



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2023] NZDT 469**

**APPLICANT      N Ltd**

**RESPONDENT    EB**

**The Tribunal orders:**

EB is to pay N Ltd \$579.60 by 27 September 2023.

**Background**

1. EB owns a swing mooring at [location redacted].
2. [THE REGIONAL COUNCIL] requires mooring owners to have their moorings serviced by a licenced mooring contractor or by an officer of the [THE REGIONAL COUNCIL] every three years.
3. N LTDN Ltd serviced EB's mooring in 2013, 2016, and 2019.
4. In February 2022, N LTD sent EB an email advising him that his mooring certificate was due for renewal in August 2022. The email included a link to make a booking online, and some information about pricing and terms and conditions (discussed in more detail below).
5. In April 2022, EB sent N LTD an email authorising them to service the mooring again.
6. N LTD carried out the job in November 2022. They lifted the mooring and inspected it. They identified the need for some repairs, including replacement of the head rope.
7. On 14 November, N LTD sent EB a report of the inspection and an invoice for \$1,474.31.
8. EB strongly disputed some of the costs on that invoice.
9. EB paid N LTD \$579.60.
10. On 13 February 2023, EB's boat broke free from the mooring and grounded.
11. N LTD's claim seeks payment of the balance of its invoice.
12. EB's counter claim seeks compensation for costs relating to the recovery of the mooring and re-floating the boat.
13. The hearing took place by phone on 22 August 2023. Both parties participated in the hearing. Mr M represented N LTD.

N Ltd's claim

14. EB did not dispute the need for repair work on the mooring.
15. EB disputed the amount charged for repairs, in particular the materials costs.
16. EB also argued that some of aspects of the work were not carried out in accordance with the [THE REGIONAL COUNCIL]'s guidelines.
17. The issue of compliance with [THE REGIONAL COUNCIL] guidelines is discussed in more detail below.
18. In terms of EB's "over-charging" argument, the relevant principles are:
  - a. If parties to a contract agree to a price, or agree to a mechanism for the calculation of the price, then the parties are bound by the contract terms.
  - b. If the contract is silent about price, and if the Consumer Guarantees Act 1993 applies, then there is a guarantee that the consumer must pay no more than a reasonable price.
19. A contract can have explicit and implicit terms. A term can be implied into a contract if the parties have had previous dealings on the same terms.
20. N LTD's email to EB in February 2022 was an invitation to enter into a contract. The email included some information about the service it was offering and the price for that service:

Our service is delivered using experienced crew working to professional standards [...] We only use the high standard independently tested and certified, quality-assured components [...]

  1. LIFT and INSPECTION FEE: \$150 (plus GST) [locations], elsewhere \$185 (plus GST):  
Covers travel, lift and inspection, certification, photos, admin, and [THE REGIONAL COUNCIL] liaison
  2. SERVICE AND MAINTENANCE COSTS:  
If our initial inspection shows mooring components are damaged or worn below [THE REGIONAL COUNCIL] specified minimum safe thresholds we are required to replace these to [THE REGIONAL COUNCIL]'s minimum design standards to achieve mooring certification. Labour and barge costs then commence on a pro-rata, hourly rate basis. Material costs are additional and at competitive rates.
21. The email also contained a paragraph under the heading *Terms and conditions*, which included the following:

I authorise N Ltd (N LTD) to lift, inspect, and service our mooring. I accept [...] i) that N LTD may vary mooring design to suit local conditions and safety; j) that N LTD reserves the right to periodically review prices. Please visit our website for information about our Terms and Conditions.
22. At the date of hearing, N LTD's website did not contain any information about its terms and conditions. I do not know whether this information was on the website when N LTD sent the email to EB in February 2022, or when EB booked the service in April 2022.
23. On the previous occasions that N LTD serviced EB's mooring, it was necessary to do some repair work and N LTD charged for materials and labour in addition to the standard lift and inspect fee. I was not provided with copies of those invoices.
24. EB submitted that he was aware of N LTD's general fee structure, but he was not aware of the amount that N LTD charge for materials.
25. On the information available to me I am satisfied that:

- a. N LTD's email in February 2022 constituted an offer to service the mooring on terms including those set out in the email. EB's email in April 2022 accepted that offer on those terms.
  - b. The contract included a specific term about the price for the lift and inspection. The price for that service was \$150.00 plus GST.
  - c. The contract empowered N LTD to carry out work if work was necessary to bring the mooring to [THE REGIONAL COUNCIL]'s minimum design standards.
  - d. There was no agreed price for that work, either in terms of labour or materials. Materials costs would be charged at "competitive rates".
  - e. Although there is a course of dealings between the parties, there is not sufficient evidence for me to find that the course of dealings established an implied term in respect of the price for materials and labour.
26. N LTD's services are subject to the Consumer Guarantees Act 1993 ("CGA").
27. Section 31 CGA states that where services are provided to a consumer there is a guarantee that the consumer is not liable to pay more than a reasonable price for the service. Section 11 CGA has an identical provision in respect of the supply of goods.
28. EB submitted that the N LTD's charges for materials are significantly beyond the parameters of "reasonable". EB noted that N LTD charged \$27.00 plus GST per metre for 24mm polyester rope, which he can be purchase retail for \$5.60 per metre.
29. EB's emails to Mr M about the disputed invoice include several other examples of the difference between the 'normal' retail price of the unexceptional materials that N LTD used on the job (shackle, swivel, thimble, etc) and the amount charged by N LTD, which is, in most instances, many times higher than the retail price.
30. In response, Mr M submitted that these comparisons do not take into account the nature of N LTD's business.
31. I agree that consideration of a "reasonable price" in a CGA context must be industry specific.
32. In his emails to Mr M, EB stated that he obtained a quote from "a competitor" to do the same job, and he was quoted less than half of what N LTD charged. I do not know whether that quote was given in writing, and I was not provided with a copy of it.
33. N LTD operates in a high-cost industry. Its operations are weather dependent. It charges a relatively low fixed amount for a 'lift and inspect'. It seems clear that it applies a substantial mark-up to materials used in repair work, and that this is an important source of revenue for the business.
34. However, this is not sufficient on its own to justify a finding that N LTD charges an unreasonable price for materials. That requires a comparison across the industry, taking into account not only the amount that operators in the industry charge for materials but also the total cost of the 'average' inspection and re-certification – other operators may charge more for the lift and inspect but less for materials and labour.
35. EB has the burden of proof.
36. The evidence provided to me does not establish that the amount charged by N LTD for labour and materials is an unreasonable price.

37. Therefore I find that EB is liable to pay N LTD's invoice, subject only to a reduction from \$175.00 to \$150.00 for the lift and inspect. It seems that N LTD increased its price for the lift and inspect (which it is entitled to do) but it failed to update the pricing information in its emails. N LTD is bound by the price of \$150.00 plus GST that it offered to EB in the February 2022 email.

38. EB is obliged to pay \$579.60 calculated as follows:

Adjusted invoice amount:	\$1,445.56
Less payment:	\$865.96

EB's claim

39. EB's boat came adrift from its mooring on 13 February 2023.

40. It is not disputed that the cause was that the head rope chafed through and snapped.

41. The parties disagree about the cause of this.

42. Mr M submitted that:

- a. The incident occurred during Cyclone Gabrielle.
- b. EB's boat did not have a pin in the bow roller, so the head rope could have come free from the bow roller as the boat moved in storm conditions.
- c. The anchor was stowed nearby, and it could have provided a hard and sharp surface for the head rope to chafe against.
- d. EB failed to check his boat prior to the Cyclone.
- e. [THE REGIONAL COUNCIL]'s Harbour Master "clear[ed] N LTD of any wrongdoing or incorrect mooring technique".

43. EB submitted that:

- a. The Cyclone did not land until 14 February 2023, and the wind and sea conditions on 12 & 13 February 2023 were no worse than previous days in May 2022, September 2021, July 2020, and October 2019 (of which EB has a record).
- b. "Nine out of ten boats near our mooring have no retaining pin", and only his boat came free from its mooring.
- c. The head rope came free from the bow roller because the line was too long. There was too much 'slack' in the line, allowing it to come free from the bow roller as the vessel moved.
- d. The head rope may have been caught / jammed on the mooring block, placing severe tension on the line, so that it chafed on the side of the boat.
- e. The chafe guard that N LTD put on the head rope failed.

44. In terms of the length of the rope, EB quoted the [THE REGIONAL COUNCIL] mooring guidelines which state that the head rope should be:

To suit; minimum 2.5m, maximum = water depth at low tide

45. N LTD fitted a 5.5m long head rope to EB's mooring. EB submitted that the water depth at low tide is less than 1.5m, and therefore the maximum length of the head rope should have been 2.5m.
46. Mr M argued that the wording "to suit" effectively means that there is no maximum length stipulated.
47. As a matter of construction, I do not find Mr M's argument convincing. The words "to suit" must be read together with the words giving a minimum and maximum length. There is discretion to cut the length to suit, within the parameters of the minimum and maximum.
48. EB described the [THE REGIONAL COUNCIL] recommendations as "rigid mooring standards". EB submitted that N LTD's work should not have been accepted by the [THE REGIONAL COUNCIL], and that he should not be liable to pay for the work.
49. However, the information available to me indicates that these are not rigid mooring standards. [THE REGIONAL COUNCIL] describes them as 'Guidelines' in the published version that is publicly available on [THE REGIONAL COUNCIL]'s website.
50. [THE REGIONAL COUNCIL] clearly accepts significant deviation from the guidelines.
51. N LTD provides its mooring reports to the [THE REGIONAL COUNCIL], describing the work that it carried out on each mooring.
52. The [THE REGIONAL COUNCIL] has the sole authority to grant or decline a mooring certificate in the [region].
53. The [THE REGIONAL COUNCIL] issued a mooring certificate for EB's mooring even though it was clear that N LTD installed a headrope that is significantly longer than the maximum recommended in its guidelines.
54. Mr M submitted that N LTD's work on EB's mooring was in accordance with its usual practice, so the [THE REGIONAL COUNCIL] has issued certificates for many hundreds (perhaps even thousands) of moorings where the head rope length is outside the parameters of its own guidelines.
55. Therefore, EB's argument that he is not obliged to pay N LTD's invoice because N LTD failed to service the mooring "to the required standards" cannot succeed. The [THE REGIONAL COUNCIL] is the final arbiter of the mooring standards, and the [THE REGIONAL COUNCIL] accepted N LTD's work and issued a mooring certificate for EB's mooring.
56. Nor cannot be argued that the fact that the head rope is longer than recommended in the [THE REGIONAL COUNCIL] guidelines means that N LTD is necessarily liable for the boat slipping the mooring, without the need for further enquiry.
57. N LTD is only liable if EB can prove, to the standard of more likely than not, that the length of the head rope was the cause (or at least a cause) of the boat slipping the mooring.
58. EB's argument linking the length of the rope to the failure is set forth above.
59. In response, Mr M submitted that:
  - a. The head rope that they replaced on EB's boat, which had been in place for several years, was approximately 5m long.
  - b. The rope snapped at the 'boat end' not the 'chain end', so the failure was not caused by excess rope abrading on the surface of the mooring block.

- c. EB's explanation of excessive tension on the line if the rope got caught on or under the mooring block could also occur if the chain got caught in a similar way.

60. My findings are:

- a. There are multiple potential factors and combinations of factors that could have caused the headrope to chafe and snap.
- b. The theory which EB puts forward represents an explanation that is plausible, but it is no more or less plausible than other explanations.
- c. It is known that the rope came free from the bow roller, and this was a factor in the ultimate failure of the rope. However, it is not possible to know that the rope would not have come free if it had been 2.5m rather than 5.5m long.
- d. It is not proven, to the standard of more likely than not, that the length of the head rope was the cause, or a cause, of the boat slipping the mooring on 13 February 2023.

61. Therefore, EB's claim must be dismissed.

**Referee: Nicholas Blake**

**Date: 5 September 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>.