



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2024] NZDT 16

APPLICANT P Ltd

RESPONDENT W Ltd

The Tribunal orders:

1. P Ltd's application is dismissed.

Reasons

2. P Ltd is the owner of a [car] used by a senior employee, NL. On 4 December 2021, NL parked the car at the car park at [a beach], in order to meet with a friend. While attending the meeting NL saw an employee of W Ltd clearing sand off a path using a leaf blower which raised a cloud of sand. W Ltd hold a contract to provide services and maintenance to the [Council].
3. NL says he raised concerns with the employee regarding the use of the blower so close to the car but was ignored. He says that after leaving the café where he met his friend, he found the car was covered with sand which, he says, has caused damage to the paintwork of the car necessitating the repainting of the car.
4. The procedural background of this matter needs to be understood. Initially NL made an application in his own name in March 2022. A hearing occurred before referee Brennan on 19 July 2022, after which she dismissed the application. The reasons for her decision were:
 - a. procedural in that NL did not have a proprietary interest in the car and, therefore, could not bring a claim under s 10 Disputes Tribunal Act 1988 (the Act); and
 - b. that the claim lacked merit as NL had not proven that the damage alleged justified the remedy sought, a complete repaint of the car.
5. In March 2022, an application was filed in P Ltd's name for the same damage. This application was heard by referee Cowey, on 2 November 2022. W Ltd did not appear due to the notice of hearing not being received. Referee Cowie's decision was that W Ltd was liable for the damage and made an order for the payment of \$30,000.
6. W Ltd applied for a rehearing, on the basis that it was unable to appear at the hearing, and because P Ltd's claim was effectively identical to the claim made in NL's name which was dismissed on its merits by referee Brennan.
7. On 31 July 2023, a rehearing-hearing was heard before referee Cowie. Her decision, issued the same day, was that a rehearing was necessary, as she had not been made aware of referee Brennan's findings, which potentially raised issues of *res judicata*.

Issues

8. To resolve this dispute, I need to consider:
 - a. Did referee Brennan's decision (the Decision) resolve the dispute with finality?

b. Has P Ltd's claim been made out?

Res Judicata

9. *Res Judicata*, which translates from Latin as “a thing judged” refers to a final decision on a dispute, the issuing of which bars any further claim about the same issues being brought. A final decision has two effects, firstly it estops (prevents) the parties from disputing any fact or issue established in the decision, raising an issue estoppel. Secondly, by finally determining the rights asserted by the parties in their claim or their defence, the decision merges those rights to produce the final outcome of the dispute. This extinguishes the prior rights and bars the parties from re-litigating the outcome.¹
10. The reasoning behind the doctrine is that litigation should be final (barring an appeal) and to protect the integrity and efficiency of the justice system.
11. The doctrine prevents a party from bringing a claim once that particular claim has been subjected to a final judgment by a Court or Tribunal of competent jurisdiction. For the doctrine to apply, the later claim must have the same cause of action (the legal and factual elements) as the earlier, decided claim, and must have the same, or closely related, parties. If these requirements are met the particular elements of the decision² are subject to an issue estoppel, which bars the later claim from being heard.
12. In *Salih v Almarzooqi* the Court of Appeal said:

In Spencer Bower and Handley: Res Judicata, the learned author summarised the requirements for establishing a res judicata:

A party setting up a res judicata as an estoppel against his opponent's claim or defence, or as the foundation of his own, must establish its constituent elements, namely that:

- (i) *the decision, whether domestic or foreign, was judicial in the relevant sense;*
 - (ii) *it was in fact pronounced;*
 - (iii) *the tribunal had jurisdiction over the parties and the subject matter;*
 - (iv) *the decision was:(a) final; (b) on the merits;*
 - (v) *it determined a question raised in the later litigation; and*
 - (vi) *the parties are the same or their privies...³.*
13. NL argued that an issue estoppel does not arise on two grounds:
 - a. fresh evidence of the circumstances in which the car was allegedly damaged, a witness statement from NL's friend, was produced after referee Brennan issued the Decision; and
 - b. referee Brennan commented earlier in the Decision that her findings did not affect P Ltd's rights.
 14. Regarding the first point, an issue estoppel is not affected by “new” evidence when that evidence could have been produced at the time the matter was first heard. This is because otherwise a party could use the process to perfect the inadequacies of their case. The situation

¹ This is known as merger in judgement, see *Blair v Curran* (1939) 62 CLR 464 at p 532

² Including factual and legal findings which lead to the final decision.

³ *Salih v Almarzooqi* [2023] NZCA 645 at [112],

would have been different if the evidence was unavailable at the first hearing, for instance if the witness was a stranger passing by who had volunteered their evidence after the hearing had occurred. NL could have produced his friend as a witness before Referee Brennan but did not do so.

15. Regarding the second point, I note Referee Brennan's comment, however this was made at the end of the section of the Decision where she made findings about NL's standing. It does not alter her substantive findings about the facts of the case. Furthermore, I cannot accept that the Referee had the jurisdictional power to set aside a fundamental doctrine, to re-vitalise a cause of action which was extinguished by a final finding, or to place a restriction on W Ltd's rights to not face the same claim twice.
16. In the current case I conclude that referee Brennan's Decision bars this claim. Considering the elements set out above:
 - a. the Tribunal is a competent judicial body;
 - b. the Decision was correctly sealed and issued;
 - c. the parties and subject matter of the Decision were within the Tribunal's jurisdiction;
 - d. the Decision was final and was on the merits of the claim;
 - e. the question resolved by referee Brennan, the nature of the alleged damage to the car and the remedy for that damage, is the same as has been raised in the current application; and
 - f. NL is a senior employee of P Ltd, and historically was a shareholder, leading me to conclude that he is a closely related party to P Ltd.
17. This being the case this application must be dismissed.

Is the claim made out?

18. While I have found that there was an issue estoppel barring the claim, I will nonetheless consider the substantive merits of the claim.
19. In effect the allegation made by NL and P Ltd is that the cloud of sand created by W Ltd's employee caused damage to the car which necessitates a complaint repaint.
20. Considering the facts, I note that:
 - a. NL's panelbeater gave evidence that beach sand is rough edged and may scour car paint if it comes into contact with a vehicle.
 - b. NL's friend, who appeared as a witness before me, estimated that the employee was 20 to 40 metres away from the car, although he also concluded that he was not expert at assessing distance, but said it was "*a number of car lengths*". NL disagreed with his friend's evidence saying that the employee was closer to the vehicle although he accepted it was several car lengths. I conclude that the distance was at least 5 metres.
 - c. The witness and NL described the leaf blower creating a cloud of sand over the car park area and the witness noted that the day was not particularly windy.
 - d. The model of leaf blower used by the employee was a Stihl BG 50, a relatively lightweight, low powered, domestic model. The evidence was that this was used as it was suitable for the job, and as the employee, who is now retired, was a man in his 70s. NL disagreed that the leaf blower was a low powered model but has presented no evidence of this. I accept W Ltd's evidence of the model used.
 - e. Sand grains are small and very light.
 - f. The photos provided by NL and P Ltd show sand deposited on the car.
21. Had the employee been directly beside the car with a higher powered blower I could accept that some damage may have occurred from the use of the blower, as the wind created by the blower could have propelled grains of sand with enough force to cause damage. However, the evidence is that the employee was 5 metres or more away from the car and that the blower was a low powered model. I accept that the sand deposited on the car is likely to have been the result of the employee using the blower. However, for sand, no matter how rough edged, to

cause damage would require sufficient wind to propel the individual grains with enough force that they would scour the paint. A sand cloud settling in light winds or still air, as was the case here, would not have caused damage.

22. P Ltd's claim is not proven and must be dismissed.

Referee: C D Boys

Date: 17 January 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>.