IN THE DISPUTES TRIBUNAL **[2011] NZDT 162**

BETWEEN	**ADM LTD**
	APPLICANT
AND	**ADN**
	SECOND APPLICANT
AND	**ZWN**
	RESPONDENT
AND	**ZWM CITY COUNCIL**
	SECOND RESPONDENT

Date of Order:	14 January 2011
Referee:	Referee A Davidson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Respondent, ZWN, must pay the Applicant, ADM Ltd, $1,125.00 (incl GST) within seven days of the date of this order. ZWN's counterclaim is dismissed.

Facts

[1] ZWN hired a truck and an excavator from ADM Ltd on 10 July 2010. While driving the truck, ZWN collided with a power pole. ZWN returned the truck and excavator on 12 July 2010. ADM Ltd has repaired the truck and is claiming for the excess under its terms and conditions. ZWN claims that ADM Ltd's terms and conditions are misleading and that he did not understand that third party damage was excluded when he entered the contract. ZWN has counterclaimed for the excess that ADM Ltd wishes him to pay, and for the costs he has incurred in relation to the power pole.

Law

[2] The law governing this claim is the law of contract and the Fair Trading Act 1986.

Decision

[3] ZWN agreed to ADM Ltd's Hire & Sales Contract Terms and Conditions (the "Agreement") when hiring the truck and excavator. A hirer's liability for damage to hired equipment is specified in clauses 7.1 and 7.2 of the Agreement:

> 7.1. Subject to clause 10 (Insurance – Damage Waiver on Hire), in the case of hired equipment, the Hirer is responsible for any loss or damage to the equipment from the time the Hirer takes possession of the equipment until it is returned to the Owner's possession ..."
>
> 7.2. In the case of damage to the equipment, however caused, the Hirer shall be responsible for and shall indemnify the owner for the full cost of all repairs to restore the equipment to the condition it was in at the time of hire.

[4] I find that between them these two clauses make it quite clear that, barring other clauses, the hirer is responsible for any damage that may occur to the hired equipment during

the term of the hire. These clauses restrict themselves to addressing the hirer's liability in relation to the equipment only. There is no reference to the hirer's liability to third parties, I assume because the drafter presumed that to be a matter between the hirer and any such third party.

[5] This basic position as to liability is then supplemented by clauses 10.1 and 10.5 regarding ADM Ltd's damage waiver and excess policy respectively:

> 10.1. If the Hirer has paid the Damage Waiver the Owner will waive the Hirer's liability (in terms of clause 7) for accidental damage ...
>
> 10.5. Excess: All claims are subject to an excess charge of $1,000 plus GST for all registered rolling plant (motor vehicles) ...

[6] The effect of these clauses is that should the hirer pay the "damage waiver", the default liability position under clauses 7.1 and 7.2 is altered such that, rather than being liable for all damage to the hired equipment, the hirer is only liable for the first $1,000.00 (plus GST) of damage. When hiring the truck and excavator, ZWN opted to pay for ADM Ltd damage waiver and as such under his contract with ADM Ltd he is not liable for any costs to repair the truck beyond $1,000.00 (plus GST).

[7] ADN argued during the hearing that clauses 10.1 and 10.5 in relation to the damage waiver were contradictory, and accordingly that ZWN should not be required to pay the excess in relation to the damage to the truck. Further, ADN argued that ZWN was not informed at the time of hire that the damage waiver did not include any third party cover; that the terms of the contract are confusing and misleading; that ZWN was not told to read the contract while at the counter; that other hire companies explicitly exclude third party damage in their agreements, and that ZWN was not asked if he had insurance cover for damage to third party property. ADN claimed that ADM Ltd's conduct amounted to a breach of the Fair Trading Act 1986, misleading ZWN as to the scope of the cover he would receive under the "damage waiver" and not disclosing gaps in cover under the damage waiver. On this basis, ADN argued that the ZWN should be reimbursed for the costs incurred by them in relation to damage to third party property.

[8] I find that clauses 10.1 and 10.5 are complimentary, rather than contradictory as argued by ADN. Insurance arrangements typically have an excess component and most people are familiar with this concept from their household or vehicle insurance. In this case, the "damage waiver" expressed in clause 10.1 is effectively the insurance and clause 10.5 the excess. This is the straightforward and obvious meaning and intent of these clauses. The meaning of these clauses might be further clarified by making clause 10.1 explicitly subject to clause 10.5 but doing so is not strictly necessary to give the clauses effect.

[9] ADN was unable to refer to any specific sections of the Fair Trading Act 1986 that she believes ADM Ltd may have breached. Misleading and deceptive conduct is addressed in ss 9 – 12 of the Act. The Tribunal does not have the jurisdiction to consider claims under s 9 and as ADM Ltd provided ZWN with a service the most likely section would appear to be s 11, misleading conduct in relation to services, which provides:

> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

[10] I find that ADM Ltd has not engaged in conduct liable to mislead the public in relation to its hire services or the damage waiver it offers. ADM Ltd made no claims to ZWN, either while he was at the counter or in advertising, in relation to its damage waiver. ZWN was offered the opportunity to take out the damage waiver and its extent is described in the terms and conditions themselves. ZWN was given the opportunity to review the terms and conditions, which he accepted in due course. At no point in the course of the transaction did ADM Ltd suggest that the damage waiver extended to third party damage; ZWN's view as to the scope of the damage waiver was a view that he came to by himself. The damage waiver to which ZWN agreed related only to ZWN's liability for damage to ADM Ltd's equipment and the agreement said as much.

[11] As noted above, ADN argued that ZWN was not informed at the time of hire that the damage waiver did not include any third party cover, that ZWN was not told to read the contract while at the counter and that ZWN was not asked if he had insurance cover for damage to third party property. I accept that ADM Ltd may not have done these things but at the same time find that ADM Ltd was not obliged to. To a certain extent, adults must be

trusted to look after their own interests. While it certainly would have been helpful and good customer service for ADM Ltd to make such enquiries or provide ZWN with such information, I find that there was no legal obligation to do so. To impose such an obligation would be overly paternalistic. All the information that ZWN needed to understand the extent of coverage offered by the damage waiver was provided to him at the time he hired the truck and excavator.

[12] ADN also argued that the terms of the contract were confusing and misleading, and that another hire company, KD Ltd, includes a clause in its contract that makes it clear that third party liability does not fall within the insurance offered. That is to say, KD Ltd takes the same position as ADM Ltd on third party liability but takes the extra step of drawing this to the customer's attention in its contract. It seems eminently sensible from a defensive drafting and customer relations perspective for ADM Ltd to include, as KD Ltd already does, an explicit provision bringing the absence of third party cover to hirers' attention. However, I find that not having such an explicit provision does not, in itself, amount to misleading conduct. I find that the relevant contract terms themselves are not unduly confusing. The entire agreement is drafted in a small font to fit onto a single page, the relevant clauses are spread over two sections, and the contract terms are not written in "plain English". This, however, is common to almost all contracts and I find that a contract cannot be misleading simply because it is drafted like a contract. I accept that there may be some social pressure when standing at the hire counter at the front of a queue of people not to spend too long reading the terms and conditions, but fundamentally the choice of whether or not to take the time to read and understand the terms of the contract rested with ZWN and he chose to sign. It would appear to me that it was not the terms of the contract that were misleading but rather that ZWN had formed an impression of what the damage waiver may cover based on his understanding of what other types of insurance typically cover, and that nothing in the contract alerted him to this misapprehension while reading it at the counter.

[13] In a related point, ADN argued that the reference to a "third person" in clause 11.3 was confusing and contributed to the impression that third party liability was included within ADM Ltd's damage waiver. I cannot agree with ADN. Clause 11.3 is quite clear: it is in fact an indemnity in favour of ADM Ltd, making it plain that should ADM Ltd somehow become

liable to a third person in relation to the hire, the hirer will indemnify ADM Ltd in relation to such liability. I accept that a person skimming through the contract may notice a term such as "third person" and, without reading more carefully, simply form a view of that clause's meaning which supported their preconceptions. Just because someone may do that, however, does not make it an acceptable form of contractual interpretation. Any person that skims a clause such that they form a mistaken view does so at their own risk. In the absence of some other factor, no such mistaken view can be given precedence over the actual meaning of such a clause.

[14] ADN noted that rental car companies such as PT Ltd include third party cover in their insurance. I accept this may be the case but the extent of any given supplier's insurance is a matter of agreement between that supplier and its customers. In the case of rental car companies, it may be that as their businesses relate only to rental cars, and third party car insurance is readily available, that it is commercially straight forward for such companies to offer third party insurance. I note that ADM Ltd rents a wide range of equipment and that its competitor KD Ltd also does not offer third party insurance.

[15] ADN noted that she was unable to find an insurer that would offer third party cover for rented vehicles. I accept ADN's evidence on this but find that whether or not such insurance is available is not relevant to whether or not ADM Ltd misled or deceived ZWN in relation to its damage waiver.

[16] When preparing for the hearing, ADN contacted numerous ADM Ltd offices and asked each whether she would need to get her own personal insurance for a tip truck and whether she would be covered if she collided with another vehicle. The responses received show a concerning degree of uncertainty and misunderstanding amongst ADM Ltd's staff. That discovery is certainly something that ADM Ltd will need to address to avoid liability for misleading customers in the future in relation to the coverage of its damage waiver. In the present case, ADM Ltd staff did not actually make any statements regarding the extent of coverage under the damage waiver nor was any enquiry along those lines made by ZWN at the time and so it cannot be said that ZWN was misled by ADM Ltd's staff.

[17] ADN presented a letter regarding this matter from the Commerce Commission dated 6 October 2010. ADN argued that this letter supported her claim that ADM Ltd's conduct had breached the Fair Trading Act 1986. In its letter, the Commerce Commission makes no claim that ADM Ltd breached the Fair Trading Act 1986, stating only that "the information may raise issues under the Fair Trading Act 1986". The Commerce Commission made no finding, undertook no investigation, and made a non-committal statement based on only one party's evidence. Further, the letter was not written by one of the Commerce Commission's legal staff but rather by a "Contact Centre Advisor". Most unhelpfully, the Commerce Commission's letter does not even state to which of the many provisions of the Fair Trading Act 1986 ADM Ltd's conduct "may" relate. On this basis, I am unable to agree with ADN's claim that the Commerce Commission letter provides any support for her argument that ADM Ltd's conduct breached the Fair Trading Act 1986.

[18] ADN also presented a two-page document regarding fine print produced by the Commerce Commission and dated August 2010. Reviewing that document during the hearing, it became clear that it was specifically directed at "fine print" in advertising. Reading through that document again, it is clear that this is the case. Most unhelpfully, the Commerce Commission again made no effort to tie the advice in its document to the Fair Trading Act 1986 so an independent assessment of the applicable provisions could easily be made. I find that the subject matter the Commerce Commission document seeks to address is advertising where certain statements made in advertising are then subject to fine print elsewhere, which materially changes the meaning of the advertising statements. In the present claim, there is no advertising and, while the text of the contract is definitely in a small font, this is not what the Commerce Commission document is referring to. This is not a case where a sweeping statement is then qualified by fine print to the customer's disadvantage. Instead, this is a case where a narrow statement regarding liability is made in a contract and no accompanying statement made as to what liability may fall outside the narrow statement. On this basis, I find that the Commerce Commission document regarding fine print is not relevant to this claim.

[19] On the basis of the foregoing, I find that pursuant to clause 10.5 of its terms and conditions, ADM Ltd is entitled to recover its excess of $1,000.00 (plus GST). I find that

ZWN was not misled or deceived by either the conduct of ADM Ltd's staff or the drafting of its terms and conditions, and accordingly that his counterclaim must be dismissed.