IN THE DISPUTES TRIBUNAL **[2015] NZDT 1049**

BETWEEN	**FB** APPLICANT
AND	**TY** RESPONDENT
AND	**TYY** RESPONDENT'S INSURER
Date of Order:	10/12/2015
Referee:	Referee: Paton Simpson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim is dismissed

Facts

[1] On 16 October 2013, FB purchased a 2007 Isuzu NQR75-2 7500GVM truck cab and chassis from TY 2004 Ltd (TY), and immediately converted it into a motor home for private use. The purchase included Autosure mechanical breakdown insurance (MBI), for which FB paid an extra $1,790.00. However, TY was not authorised by the insurer, TYY New Zealand Limited (TYY), to issue MBI for vehicles over 6,000 kg. In June 2014, when TYY 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, FB made a claim against TY in the Motor Vehicle Disputes Tribunal (MVDT) for misrepresenting both the mileage of the vehicle, due to an altered odometer, and TY's ability to provide MBI cover. The MVDT's decision dated 4 March 2015 awarded FB $10,000 for the altered odometer. However, the MVDT rejected the claim relating to the MBI cover, as it was not satisfied that FB had been misled by TY's assurance that TYY had approved MBI cover for the truck. The reason given was that FB was aware that TY had a dispensation limit of only 6,000 kg, and a reasonable person knowing this would have sought TYY's confirmation rather than relying on TY's assurance that it had obtained cover.

[3] FB now claims $1,479.60 against both TY and TYY 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.

Issues

(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 TY have apparent authority to act on TYY's behalf in approving the insurance?

(c) Did TY/TYY take reasonable care in supplying MBI services?

(d) If not, has FB suffered any loss as a consequence?

Issue to be Determined

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

[4] FB argues that TY 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 TYY is liable for the actions of TY since TY was acting as TYY's agent.

[5] However, FB has already had a claim against TY 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.

[6] FB 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 FB 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 FB's claim against TY, which I doubt, I find it appropriate to dismiss the claim on the basis that the matter should not be relitigated.

[7] This reasoning does not apply to FB's claim against TYY, since TYY 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 TY have apparent authority to act on TYY's behalf in approving the insurance?

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

Did TY/TYY take reasonable care in supplying MBI services?

[9] 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.

[10] 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.

[11] Based on the evidence before me, TYY through its agent TY failed to take adequate care in supplying the MBI services and failed to provide an MBI policy fit for FB's purposes. FB 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 FB suffered any loss as a consequence?

[12] Since I have found that TY acted with apparent authority from TYY in approving the insurance, it follows that TYY 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 Autosure contract, under the heading "Important Notices", allowed TYY to cancel the policy at any time and refund the premium. Since TYY was free to take this step without needing any reason, I find that FB's loss of cover for the ABS failure was caused not by the actions of TY as TYY's agent, but by TYY's free choice to cancel as permitted under the contract. Therefore, it cannot be recovered as a consequential loss.

[13] FB argued that he had lost the opportunity to obtain an alternative MBI policy, but TYY 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 FB 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 TY was not acting on behalf of TYY or any other insurer in selling a vehicle with an altered odometer.)

[14] Therefore the claim must be dismissed. Although FB 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 TY 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.