



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2015] NZDT 1491

APPLICANT OD Ltd

RESPONDENT TM Ltd

The Tribunal hereby orders:

TM Ltd is to pay the sum of \$10,666.55 to OD Ltd on or before 12 February 2015.

Reasons:

1. On 11 September 2013, OD Ltd (OD Ltd) ordered two consignments of timber from TM Ltd (TM Ltd) for a total of 1300 metres of Kwila decking. One of the consignments was for OD Ltd, to be used for a building project at the house of director OD Ltd, and the other was ordered on behalf of a friend, BS, for a building project at his house. The wood was not needed immediately but QI, the general manager of TM Ltd, advised OD Ltd that prices were about to increase. To avoid the price increase, OD Ltd arranged to buy the timber on account and have it stored by TM Ltd until needed.
2. OD Ltd paid \$10,666.55 for both consignments on 21 October 2013, and BS paid OD Ltd \$6,451.34 for his order on 20 January 2014.
3. Around 8 September 2014, OD Ltd rang QI to tell him he would be picking up the timber over the next few days. However, on 10 September 2014, QI sent an email saying that OD Ltd had picked up the timber some time in October 2013.
4. OD Ltd denies having collected the timber, and now claims for the supply of the timber.
5. The issues to be determined are:
 - a) Was the timber collected by OD Ltd?
 - b) If not, had property in the timber passed to OD Ltd?
 - c) If property in the timber had passed, did TM Ltd take all reasonable precautions to avoid the loss of OD Ltd's timber?
 - d) What remedy, if any, should be granted to OD Ltd?

Was the timber collected by OD Ltd?

6. QI and his warehouse supervisor [Employee at TM Ltd] recalled that two men in high-visibility gear driving a truck marked with "OD Ltd" collected the timber. TM Ltd sales support employee [Employee at TM Ltd] stated that the timber was collected during the week starting Monday 21

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October 2013, and that he wrote "collected October" on the dockets as part of his duties filing signed dockets.

7. However, OD Ltd questioned the accuracy of the witnesses' recollection and denied that anyone from OD Ltd picked up the timber. It is impossible to be sure what happened to the timber, whether it was collected fraudulently by a third party or lost due to a warehouse mistake or some other scenario. However, I am satisfied on the balance of probabilities that the timber was not collected by OD Ltd for reasons including the following:
- a) OD Ltd and BS both denied collecting the timber, and their building projects have been delayed by the lack of the timber.
 - b) The witnesses' recollections were vague as to time, and they may have confused memories from a OD Ltd order the previous year.
 - c) OD Ltd is a small family company, and BS supported OD Ltd's evidence that only OD Ltd and his uncle ever drove the truck.
 - d) The witnesses did not recognise the men in the high visibility vests, though QI had dealt with OD Ltd for many years and said he could probably recognise his uncle.
 - e) OD Ltd produced records showing that the only OD Ltd truck capable of carrying this load had not been to TM Ltd during the relevant time period.
 - f) OD Ltd gave evidence that his truck would never pick up timber without letting QI know beforehand, to allow time for the timber to be made accessible.
 - g) The signature on the delivery docket is unreadable and does not match that of any OD Ltd employee. (The other docket was unsigned.)
 - h) The delivery dockets were undated and there is insufficient evidence to support [Employee at TM Ltd]'s notation "collected October".

If not, had property in the timber passed to OD Ltd?

8. If the property in the timber remained with TM Ltd and had not passed to OD Ltd, then TM Ltd would bear the risk of the loss of the timber, and would be liable for breach of contract for failing to deliver the timber.
9. The Sale of Goods Act 1908, s 20 Rule 5(1) provides:
- "Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."
10. QI gave evidence that the timber for OD Ltd was parcelled up and stored in the same area as other orders, with a label on the butt end of the timber identifying it as being set aside for OD Ltd. The packet number cross-matched to the invoice number.
11. The guidelines set out by the courts on Rule 5 do not provide a clear answer as to whether TM Ltd's actions in this case constituted unconditional appropriation with OD Ltd's assent. The courts have reached opposite conclusions in somewhat similar cases and the facts of this case are different in significant respects from the facts of other cases the courts have decided. However it is not necessary to determine this issue due to my finding on the next issue.

If property in the timber had passed, did TM Ltd take all reasonable precautions to avoid the loss of OD Ltd's timber?

12. If the property in the timber had passed to OD Ltd, then TM Ltd was a bailee of the timber. As a bailee, TM Ltd had a duty of care to look after the timber, and bears the onus of proving that it took all reasonable precautions to prevent the loss of the timber.

13. For reasons including the following, I find that TM Ltd has failed to prove that it took all reasonable precautions:

- There was no name recorded on the delivery docket, and no measures to check identification, even though according to the witnesses' recollection the order was collected by men they did not recognise rather than the men they knew from the small family company.
- There was no evidence that anyone called before the truck arrived, as OD Ltd said he always did.
- There was no date recorded on the delivery docket.
- The truck was identified only by letters on its side, and it would not be unrealistic for fraudsters to apply temporary signage to a truck in order to steal commodity goods worth many thousands of dollars.
- In the circumstances, it would have been reasonable to call OD Ltd to verify that the men collecting the order had authority to do so.

What remedy, if any, should be granted to OD Ltd?

14. TM Ltd must bear the responsibility for the loss of the timber, either because the timber was still TM Ltd's property, or alternatively because the timber was OD Ltd's property and TM Ltd failed to take reasonable precautions to prevent its loss.
15. The Tribunal can make an order for a party to deliver "specific property" to another party (Disputes Tribunals Act 1988 s 19(1)(c)) but the specific timber set aside for OD Ltd is lost and can no longer be delivered. Therefore I find that TM Ltd must refund the money paid by OD Ltd for the timber.

Referee: E Paton-Simpson
Date: 29 January 2015



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".