



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2015] NZDT 1465

APPLICANT **FD**

RESPONDENT **LD Limited**

SECOND **WJ Limited**
RESPONDENT

The Tribunal hereby orders:

The claim is dismissed.

Reasons:

1. On 16 October 2013, FD purchased a truck cab and chassis from LD Ltd (LD), and immediately converted it into a motor home for private use. The purchase included mechanical breakdown insurance (MBI), for which FD paid an extra \$1,790.00. However, LD was not authorised by the insurer, WJ Limited (WJ), to issue MBI for vehicles over 6,000 kg. In June 2014, when WJ discovered that the vehicle was 7,500 kg, it cancelled the policy and refunded the premium. In December 2014, the vehicle's ABS control unit failed, and was replaced a few months later at a cost of \$3,474.60.
2. Early this year, FD made a claim against LD in the Motor Vehicle Disputes Tribunal (MVDT) for misrepresenting both the mileage of the vehicle, due to an altered odometer, and LD's ability to provide MBI cover. The MVDT's decision dated 4 March 2015 awarded FD \$10,000 for the altered odometer. However, the MVDT rejected the claim relating to the MBI cover, as it was not satisfied that FD had been misled by LD's assurance that WJ had approved MBI cover for the truck. The reason given was that FD was aware that LD had a dispensation limit of only 6,000 kg, and a reasonable person knowing this would have sought WJ's confirmation rather than relying on LD's assurance that it had obtained cover.
3. FD now claims \$1,479.60 against both LD and WJ by way of damages for breach of the Consumer Guarantees Act 1993 (CGA). This sum represents the cost of the ABS replacement less the premium refund and the \$250.00 policy excess, plus his \$45.00 filing fee.
4. The issues to be determined are:
 - a) Does this dispute cover issues already determined by the Motor Vehicle Disputes Tribunal? Does the Disputes Tribunal have jurisdiction to hear this claim?

- b) Did LD have apparent authority to act on WJ's behalf in approving the insurance?
- c) Did LD/WJ take reasonable care in supplying MBI services?
- d) If not, has FD suffered any loss as a consequence?

**Does this dispute cover issues already determined by the Motor Vehicle Disputes Tribunal?
Does the Disputes Tribunal have jurisdiction to hear this claim?**

- 5. FD argues that LD failed in its duty under CGA s 28 to take reasonable care in supplying MBI services, and that the MBI policy was not fit for its particular purpose under s 29. He also argues that WJ is liable for the actions of LD since LD was acting as WJ's agent.
- 6. However, FD has already had a claim against LD heard by the MVDT relating to the MBI Insurance. Section 17(2) of the Disputes Tribunals Act 1988 provides for the situation where a claim is lodged with the Disputes Tribunal after proceedings have already commenced before another tribunal. In this situation, the issues in dispute in the earlier proceedings (whether as shown in the initial claim or emerging in the course of the hearing) cannot be the subject of proceedings between the same parties in the Disputes Tribunal.
- 7. FD argued that the MVDT claim was based on the Fair Trading Act 1986, whereas his present claim is based on the CGA. However, the issues raised are essentially the same or at least similar, and FD could have raised the CGA in the MVDT proceedings. It is undesirable for the same matter to be litigated more than once if the parties have had a fair opportunity to put their case. Therefore, even if I technically have jurisdiction to hear FD's claim against LD, which I doubt, I find it appropriate to dismiss the claim on the basis that the matter should not be relitigated.
- 8. This reasoning does not apply to FD's claim against WJ, since WJ was not a party to the earlier proceedings, and the MVDT can only deal with claims where one of the parties is a motor vehicle dealer.

Did LD have apparent authority to act on WJ's behalf in approving the insurance?

- 9. I find that although LD was not actually authorised by WJ to approve cover for vehicles over 6,000 kg, LD had apparent authority to do so. This is because LD had WJ's authority to make representations as to the extent of its dispensation. On this basis, LD was acting within its authority in making representations concerning the extent of its authority to act on WJ's behalf.

Did LD/WJ take reasonable care in supplying MBI services?

- 10. Since provision of mechanical breakdown insurance is a service ordinarily acquired for personal, domestic, or household use or consumption, the Consumer Guarantees Act 1993 (CGA) applies.
- 11. Section 28 of the CGA provides that where services are supplied to a consumer, there is a guarantee that the service will be carried out with reasonable care and skill. Where part of the service involves providing advice about the service, the advice must itself be provided with reasonable care and skill, even if there is no extra charge for that advice. Section 29 of the CGA provides that services must be reasonably fit for any purpose the consumer makes known to the supplier before the contract is formed, unless the circumstances show that the consumer does not rely on the supplier's skill or judgment, or it would be unreasonable for the consumer to do so.
- 12. Based on the evidence before me, WJ through its agent LD failed to take adequate care in supplying the MBI services, and failed to provide an MBI policy fit for FD's purposes. FD has already received a refund of his premium, but is also entitled under s 32(c) of the CGA to recover damages for reasonably foreseeable consequential losses.

Has FD suffered any loss as a consequence?

13. Since I have found that LD acted with apparent authority from WJ in approving the insurance, it follows that WJ was bound by the insurance contract until it was revoked, and would have been obliged to cover any breakdown that occurred before revocation. However, the MBI contract, under the heading "Important Notices", allowed WJ to cancel the policy at any time and refund the premium. Since WJ was free to take this step without needing any reason, I find that FD's loss of cover for the ABS failure was caused not by the actions of LD as WJ's agent, but by WJ's free choice to cancel as permitted under the contract. Therefore it cannot be recovered as a consequential loss.
14. FD argued that he had lost the opportunity to obtain an alternative MBI policy, but WJ gave evidence that MBI insurers do sell direct to the public, not only through dealers at the time of purchase. Also, it is uncertain whether FD would have found another insurer willing to offer MBI in any case. If he had, the hypothetical insurer would be quite likely to have revoked the insurance once it emerged that the mileage was much higher than represented. (It needs to be noted that LD was not acting on behalf of WJ or any other insurer in selling a vehicle with an altered odometer.)
15. Therefore the claim must be dismissed. Although FD must bear the cost of the ABS repairs without the benefit of MBI, it should be noted that he has received \$10,000.00 from LD for the altered odometer, which should go some way to addressing the repairs needed for a higher mileage vehicle. If he had also been entitled to damages for the loss of MBI cover, there would potentially have been an issue of double recovery.

Referee: E Paton-Simpson

Date: 10 December 2015

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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 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, and 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: www.justice.govt.nz/fines/civil-debt

Help and Further Information

Further information and contact details are available on our website:

www.justice.govt.nz/tribunals/disputes-tribunal.