



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court

[2023] NZDT 242

FIRST APPLICANT BQ

SECOND APPLICANT OQ

RESPONDENT ET

**The Tribunal orders:**

ET is to pay the sum of \$1,367.50 to BQ and OQ on or before Thursday, 11 May 2023.

**Background summary**

1. ET lives in [City 1] and is the owner of [Address] (“the Property”) which she rents out as short-term accommodation. ET advertises the Property, and takes bookings for the Property, through Booking.com.
2. BQ and OQ live in [Country] and booked and paid for the Property through Booking.com for the period 5 to 13 November 2022 for BQ to stay in while she was visiting her [City 2]-based parents. BQ and OQ paid a total of \$1660.00 to Booking.com, being the rental cost of \$1,560.00 (at \$195.00 per night for 8 nights) and a cleaning fee of \$100.00.
3. BQ moved into the Property on Saturday, 5 November 2022. She was not satisfied with certain aspects of the Property and left the Property on Monday, 7 November 2022 and booked new accommodation for the rest of her stay in [City 2].
4. BQ and OQ bring a claim against ET seeking compensation of \$1,660.00, being a full refund of the amount they paid to Booking.com for the Property (being the rental cost of \$1,560.00 and the cleaning fee of \$100.00).

**Issues**

5. The issues I need to determine in relation to the claim are:
  - (a) Did ET breach the terms of the rental contract she had with BQ and OQ regarding the Property?
  - (b) If the answer to (a) is yes, did BQ and OQ cancel the rental contract and, if so, are they entitled to relief?
  - (c) If so, what should the remedy be and is the amount claimed proved and reasonable?

## Did ET breach the terms of the rental contract she had with BQ and OQ regarding the Property?

6. The law of contract applies to this claim. A contract is formed when one party accepts another party's offer and certain requirements are met. Once a contract is formed, the parties are bound by the terms they have agreed to, and those terms are enforceable by one party against the other. This means that if one party breaches a term of the contract, the other party may seek a remedy. The courts may imply a term into a contract in certain circumstances, and the parties are obliged to comply with both express and implied terms. There are various types of implied terms that have been recognised by the courts, including terms that are implied as a matter of course into all contracts of a particular type.
7. ET made an offer to rent out the Property as a short-term holiday house rental by advertising the Property on Booking.com's website. The advertisement stated that the Property had a flat-screen TV, included a number of photographs of the interior of the Property, and the description of the Property included:

*"I have hosted this property as a holiday home since 2016, taking time off to renovate restore and modernise this villa. I have received numerous positive reviews. Gorgeous renovated cottage with modern interior...This property is a full time holiday home..."*
8. BQ and OQ accepted ET's offer by booking the Property through Booking.com (ET's agent) and a rental contract was formed between BQ and OQ (as renters) and ET (as owner). I am satisfied that BQ and OQ did not simply rent the Property; they also rented all the features and facilities that ET advertised the Property as having, and the advertisement formed part of the terms of the rental contract.
9. In addition, I am satisfied that short-term rental accommodation contracts include implied term that the owner will provide the general everyday equipment and facilities expected in a rented holiday house and that the Property will be reasonably clean. Therefore, there was an implied term in the rental contract relating to the Property that ET would provide the equipment and facilities expected in a rented holiday house worth \$195.00 rental for one person per night, and that the Property would be reasonably clean. I have also taken into account that the contract required BQ and OQ to pay a cleaning fee at the end of BQ's stay, which suggests that the Property would be appropriately cleaned between guests.
10. ET says that the Property is a comfortable family home that she has renovated, and it is not perfect. She says that on the day BQ arrived at the Property, BQ sent her a message via Booking.com saying "Everything is good", apart from raising the problem with the TV that ET was unable to resolve over the weekend. ET says that the TV at the Property can be affected by atmospheric conditions. She says that the TV was easily fixed on 7 November 2022 by the cleaner (after BQ had left the Property). ET says that the loft was for storage only and had ET gone up the stairs to the loft she would have seen it was just for storage, no one lives there, and there is no access from the outside into the loft. She says that the bed in the loft was being stored there temporarily. ET says that Booking.com did not send her BQ's message of 7 November 2022 saying that she is leaving the Property until 8.13pm on 7 November 2022, so she did not know that BQ had left the Property until then. She says that BQ had booked the Property 98 days before her arrival, and it could not be re-rented for the balance of BQs' stay so it remained empty between 7 and 13 November 2022. ET says that there were no active cameras at the loft entrance, rather, there was an outdoor CCTV camera being recharged, and the other item that may have looked like a camera was a light. ET says that she was not aware of BQ's concerns about the loft, so she did not have any opportunity to reassure her and explain about the loft. ET says that the only concern BQ raised during her stay was that the TV not working. ET also says that she has had many good reviews of the Property from other people who have rented it, both before and after BQ's stay.
11. Having heard from both parties, and after careful consideration of the available evidence and information, I am satisfied that the Property did not live up to how it was advertised and, in

this way, ET breached the rental contract's express and implied terms. I reach this finding for the following reasons:

- (a) I have taken into account that BQ was not satisfied with certain aspects of the Property and says that it was falsely advertised. She says that the Property was not a "*Gorgeous renovated cottage with modern interior*" as stated on the Booking.com advertisement and was not clean. She says that she was very uncomfortable staying at the Property by herself due to there being open narrow wooden stairs with a metal hand-rail to a loft through a cut-out in the ceiling with cameras and black plastic netting across the front. She was so concerned that she called the Police to check the loft at 2am on Monday, 7 November 2022. She says that the Booking.com advertisement and attached photographs did not describe or show the stairs up to, or the loft, and she would never have rented the Property had she known about those aspects of the Property. Also, BQ says that the TV also did not work, and she contacted ET about this, but it was not repaired by the time she left the Property on Monday, 7 November 2022.
- (b) Having viewed the wording of the advertisement, the photographs of the Property included with the advertisement, and the photographs taken by BQ during her stay at the Property, I am satisfied that the interior of the house at the Property did not measure up to the description of a "*Gorgeous renovated cottage with modern interior*". I am satisfied that parts of the interior of the Property did not live up to the description, including home renovations such as rough plastering and painting, the repurposed ill-fitting kitchen with drill-holes showing on the benchtop, wall damage in the toilet, broken tap, and a broken toilet- roll holder.
- (c) I am satisfied that the set-up of the loft in particular means that the Property was not as described. I note that BQ was not aware of the loft or the way it looked, or the stairs to the loft, because the advertisement did not describe the loft or include photographs of the loft or the stairs. I note that the stairs to the loft were old narrow wooden stairs with chipped paint with a metal railing, the entrance to the loft was through the ceiling, and the entrance to the loft was covered in black plastic netting. There were also items that looked like operational cameras (with flashing lights) at the entrance to the loft and (as it turned out) items in the loft including a bed. It is immaterial that the flashing lights may have been a light fitting and an outdoor security camera that were recharging, because it was their appearance that worried BQ. There were also signs which read "*No Entry*" and "*Strictly no access! Loft stairs are steep no children allowed thank you*". This type of loft would not be expected of a "*Gorgeous renovated cottage with modern interior*" and contributed to the Property not living up to its advertised description.
- (d) It is not unexpected that a short-term rental property might have a loft, but it is unusual and unexpected that the Property had a loft of the type it had. While the loft and stairs may not have been concerning for a group of renters, I acknowledge that for BQ as a person renting the Property alone it was unusual and unexpected based on the advertised description of the Property, and it upset her so much that she called the Police at 2am and the Police attended the Property.
- (e) I believe BQ when she says she would absolutely not have rented the Property to stay in by herself if she had known there was a loft like the one she found at the Property.
- (f) I note that ET acknowledges that the Property was not perfect but is a comfortable home, which may be correct, but the Property was advertised as being more than this, so it was misrepresented.
- (g) I am satisfied that it is immaterial that BQ sent a message to ET when she arrived at the Property to say that "Everything is good" because I appreciate that BQ became more concerned about the loft, the flashing lights that she believed to be cameras, and the possibility of someone having access to that loft from the outside, once she was alone in the house at night. She became so scared that she called the Police on the second night.

- (h) I am also satisfied that it is immaterial that BQ did not go up the stairs and look into the loft, or that she did not check outside the house to see that no one could access the loft, because she was scared of the loft, and it would be unreasonable to expect her to go up the stairs to look at it. She was entitled to expect the house not to include aspects that would frighten her, given the advertised description. It is also understandable that BQ chose not to contact ET about the loft, and decided to leave the Property instead, because she felt unsafe and any explanation from ET would not have been likely to reassure her.
- (i) It is also immaterial that ET says she put up the black plastic netting to secure the top of the stairs in case children went up them, because it is the appearance of the black plastic that worried BQ, and which means that the house did not live up to the advertised description.
- (j) I am satisfied that the Property was advertised as including a flat-screen TV, however, the TV (which may have worked initially) did not work during BQ's stay. Therefore, BQ did not receive the benefit of the TV which was an advertised facility of the Property and therefore formed part of the rental contract. I acknowledge that ET tried to arrange for the TV to be looked at when BQ contacted her about the TV issue on 5 November 2022, and that she was unable to do so over the weekend. However, I note that other reviews of the Property comment on there being problems with the TV which shows that this was not a one-off problem. It is therefore not reasonable for ET to blame atmospheric problems for the TV issues, or to suggest that BQ could have fixed the TV herself, particularly when ET told her not to unplug the TV. I am therefore satisfied that the Property was worth a lower nightly rate than what BQ and OQ paid for it because a workable flat-screen TV was not provided.
- (k) I am also satisfied that the inside of the Property was not sufficiently clean based on the descriptions given by BQ, including the kitchen and the laundry/bathroom (including dust, and unclean floors). I consider it immaterial that ET pays a commercial cleaner to clean between guests and deep-cleans herself from time to time, or that she did not know the Property was not sufficiently clean, because I am satisfied it was not reasonably clean when BQ stayed there, I note that BQ told Booking.com of her concerns about the home renovations and lack of cleanliness in her message on the day she left the Property (on 7 November 2022).
- (l) I consider it immaterial that other renters have given the Property good reviews, because I only need to consider the experience that BQ had of the Property, and I find that she did not receive what she had contracted to receive.
- (m) I do not consider the presence of locked/chained storage cupboards for cleaning and other supplies, or a locked wardrobe, to be unreasonable for a short-term rental property, and I do not regard the presence of such things in the Property to be a breach of the contract by ET.

12. I raised other areas of law with the parties at the hearing. However, I have chosen to consider the claim under the law of contract, and it is unnecessary for me to also consider other areas of law as it would not affect my findings or the outcome.

**Did BQ and OQ cancel the rental contract and, if so, are they entitled to relief?**

13. A party may cancel a contract if a term of the contract has been breached by another party to the contract or it is clear that a term of the contract will be breached by another party. However, the right to cancel may only be exercised where the parties have expressly or impliedly agreed that the performance of term is essential to the cancelling party or the effect of the breach of contract will be to substantially reduce the benefit, or increase the burden, of the contract to the cancelling party, or make the benefit or burden substantially different from that contracted for (s37 of the Contract and Commercial Law Act 2017 ("the CCLA")).

14. I find that BQ validly cancelled the Agreement under s37 of the CCLA when she sent a message to Booking.com on Monday, 7 November 2022 to advise that she was leaving the Property and to record her complaints about the Property. For the above reasons, ET breached the rental contract and this resulted in a substantial reduction in the benefit received by BQ.
15. It is immaterial to my findings that Booking.com's website sets out a cancellation policy, because BQ did not cancel for her own purposes, she cancelled due to ET's breach of the contract, which is permitted by s37 of the CCLA.

**What should the remedy be and is the amount claimed proved and reasonable?**

16. When a contract is cancelled by a party, the Tribunal may, if it is just and practicable to do so, make an order granting relief (s43(1) of the CCLA). Relief can include directions that one party pay another the sum that the Tribunal thinks just (s43(3) of the CCLA) and can be subject to the terms and conditions that the Tribunal thinks fit (s44 of the CCLA).
17. When considering whether relief is appropriate under s43 of the CCLA, the Tribunal must have regard to any matters that the Tribunal thinks proper including such matters as the terms of the contract, any expenditure incurred by a party for the purpose of performing the contract and any benefit or advantage obtained by a party because of anything done by another party in performing the contract (s45 of the CCLA). Before the Tribunal awards monetary damages to a successful applicant, it must also be satisfied that the amount claimed is proved and reasonable.
18. BQ and OQ seek damages of \$1,660.00, being a full refund of the accommodation cost she paid to Booking.com for the Property: being rental costs of \$1,560.00 (\$195.00 per night for 8 nights) and a cleaning fee (\$100.00).
19. For the reasons noted above, I have found that BQ and OQ validly cancelled the contract as a result of ET's breaches of the rental contract. I am therefore satisfied that they are entitled to relief under s43 of the CCLA in the form of monetary damages, being a refund of part of the rental cost paid for the Property.
20. When considering the damages to be awarded, I have taken into account various matters, including that BQ stayed at the Property for two nights (5 and 6 November 2022) and cancelled the rental contract on 7 November 2022 when she sent a message to Booking.com; that she received a lesser quality of house than described in the advertisement; and that she rebooked another property for the remainder of her stay at a cost of around A\$200.00 per night. To balance these factors, I have also taken into account that BQ did not advise ET directly that she was leaving the Property (despite having messaged her previously about the TV) so ET was not advised by Booking.com until the evening of 7 November 2022 that BQ had left the Property. I have also noted that ET was unable to rebook the Property for the remaining period of the booking after BQ moved out (that is, 7 to 13 November 2022).
21. Given my findings about the breaches of the rental contract, I am satisfied that it was reasonable for BQ to move out of the Property and pay for new accommodation, and this outweighs the loss suffered by ET by being unable to rebook the Property at short notice. I am satisfied that it is immaterial that ET did not receive all the rental cost from Booking.com (due to the booking fee being deducted) because I am looking from the perspective of BQ and OQ and how to compensate them fairly.
22. I am satisfied that the fair and reasonable outcome is that BQ and OQ receive damages of \$1,367.50 from ET, calculated as follows:
  - \$292.50, being a fifty percent refund of the rental for the first three days of the booking. I am satisfied that it fair that 3 nights at half rent be paid because it acknowledges that BQ

stayed two nights at the Property (so had the use of the Property) and cancelled the rental contract on the third day (7 November 2022) but did not advise ET directly, so ET was not aware of the cancellation until the evening of 7 November 2022. Therefore, BQ, in effect, had the use of the Property for three days, and it is fair that she pays half the rent for the third night in lieu of notice. The fifty percent refund is because BQ and OQ did not receive all the features and facilities, or the quality of features and facilities, that they had agreed to rent based on the advertisement and photographs provided on Booking.com during the three days BQ stayed at the Property.

- \$975.00, being the full amount of the rental for the remaining five days of the booking that BQ and OQ did not use, given my finding that BQ validly cancelled the contract, and booked alternative accommodation.
- \$100.00, being a refund of the cleaning fee, given my finding about the Property not being reasonably clean.

23. For these reasons, I award damages of \$1,367.50 to BQ and OQ, which ET is to pay by the date set out in the order.

**Referee: D Brennan DTR**  
**Date: 13 April 2023**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

### Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact. Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

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 or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

### Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.