



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 722

APPLICANT NB

APPLICANT QD

RESPONDENT H Ltd

The Tribunal orders:

The claim is dismissed.

Reasons

1. During the latter half of 2022, H Ltd were doing repair work on the property belonging to the Applicants. The Applicants were not living on the property. In late January 2023, the Applicants left some belongings in the empty property. Several days later the items were found to be missing, and there had been no sign of a break-in. During a discussion with H Ltd, NB discovered that there was a key that had been left in the garage by the Respondent to allow access to the property by various parties including subcontractors and others. The Applicants considered that the Respondent was at fault and asked the Respondent to pay for the lost items but the Respondent did not pay. The Applicants filed a claim in the Disputes Tribunal.
2. This is a claim by the Applicants for compensation for negligence by a building company, the Respondent, in holding a key to the Applicants' property that may have been used in a robbery of the Applicants' property.
3. The issues discussed today included the following:
 - a. Has H Ltd breached their duty of care, or any relevant contractual duties, to the Applicants in not taking sufficient steps to keep the property or the key they held secure, or in any other way?
 - b. If H Ltd has breached their duty, is there sufficient evidence on the balance of probabilities that the breach caused the Applicants' loss, bearing in mind the existence of other keys in the hands of other people?
 - c. If so, are the losses foreseeable, or in other words, what damages are payable?

Has H Ltd breached their duty of care, or any relevant contractual duties, to the Applicants in not taking sufficient steps to keep the property or the key they held secure, or in any other way?

4. A duty of care is owed when the law recognises that a person is required under the tort of negligence to be careful in certain circumstances to avoid causing harm to another. Some cases are clear that a duty is owed, for example when a person drives a car; they are required, under a duty of care, to drive with sufficient care and attention to avoid causing damage to others. Other situations in which duties arise may be less clear. Generally, the law recognises a duty when a person can reasonably foresee that if they do not act carefully, another person may be harmed in some way. There have been whole books written about this topic, and there are a number of caveats on this general statement, but it is generally correct.
5. One of the reasons why a duty of care may not be found, even when there is foreseeable harm, is when a contract between the parties determines the duties and obligations between the parties.
6. A party may have breached its duty by not acting in a manner that was careful enough to have avoided foreseeable damage occurring.
7. In this case the facts that were largely undisputed were as follows. The Applicants' house was vacant while work was being done on the property by the Respondent under an insurance claim the Applicants had made. To facilitate sub-contractors being able to come and go from the property conveniently, a key to the property had been given to the Respondent, which had been placed in the garage at the property. The location was obviously known to the contractors who needed to use it. Shortly after the work had been completed, the Applicants had placed some items in a wardrobe in the house, including some ski gear and some duvet inners. Several days later they went back to retrieve the items and found they were missing. There was no sign of a break-in. The key was later found in the place it had been in for some time.
8. The contractual situation between the Applicants and the Respondents was not quite straightforward because this was an insurance claim the Respondents were working on, and the parties were not clear about who was in a contractual relationship with who (bearing in mind the insurance company was paying for the work). It appeared however that in any event there were no particular terms and conditions that would have covered this situation, so I turn to considering whether H Ltd have been negligent.
9. I must first decide whether the Respondents owed a duty of care. They had a key to a property owned by the Applicants. They obviously had a duty to keep the key secure, since a failure to do so might be expected to perhaps lead to property damage. Generally speaking, I find that it is reasonable to expect that even without contractual terms covering such security issues, a builder owes a duty to its customer to keep a property secure when entrusted with a key.
10. A more difficult question however is whether the Respondent has breached their duty. H Ltd was entrusted with a key for a house that was vacant, and they had taken steps to ensure that the key was not somewhere obvious or insecurely held or given to untrustworthy people. That is the evidence that Mr H gave, and I accept his evidence. The key had been kept on a hook in the garage. After the property had been entered and the goods taken, the key had been found again on the hook. It was unclear whether it had been used to break into the property. There were other keys in existence and held by various people. The question is whether H Ltd has done enough to fulfil their duty to the Applicants.
11. I find that H Ltd have done enough. If the key had been placed under a mat or left in the door, they would have clearly been careless. But they have taken steps to ensure the key was not obviously lying around. I accepted Mr H's evidence that the sub-contractors were trustworthy people, or at least H Ltd had no reason to doubt any of them. I also find that as far as Mr H was aware the house was vacant, and there was nothing in the house to steal in any event. He was not informed by the Applicants that they had placed any item in the house, and while the work had probably been completed by that time, because of the time of the year (it was

January) and because H Ltd appeared not to have received confirmation that the work had been assessed as finished yet by the insurance company, there was nothing that appeared to be required for him to do about the key. If some considerable time had passed since the work had been completed, and H Ltd had been notified, and H Ltd had not returned the key to the Applicants, or H Ltd knew that there were items in the house that could be stolen, then that might have been a breach of the duty, but not I think in the current circumstances. It is also, in my view, quite relevant that there is an unclear number of keys to the property, and no actual evidence that the key in the garage was the one that had been used to enter the property.

12. Because of my view that there is no breach of the duty of care, there is no need to discuss the further issues. The claim is dismissed.

Referee: M Wilson
Date: 18 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>.