MINISTRY OF JUSTICE
Tāhū o te Ture

(Disputes Tribunals Act 1988)

ORDER OF DISPUTES TRIBUNAL

District Court: Wellington

Case number: CIV-2006-085-001490

APPLICANT Glen Williams
74 Kelburn Parade
Kelburn
Wellington

RESPONDENT (1) The Patter Ltd
PO Box 77-061
Mt Albert
Auckland

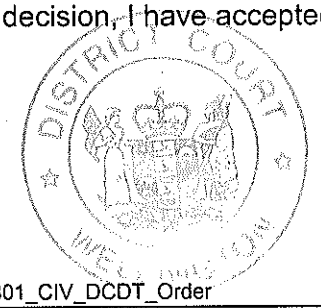
RESPONDENT (2) International Management Group Ltd
Level 14
263 Clarance Street
Sydney, NSW, Australia

The Tribunal hereby orders the second respondent IMG Ltd to pay the applicant the sum of $100.00. The amount is to be paid directly to him by 10 August 2007.

1. The applicant Mr Williams is claiming a proportion of his entry fee for the Taupo Ironman 2006 event on the basis that one or the other of the respondents breached the Consumer Guarantees Act provision that services are to be supplied with reasonable care and skill.

2. The respondents collectively dispute the applicability of the Consumer Guarantees Act to such an event. However, they also say that the event was well planned and managed and did not breach the reasonable care and skill guarantee. They point to the conditions of entry clause 21 that states that the entry fee is non–refundable in the event of a race cancellation due to conditions, including but not limited to, the weather beyond the control of Ironman New Zealand. Jane Patterson for the first respondent also denies that her company can have any liability to Mr Williams as her company is contracted to the owner of the event and was not the decisionmaker about the running or not of the event on the day. The decision on the day was to eliminate the swim section and reduce the cycle and run to half the planned distance due to the weather conditions.

3. As a preliminary matter I accept that Mr Williams can have no claim against The Patter under contract or the Consumer Guarantees Act ("CGA"). The entry makes it clear that the event organizer is Ironman New Zealand Ltd. I have been told that the second respondent, International Management Group Ltd is the owner of the event and although this position has not been established by reference to the ownership of Ironman New Zealand Ltd at the applicable time, for the purposes of this decision, I have accepted this position.



4. While the Consumer Guarantees Act may apply when there is no contract between the supplier and the consumer, the services provided by The Patter, event management, are not the type of service that is ordinarily acquired (by a consumer) for 'personal, domestic or household use or consumption'.

5. I have formed the view that the Consumer Guarantees Act does apply to the event. Mr Williams is within the definition of services covered by the CGA on the basis his entry to the event was for his personal benefit and the event itself is within the definition of services under the Act, being either a facility or benefit supplied by a service provider.

6. Following from this, his claim that the entry conditions are a breach of section 13 (i) of the Fair Trading Act ("FTA") by purporting to contract out of any liability is established. Under section 43(4) of the CGA it is an offence to purport to contract out of any provision of the CGA. I refer to clauses 16 & 17 of the entry conditions and as raised by Mr Williams, section 43 of the Consumer Guarantees Act that does not permit contracting out of the Act. However, although I agree with him on this point, I have allowed only a token amount of $100.00 as compensation for the breach. There was not a direct financial loss associated with that breach and it is not the main thrust of his claim although the position taken by the respondents about this has clearly been frustrating. If the respondents had merely misunderstood the New Zealand legislation by attempting to contract out, I probably would not have bothered with awarding the compensation but, because of the persistent expression of that view coupled with the adverse consequences imposed on Mr Williams because of his challenge, I have decided the breach should be recognized. The responses, from the The Patter, IMG Ltd and Ironman NZ Ltd and the WTC, have also included banning him from Ironman and Triathlon events ostensibly due to his 'breach of the rules' in claiming a partial refund and/or by bringing the safety of the event into question by questioning the decisions made through the Disputes Tribunal.

7. The applicability of the Act does not invalidate the conditions of entry except to the extent that if there is conflict between a term of the contract and the Consumer Guarantees Act, the Act prevails. It does not invalidate that clause that state there is no refund if there is cancellation due to weather conditions but conversely, the clauses that exempt the organizers from any legal liability are ineffective in respect of the guarantee that services are to be provided with reasonable care and skill.

8. The thrust of Mr Williams' complaint is that he believes there was insufficient contingency planning to deal with the adverse weather conditions that occurred on the day. He believes that the inadequacy of the contingency plan meant that decisions made on the day were not made as well as they could have been. He also says the lack of a good contingency plan contributed or caused other difficulties such as communication with the competitors and the provision of services such as food and massage at completion. Mr Williams believes a proper contingency plan would have led to different decision being made in particular that either the full cycle and run or that a half cycle and full marathon could have been run safely. He makes the point that competitors train for 6 to 12 months for such events and that the endurance nature is a crucial feature of the event. He says only having a half run and cycle and no swim meant that that the central purpose of the event, testing endurance, did not occur. He is at pains to point out that he accepts that decisions had to be and were made by a committee on the day. He does not question those decisions as such but questions the planning prior that may have had a negative effect on those decisions leading to the event being less than what it may have been. He believes the wind experienced on the day was a predictable event and could have been planned for by having an alternative route to avoid the more exposed sections of the route. He also sees the delay in making a decision as contributing to the decision that both remaining events would only be half the original length. In addition he sees lack of detailed planning contributing to the problems in getting food and other resources to the athletes on the day.

9. The respondents have provided explanations for the decision including the need to plan for the weaker participants, the wind and forecasted wind conditions and the effect it had on the timing of decisions about the length and starting times for the cycle and the need for proportionality between the remaining two sections. I have been told that if the competition was to be accepted as a qualifier for other triathlon/Ironman events the two remaining sections of the event had to be proportional. That is, they could not have a half-length cycle and the run a full length. Mr Williams is frustrated by the reference to this rule or principle as he can find no reference to it. I can understand why he is frustrated as it would seem to me that if there is such a rule or principle it should be readily available and known to those who compete in events as well as demonstrating that it is in fact a rule for the

purposes of these proceedings. In regards to communication problems on the day it is said this was also affected by the wind due to the marquee having to be dismantled. Mr Williams disagrees that communication was prevented by the marquee coming down because he says there was an MC communicating with the athletes as they waited for decisions but the communication did not include what would be announced when.

10. The usual external reference to the standard of reasonable care and skill is by comparing the quality of the event and the planning of the event for adverse wind/weather conditions with other similar providers. Unfortunately this evidence is not in front of me and I imagine is not readily available due to the lack of events of a similar size and magnitude. While this Ironman is clearly not the only such event in New Zealand (or the world) when reference is made to other service providers to ascertain an acceptable standard it is usually the case that there will be many examples before one can state that something is a well established principle or standard.

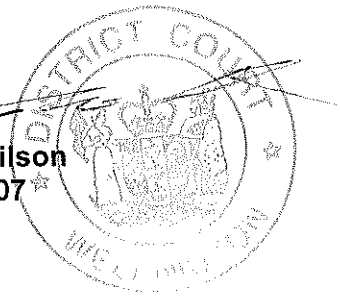
11. I have no doubt that the contingency planning could have been better and that the effect on the competitors of not being able to compete as planned should be a given a high level of priority because of the effort that has to be expended to prepare for the event. The entry fee is, relatively speaking, a minor component of the investment by athletes compared to the preparation and other costs of competing. I also think it likely that the organizers would also say that with the benefit of hindsight, planning for the particular weather conditions could have been better. But 'could be better' is not necessarily a breach of the duty to take reasonable care and use reasonable skill.

12. I am left wavering between accepting that the weather was extreme ("the worst storm in 44 years in Taupo") and that the degree of preparation required for that particular instance is expecting too high a standard and Mr Williams's view of that weather event being predictable and something that should have been planned for and in more detail. It is also not appropriate to put myself in the position of the decisionmakers on the day when I have no basis in terms of evidence or experience to question those decisions. Even though Mr Williams says he is not questioning those decisions as such he is saying better decisions would have been made and better facilities provided if there was a more thorough and well thought out contingency plan. I also accept that the terms of the entry condition about no refunds in the case of adverse weather is not rendered ineffective by the CGA. I am also mindful of the scale of the event in terms of the numbers of competitors, officials and volunteers that would impact on the possibility of alternative facilities and plans being put in place.

13. The contingency plan provided is a very broad document, only really saying when and who would make decisions about the race if there were adverse conditions. It doesn't for example include any reference to what may happen if the main marquee could not be used or include reference to having half distances in addition to removing the swim stage. I can only assume that the details of the 'what if' depended on the experience of the people involved who could make adjustments to the plan as and when required. It appears from the document that planning to run a shortened event in adverse weather starting at a later time was not one of the thought through possibilities.

14. On balance I have decided the applicant has not proved his claim of a breach of the reasonable care and skill guarantee to the standard required. 'Left wavering' is the best description I can give of my view of the case based on the information provided and that is not at the level of being satisfied that it is probable that there was not an acceptable contingency plan in place.

15. It would always be a difficult case for someone in Mr Williams's position to prove. Providing the documents about standards of risk management does not provide me with a clear picture of what is reasonable for organizers of this type of event to do. I would suggest however, that a less defensive response to what I see as legitimate questions by the disappointed athletes such as Mr Williams might have avoided recourse to this Tribunal or other legal forums.



Referee: Robyn Wilson
Date: 3 August 2007

MINISTRY OF JUSTICE
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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".