



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 739

APPLICANT **M1 Ltd**

RESPONDENT **M2 Ltd**

SECOND **FS**
RESPONDENT

The Tribunal orders:

The claim is struck out.

Reasons

Introduction

1. M1 Ltd have filed a claim (the current claim) for \$30,000.00 in relation to a Building Warrant of Fitness (BWOFF) that was not provided prior to the settlement of a property transaction for the M Lodge (the Lodge), between DQ and KQ (the Qs) as trustees of the M Trust and M Ltd (the S).
2. The Qs advise the property transaction was in fact completed under their nominee company M1 Ltd and the agreement was between M1 Ltd and the S'. Regardless of the company entities involved, the persons involved are the Qs and the S'.
3. On the 22 November 2022, the Tribunal delivered a decision between the parties, the Qs as Trustees and another trustee of the M Trust and S' as M Trust. The claim (the original claim) and subsequent decision included matters relating to the fire alarm system and the BWOFF.
4. The issues to be resolved are:
 - a. Has the current claim previously been decided by the Tribunal?
 - b. If so, is there any particular factor that can set aside that decision?

Has the current claim previously been decided by the Tribunal?

5. Under the Disputes Tribunal Act 1988 the Tribunal is permitted to undertake re-hearings or revisit the award for the purposes of correction or interpretation. However, the issues which are not under review cannot be re-heard and are *res judicata*, meaning those things decided cannot be decided again. If the subject matter is the subject matter of newly issued court proceedings the defence to the claim is that the issues are *res judicata* and that the claimant is estopped from

bringing the claim. This is referred to as issue estoppel. In *Opotiki Packing & Coolstorage Ltd v Opotiki Fruitgrowers Co-op Ltd (in rec)*¹ at [25], Fisher J stated:

“As a general principle issue estoppel applies whether the award is interim or final so long as the award purports finally to resolve the issue in question. ...”

6. I find that the claim has previously been decided by the Tribunal for the following reasons:
 - a. The original claim sought compensation under the heading - number 5 The Fire Alarm System & Building Warrant of Fitness. The associated paragraph then set out the issues surrounding the Fire Alarm system and the BWOFF. An estimate of \$1800.00 was sought from the respondents to obtain a BWOFF and address the fire alarm system. At the time of filing the original claim, the applicants had been advised that a BWOFF was required. The current claim seeks compensation for obtaining the BWOFF.
 - b. The Tribunal’s decision on 22 November 2022, addresses both the Fire Alarm and the BWOFF together and separately. The decision of the Tribunal in relation to these two headings was that substantially there was no evidence to substantiate the claim and that the parties had had “a good deal of time between June and October to submit this evidence’. Furthermore, “that there was no evidence [provided] as to the cost or as to any independent evidence as to the legal requirement for this.” The decision reads that the issue has been determined and that no award is made because there is no evidence.
 - c. The Qs make two arguments, firstly they say that this claim is made by a different entity than the last claim and therefore it is a different claim. Issue estoppel applies when the already determined subject matter is the subject matter of newly issued court proceedings. The issue in the current claim is the same as the issue in the original claim.
 - d. The Qs second argument is that the Referee noted in the decision that the BWOFF could not be dealt with in this claim (the original) and that it was not part of the [original] claim. They said that this was the interpretation of the decision. I do not accept that interpretation because the decision states that the claim for the amount sought has been found to be unsubstantiated due to no independent evidence being provided. Moreover, under the paragraph 5 of the decision, the referee has listed the items claimed as at the date of the last hearing, which included the BWOFF and Fire Alarm System. And again, the Referee set out under paragraph 15.iv the items that were covered under the sale and purchase agreement and the amount claimed.

If so, is there any particular factor that can set aside that decision?

7. The House of Lord’s has previously indicated² that for a decision subject to res judicata, to be set aside there needs to be:
 - Fresh evidence that was not available, or which could not with reasonable diligence have been obtained, at the time of the judgment in the earlier claim.
 - ‘Conscious and deliberate dishonesty’ in relation to the concealment of that evidence
 - Material evidence, ie that such evidence would have entirely changed how the judge decided that earlier claim.
8. I find that there is no particular factor that can set aside the decision. I make this finding for the following reasons:
 - a. There is no fresh evidence and all material evidence now relied upon was available at the time of the original hearing had the applicants undertaken due diligence. It is noted in the

¹ [2003] 1 NZLR(HC & CA)

² *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529

decision that the applicants informed the Tribunal that they didn't have the evidence because they hadn't started work on it yet. However, in the original claim, it is clear in their application that they had been informed that a BWOFF was required, even though they had been told it wasn't.

- b. There is no evidence of concealment of the evidence. It is openly discussed in the original claim and decision.
9. Having found that the current claim before the Tribunal has already been determined by the Tribunal and there is no particular factor that could set aside that decision, then the matter cannot be decided again, and the claim is struck out.

Referee: Nigel Wolland
Date: 15 December 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 of 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>.