

**IN THE DISPUTES TRIBUNAL**

**[2014] NZDT 662**

**BETWEEN**

**AT LIMITED  
APPLICANT**

**AND**

**ZG  
RESPONDENT**

Date of Order:

15 September 2014

Referee:

Referee Perfect

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that ZG is to pay the sum of \$1,103.23 directly to AT Limited on or before 29 September 2014.**

## **Facts**

[1] ZG entered into a sole agency agreement with AT Limited in early February 2014. The sole agency period was to run from 9 February to 17 April 2014. As part of the agreement ZG authorised up to \$2,500.00 (inc GST) to be spent marketing his property.

[2] A proposed auction on 8 March was cancelled beforehand due to lack of interest in the property and at the end of March a conditional sale and purchase agreement was signed, but fell through before it went unconditional. On 24 March, ZG attempted to cancel the contract and this cancellation was initially accepted by text by the agent, AA, until the principal of AT Limited, BB, declined to formalise the cancellation, stating apparently that AA had no authority to accept the cancellation for AT Limited. AT Limited ceased marketing the property at this time even though the contract was not cancelled

[3] AT Limited claims \$2,500.00 for marketing expenses which have been invoiced but not paid.

## **Issues**

[4] What period are the marketing services provided for in the contract (agency agreement) to cover?

[5] Is any deduction due for the reduced marketing period?

[6] Is the auctioneer's fee and pre-auction meeting chargeable given that auction was cancelled prior to a pre-auction meeting taking place?

[7] Have the marketing services been provided with reasonable care and skill as per section 28 of the Consumer Guarantees Act 1993 (CGA)?

[8] What amount, if any, is owed by ZG?

## **Decision / Law**

*What period are the marketing services provided for in the contract (agency agreement) to cover?*

[9] I find that it is reasonable to infer that the (maximum) \$2,500 marketing and advertising costs provided for by the contract will cover marketing for the entire period of the sole agency. Those costs are outlined in the document provided to the hearing entitled "Superior Media & Online Auction Campaign" which AA confirmed was the marketing plan prepared at the outset and which totalled \$2,621.50.

[10] AA claims that he personally incurred additional marketing costs and it was agreed that these would be recovered from the commission on any sale. These are distinct from the marketing costs detailed in the document described above which were the \$2,500.00 worth covered by the contract and are not recoverable because there was no sale.

*Is any deduction due for the reduced marketing period?*

[11] I find that a pro-rata deduction of marketing costs claimed is warranted because the parties agree that all marketing ceased after ZG attempted to cancel the contract on 24 March. Based on the number of days left in the sole agency period (24) and the total days of the sole agency period (74), 67.6% of the reasonable marketing costs will be awarded. Reasonable marketing costs are addressed below.

*Is the auctioneer's fee and pre-auction meeting chargeable given that auction was cancelled prior to a pre-auction meeting taking place?*

[12] I find that there is no basis on which the amount of \$520.00 can be charged as the service relating to the auction was not provided. The auction was cancelled prior to even a pre-auction meeting taking place and the auctioneer was the principal of AT Limited, so no external fees were payable.

*Have the marketing services been provided with reasonable care and skill as per section 28 of the Consumer Guarantees Act 1993?*

[13] I find that there was some value obtained from marketing, notwithstanding ZG issues with the agent's service generally. However, there were also issues with the marketing services, although these were relatively minor and they were remedied in a timely manner (duplication of aerial photos) and some were outside AT Limited's control (Trade Me's system failure resulting in open home times being omitted for one weekend).

[14] Although they were minor failures, the issues with the marketing within AT Limited's control do still constitute a breach of the guarantee of providing services with reasonable care and skill and I award 50% reduction in the value of one ad (valued at \$270), being \$135.00, as damages in compensation as per section 32(b)(ii) of the CGA.

[15] One of ZG's main complaints is that he says AA promised to bring agents from other local CC offices through his property on the Tuesday 'caravans' but no agents from other offices ever came to the property. AA denies promising this and says he could not guarantee other agents' attendance, that the property was listed on the internal CC system for other agents to see if they wanted to.

[16] Given the verbal nature of that disagreement, no breach is proven – this is the nature of many of the issues in dispute in this case. I accept though that there is evidence to show that ZG expressed concerns about the level of service he was receiving just two weeks into the agency period by email, that there is an acknowledgment of poor performance in a text from AA and that there is a written record by ZG's solicitor of concerns about mistakes made by the agent, so the overall picture is one that tends to support ZG's points. However, most of these issues do not relate directly to the marketing costs incurred and the ones that do have been addressed in finding 14.

*What amount, if any, is owed by ZG?*

[17] AT Limited has provided a list of total costs of \$3,303.88 but as stated at finding 10, the amount above \$2,500 was paid by AA personally and subject to a different agreement. Those additional amounts are therefore not considered as part of this claim.

[18] AT Limited has not quantified its claimed amounts well. Some external invoices have been provided (some with costs identifiable to ZG's property and some not) but much of their cost breakdown is only supported by internally generated invoices. I have therefore worked below off the figures estimated in the original marketing document, comparing to actual invoices where these are available.

[19] An actual cost of \$204.99 has been proven (invoice from ABC Limited) and actual costs of \$9.00 for the title search and \$85.00 for copy have been proven, but the remainder of costs relating to brochures, signboards, photography, and internet advertising (on two sites) have not been quantified. I reduce the balance of amounts estimated on the original marketing cost sheet (under the first sub-total but not including the auction amount of \$520)

of \$857.51 by 20% (because no evidence of actual costs has been provided and deem \$686.01 to be the cost of those services (which I accept were provided). The first sub-total is therefore amended to  $\$204.99 + \$9.00 + \$85.00 + \$686.01 = \$984.00$ .

[20] AT Limited has provided an internal document showing the cost of advertising (of the four weeks actually provided) in DD as \$1,349.65 but has provided no external invoice. I note that booking sheets are not proof of advertising as it has been agreed that some bookings were later cancelled. The lesser amount of \$945.00 (the cost estimated on the original marketing breakdown total for this service) minus the \$135.00 deduction made in finding 10 = \$810.00, minus a deduction of 20% because there are no actual invoices is deemed to be the cost of this service, that total being \$648.00.

[21] The auction-related costs are not awarded so the total reasonable marketing costs are  $\$984.00 + \$648.00$ . 67.6% of that amount is payable on a pro-rata basis as per finding 11, the total awarded being \$1,103.23.