KD responded that he did not have insurance because the bike was in N Ltd's care. N Ltd responded saying "unfortunately we cannot admit liability to this at this stage...my managers ...have advised me that they will put this forward to the insurer".
35. On 1 March N Ltd responded apologising for the delays as they have had a volume of work to get through. They added that they could not give him any guarantees but said that have added his bike with the list of uninsured bikes and presenting this to the insurers. They said the insurers were taking a while to get back to them and asked for patience.
36. On 8 March KD emailed saying he did not accept N Ltd's delays. He also says:

I ask that you offer me a solution by the end of this week to my loss, that without prejudice, ...to remediate the loss of my motorcycle...Without this proposal I will ...be forced into legal action with [N Ltd] for total loss and damages. *[emphasis added]*

N Ltd responded on the same day they were still waiting to hear back from the insurers and that they update him when they hear.

37. It is clear the N Ltd were trying to assist KD after KD said N Ltd were liable and KD had expected N Ltd to cover his loss from the outset through their insurers. N Ltd have told him they could not given any guarantees and told him what their insurer (X Ltd) had told them, that is, that N Ltd were not liable. In any event N Ltd still tried to assist. I asked KD at the hearing why he didn't just pick the bike up. He said he didn't know he could. However, given his response referred to at paragraph 36, KD could have collected the bike to remediate. Had he chosen to do so, and assuming, I found N Ltd liable in negligent (which I have not) then he may have had a claim against N Ltd for remedial work. Except he chose to wait for the outcome from N Ltd's insurer even though he was told it was unlikely he would be covered.
38. I conclude therefore that KD had not lost the opportunity to remediate the bike. He could have collected the bike. Whether or not it could have been fixed even if he collected it earlier is a moot point.

Conclusion

39. I appreciate that KD's loss of the bike would be distressing for him particularly given it was not his fault. Unfortunately, the weather event was an Act of God and the fault cannot be placed on N Ltd, as I have determined above.
40. For the reasons above, KD' claim is dismissed.

Referee: Ms Gayatri Jaduram
Date: 3 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 HXed 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 of 20 working days if you have been HXed 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>.