



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 743

APPLICANT **UQ**

APPLICANT **XQ**

RESPONDENT **B Ltd**

SECOND **BT**
RESPONDENT

The Tribunal orders:

- A. BT is added as Second Respondent.
- B. B Ltd, as the Second Respondent's insurer, is to pay UQ and XQ \$4,704.15 on or before 12 January 2024.

Reasons

1. On or about 22 October 2022, a collision between the cars belonging to the Applicants and the Second Respondent occurred. Both parties had insurance, and the Second Respondent was held liable for the damage. The Applicants' insurance company (C Ltd) took about 12 weeks to arrange a repair, during which time the Applicants hired a vehicle for transport. B Ltd, the insurer for the Second Respondent, settled with C Ltd under the provisions of a scheme known as "knock for knock", an arrangement between insurance companies, but this only applied to the repair costs. The rental costs were uninsured losses. C Ltd claimed those uninsured losses from B Ltd on behalf of the Applicants, but when B Ltd paid those losses they had not understood them to be uninsured losses. B Ltd deducted depreciation under the "knock for knock" scheme provisions for rental car charges, and did not pay some of the charges made to the Applicants by the rental car company. The Applicants filed a claim in the Disputes Tribunal.
2. This is a claim for uninsured losses incurred by the Applicants when hiring a rental car following the car collision with the Second Respondent, who was fully insured by B Ltd. The amount claimed is \$4,704.15.
3. The issues to be determined were as follows:
 - a. Is BT liable for the unpaid rental charges, namely the cost of insurance, airport fees and credit card charges, or in other words are losses recoverable that may not be direct but are consequential and foreseeable?
 - b. If so, what is the total that her insurance company must pay to the Applicants?

4. The claim was filed originally by the Applicants against B Ltd on the basis that it was B Ltd they had the dispute with. However B Ltd is not liable to pay unless their client is liable, and entitled to be indemnified by B Ltd. B Ltd confirmed today that BT was fully insured, and thus whatever BT was required to pay would be covered by B Ltd. However I considered it necessary to add BT as a Respondent, since if she is not found to be liable in the proceeding, B Ltd do not have any direct liability to the Applicants. BT was unavailable at the time of the hearing, but on the assurances of B Ltd that she was fully liable I considered it appropriate to add BT and continue in her absence. I also note that the Applicants and B Ltd both said that it would make no difference to BT, and B Ltd added that she would have nothing to add to hearing, it should not be necessary for her to attend, and she would expect B Ltd to get the issue resolved since it did not really concern her. I can see the points that are being made, and while I consider BT needs to be added, I agree that the hearing does not need to be adjourned to give her notice, in these circumstances. Under the Disputes Tribunal Act 1988 I can resolve a dispute in the absence of one or more of the parties.

Is BT liable for the unpaid rental charges, namely the cost of insurance, airport fees and credit card charges, or in other words are losses recoverable that may not be direct but are consequential and foreseeable?

5. When one person breaches their duty of care as a driver, they are liable for the costs of repair and other costs which are permitted to be claimed by the law of negligence.
6. The Applicants were charged an amount for the rental car while their car was being repaired. It took C Ltd an unusually long time to repair the vehicle. The Applicants insurance policy with C Ltd did not include a rental car benefit, so the Applicants' expenses for the rental were uninsured losses. However C Ltd asked B Ltd to pay the amount that it had cost the Applicants, which was \$13,543.70 for a rental car, to C Ltd. B Ltd only agreed to \$8,839.55, and paid that to C Ltd who then paid that amount to the Applicants. The Applicants therefore had a shortfall of \$4,704.15.
7. At some point B Ltd became aware that the claim for the rental car was for uninsured losses. I was advised in the hearing that when two insurance companies agree under the "knock for knock" scheme about rental car expenses, one company will pay the other the amount they agree is appropriate less an amount for depreciation. Depreciation had been deducted in this case in the sum of \$1,877.22. Ms L for B Ltd had already conceded that this sum should not have been deducted and should be paid to the Applicants, but at the time of the hearing B Ltd had not done so. This amount should be paid as part of the current order.
8. Ms L went on to say that the reason B Ltd did not think it appropriate to pay for the cost of the credit card fees, the airport fees and the insurance for the rental car, (amounting to a total of \$2,826.93) was because these were consequential losses, or in other words were not direct losses. She said that this was the test in the law of negligence that B Ltd applied in determining what costs were appropriate to pay out in such cases.
9. I am not able to agree with Ms L that this is the correct measure. In the law of tort, of which negligence is an example, generally, damages are awarded in the amount required to put the person suffering a loss because of the tortious behaviour back in the position they would have been in had the tort not been committed. This is subject to a claimant's duty to mitigate their loss. Considerations when considering the breach of the duty of care, that is, remoteness and foreseeability, are also relevant. Remoteness operates, in large part, on the principle as to whether it is fair to award the damages claimed for the particular loss suffered. The question for a court is whether a person breaching their duty of care should be liable for every single consequence of the breach or if not where is the line beyond which liability is not imposed, for example, because it may be out of proportion to the wrong that created the liability in the first place.
10. One approach is that direct consequences are recoverable. This however has been overtaken in the last several decades by the Courts considering foreseeability as being the preferable "dividing line". "Direct losses" might exclude some things which can be readily foreseen and

include some things which are not, and thus foreseeability is seen as a more fair measure of recoverable loss by modern courts.

11. A loss may be too remote if it is not sufficiently proximate to the cause of the damage. In this case the rental charge is a normal and foreseeable aspect of potential liability for an innocent party in a collision. It is often catered for in insurance, for example, as cover available for an additional premium, which in my view underscores its foreseeability in practice. The costs of a rental however must be said to be the actual costs. If the losses are not insured then it is foreseeable that credit card fees may be payable when a person is obliged to rent a car. It is also foreseeable that driving a rental without insurance would be unwise and so the insurance for the vehicle is both proximate to the damage caused and foreseeable. Finally it appears the airport charges which were only charged for cars picked up from [City] is an unavoidable charge that is in effect part of the cost of the rental. In my view all these are payable in the current circumstances because they were foreseeable, are not reasonably mitigated (or at least there was no evidence they could have been avoided) and arise from or are proximate to the collision. For example, it would be unreasonable to expect UQ and XQ to drive a rental car without insurance, but if there had been evidence that they had a cheaper option, I might well have reduced the amount they could claim, but on the basis that they had not sufficiently mitigated their loss.
12. I have some doubts too even if applying the “direct and not consequential” loss analysis applied by B Ltd, that it was correct to exclude these charges, though I do not need to decide this. All appear to be direct losses caused by the collision, in effect, because they are all part of the cost of the rental, unless they could have been mitigated.

If so, what is the total that her insurance company must pay to the Applicants?

13. It may seem artificial to non-lawyers, but the discussion above is about the loss that BT is liable for, having breached her duty of care. B Ltd have a responsibility to her, as B Ltd submitted, to indemnify her fully under her policy. B Ltd therefore are obliged to pay UQ and XQ the amount claimed \$4,704.15, as the remaining amount required to be paid by BT in damages.

Referee: M Wilson
Date: 8 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>.