



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2014] NZDT 1346

APPLICANT **PG Limited**
(and
Counterclaim
Respondent)

RESPONDENT **KH Limited**
(and
Counterclaim
Applicant)

SECOND **JC Limited**
RESPONDENT

The Tribunal hereby orders:

1. The claim against KH Limited is dismissed.
2. JC Limited is to pay PG Limited the sum of \$8,336.11 on or before 14 November 2014.
3. KH Limited's counterclaim is dismissed.

Reasons

1. PG runs a lodge and caravan business in [village]. The insurance broker for PG is the second Respondent (JC) which placed business interruption insurance with KH for PG. In 2010 and 2011 PG explained to JC it required cover for loss of access if there was a bridge washout. [Village] is remote. Travellers to [village] are dependent on one road for access in and out.
2. Cover with KH gave PG cover for loss due to prevention of access. That cover was not absolute, but on terms. In particular losses need to result from damage '*within the vicinity*' of the lodge.
3. In 2012 that cover changed. This was because of a change to the policy wording for the prevention of access. This change was set out in the '*[Redacted] & KH Endorsement Feb 2012*' and advised by KH to JC. This change was made in February 2012 and would apply if PG renewed its insurance with KH. PG did renew its cover with KH. The new clause therefore applied from the date of that renewal – 29 October 2012. So, whereas before 29 October 2012 losses could be claimed as a result of damage '*within the vicinity*' of the lodge, from 29 October 2012 they could only be claimed as a result of damage '*within a 5 kilometre radius*' of the lodge.
4. In January 2013 access was blocked in [place 1]. This was 85 kilometres or so from PG's business. PG claimed via JC for losses. KH accepted that first claim and paid out \$9,447.29.

5. In September 2013, which is in the same insurance period, access was blocked at [place 2]. [Place 2] is around 150 kilometres from PG's business. PG claimed again for losses as it had done for the first claim. This claim was refused by KH. KH pointed out the change in cover. [Place 2] was more than 5 kilometres from PG's business.
6. PG wants KH to pay for the second claim, \$11,114.81. It says KH is estopped from denying cover having paid out on the first claim. PG also claims that sum from JC.
7. KH says the first claim was paid in error. It seeks recovery from PG of the \$9,477.29 paid.
8. The issues to decide are:
 - a. Is KH required to pay PG because it paid on a previous claim?
 - b. Did JC take reasonable care and skill to effect/renew PG's insurance and let PG know if it couldn't?
 - c. If not, would cover have been available? Would it have responded? Did PG suffer \$11,114.81 of loss?
 - d. Is KH's estopped from 'clawing back' the \$9,447.29 paid to PG?

Is KH required to pay PG because it paid on a previous claim?

9. KH is not required to pay PG because it paid out of a previous claim.
10. An estoppel may be created where there has been a clear representation (by statement or conduct) that is relied on to a party's detriment.
11. Although PG is understandably perplexed and frustrated by the change in approach between the two claims, I am satisfied this has not created an estoppel as I am not persuaded at any point KH has clearly represented it would not be bound by the 5 kilometre wording that did in fact apply. It is evident the first claim was paid out in error by KH. That of itself does not provide a basis for all subsequent claims to be met by KH. It does not create any implied agreement to accept further claims. Nor does the provision of a claim number by KH bind KH to having to accept further claims.

Did JC take reasonable care and skill to effect/renew PG's insurance and let PG know if it couldn't?

12. On balance I am not satisfied JC took reasonable care and skill to renew PG's insurance and let PG know if it couldn't.
13. Insurance Brokers need to work with reasonable care and skill (in terms of any contract or if the Consumer Guarantees Act 1993 applies). Here there is certainly a contractual basis for PG's claim against JC.
14. Mr N has explained that PG was sent notification of the change in wording in the renewal. I am not satisfied the "Business Plan Package" document JC referred to was actually sent to PG. That document refers to a 5 kilometre radius exclusion. The invoice and policy certificate PG did receive does not expressly refer to that 5 kilometre exception in the same terms but there is a reference to a 5 kilometre "contingency extension" although separate from the advice "This policy is subject to [Redacted] & KH Endorsement Feb 2012". However, I find that, in the circumstances of this case, given PG had so clearly been alive and concerned with the issue of access and had clearly conveyed that to JC that, once the clause had changed JC had an obligation to clearly appreciate the significance of the change and clearly explain that change to PG so that PG could have the chance to seek additional cover if it wasn't happy with the change. In this case, JC needed to clearly explain the change and implications to PG, and these references in the policy renewals were not sufficient to do that.
15. My impression is that Mr N had not adequately reviewed the [Redacted] & KH Endorsement Feb 2012 himself so as to be aware of the deletion of the old policy and the new 5 kilometre

limit. He says he had not looked at the particular wording. The first Mr N appears to have been clearly aware of the change is when KH emailed him on 8 October 2013 clearly pointing out the 5 kilometre limit now applying.

16. In the circumstances I find JC did not act with the required care and skill and is breach of its obligations to PG.

If not, would cover have been available? Would it have responded? Did PG suffer \$11,114.81 of loss?

17. On balance I consider there is greater chance than not that cover would have been available and would have responded. I apply a 25% reduction in the sum claimed to account for uncertainties.

18. Following a breach, damages for a loss of opportunity may be available if it can be shown that there was a real and substantial chance of the opportunity and not one that was merely speculative.

19. I am satisfied the figure of \$11,114.81 most probably represents PG's claimed loss. Certainly KH and JC did not persuade me the calculation is anything other than reasonable. Mrs T appears to have adopted the same template as the first claim which was accepted and has made deductions where appropriate.

20. I am satisfied that if Mr N had adequately explained the change in cover PG would have sought cover elsewhere.

21. Although PG is clearly of the view that having suffered the loss and having sought cover it should be paid for all of the loss suffered, it is not quite that straight forward.

22. In any insurance policy, cover is unlikely to be absolute. There will be thresholds to be met before a claim will be accepted and conditions that may apply. Here even under the 'old' wording PG would have been required to have proved damage occurred *'in the vicinity'*. When something could be said to be 'in the vicinity' is not clear. JC expressed a view to PG in November 2011 that it doubted a bridge 50 kilometres way would be in the vicinity. JC in that same email also noted Mr N was not aware of any other cover that would provide any greater protection than what PG had conveyed.

23. The fact that PG now has cover with [Insurance Company] does not really assist with what cover could have been available back in October 2012 before the KH policy renewed. I consider the most probable cover available would have been a vicinity type cover. The Tribunal can take into account evidence not strictly admissible. PG has referred to other companies offering vicinity type cover and other [village] businesses having claims honoured for [place 2] suggesting vicinity type cover was available back in October 2012 and interpreted fairly liberally.

24. There is of course an element of doubt as to the nature of any other excesses, conditions and exclusions that would have attached to any new policy. Further whether another insurer would have considered [place 2] *'within the vicinity'*.

25. In short, I am not satisfied that even had JC told PG of the issue in October 2012, PG would have obtained insurance that would have definitely responded to the claim now made. I think there was a greater chance than not that it would have. I put that chance at 75% allowing a 25% deduction for uncertainties. I therefore award \$8,336.11 to PG (75% of \$11,114.81). JC is to pay this as this loss occurred due to its failings detailed above.

Is KH's estopped from 'clawing back' the \$9,447.29 paid to PG?

26. I find KH is estopped from 'clawing back' the sum paid.

27. KH has taken the position that it is seeking repayment as PG has sought payment of the second claim.

28. I find this situation is akin to that in the *General Accident, Fire, and Life Assurance Corporation Ltd v National Bank of New Zealand Ltd* case I referred to at the hearing. In the circumstances, I am satisfied the length and nature of KH's inaction after discovering the mistake raises a valid estoppel. I dismiss KH's counterclaim.

Referee: J Costigan

Date: 31 October 2014



Information for Parties

Rehearings

On application of a party to the proceedings, the Disputes Tribunal may order a rehearing of the proceedings, on such terms as it thinks fit.

If you wish to apply for a rehearing, you can obtain an application form from any Tribunal office. The application must be lodged with the Tribunal that made the decision, within 28 days of the decision having been made, or within further time as the Tribunal may, on application, allow.

PLEASE NOTE: Being unhappy or dissatisfied with the decision is not a ground for a rehearing.

Ground for Appeal

You may appeal to the District Court only on the grounds that the proceedings were conducted by the Referee (or an inquiry was carried out by an Investigator) in a manner which was unfair to you and prejudicially affected the result of the proceedings.

If you wish to appeal, the Notice of Appeal may be obtained from any Tribunal office. The Notice must be filed at the office of which the Tribunal that made the decision, within 28 days of the decision having been made, or within such further time as a District Court Judge may, on application, allow.

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 of the Tribunal or the terms of the Settlement Approved by the Tribunal are not complied with, you should contact the Collections Unit of the District Court for assistance with enforcement.

Help and Further Information

If you would like any help or further information, please contact the Disputes Tribunal office at your nearest District Court. Court staff are there to help.

The Court telephone number may be found at the front of the telephone book, in the blue pages - Government Phone Listings - under "JUSTICE MINISTRY OF".