



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1451

APPLICANT **EM**

APPLICANT **LM**

RESPONDENT **KQ**

The Tribunal orders:

KQ is to pay EM and LM the sum of \$2,092.93 on or before 5pm on 26 April 2021.

Reasons

1. On 24 December 2020 KQ provided a quote to EM and LM (the applicants) for the painting of their house at [address] (the house). The applicants accepted the quote on 24 December 2020. The applicants made three payments as follows: 14 January 2021, 25 January 2021 and 29 January 2021, each for \$2,300.00 being a total of \$6,900.00.
2. KQ chemically washed, and water blasted the house on 14 January 2021. KQ applied three coats of the stain to half of the first floor. The applicants noted they have paid 46% of the quoted price but the work undertaken constituted only part of the required work.
3. The applicants are claiming KQ misrepresented himself and has breached the contract by not completing the work and are claiming the \$6,900.00 paid plus filing costs of \$90.00.
4. The issues to be determined are:
 - a. What was agreed between the parties?
 - b. Has there been a misrepresentation under the Fair Trading Act 1986?
 - c. Have the applicants suffered loss due to the misrepresentation or misleading conduct?
 - d. Has the contract been cancelled for repudiation?
 - e. If so, what amount is payable?

What was agreed between the parties?

5. The relevant law is the law of contract, the Fair Trading Act 1986 (FTA) and the Contract and Commercial Law Act 2017 (CCLA).
6. Both parties agree that the terms of the contract were contained in the quote provided by KQ on 24 December 2020. This stated that the house would be chemically washed, water blasted and

stained with three coats of stain. The downpipes and soffits would be painted. The cost was \$13,324.00 plus GST, a total of \$15,322.60 including GST.

Has there been a misrepresentation under the Fair Trading Act 1986?

7. Section 13 FTA states that “*no person in trade, in connection with the supply of services make a false or misleading representation that services are of a particular kind, standard, qualityor that they are supplied bya person of a particular trade, qualification, or skill.....*”.
8. The applicants gave evidence that KQ had presented them with his business card, and it had the description “*Master Painter*” under his name. KQ noted the business card did not state that he was a member of the Master Painters Association of New Zealand (MPANZ) and he had not used the logo. KQ stated that he did not intend to represent that he was a member of the MPANZ. He also noted that it was common practice for painters to call themselves master painters. However, the term Master Painters is a trademark registered to the MPANZ and by using the term KQ has made a representation that his services are supplied by a person with “*a particular qualification or skill*”. KQ therefore represented that his services were supplied by a Master Painter. Given this term is trademarked to MPANZ he therefore represented that his services were of a particular kind, standard, quality and supplied by a person of a particular trade and qualification that the membership to MPANZ represented.
9. The applicants stated that this representation was a contributory factor in their acceptance of the quote. For these reasons I find that KQ did make a misleading representation by using the trademarked term of Master Painter on his business card.

Has the contract been cancelled?

10. Section 36 of the Contract and Commercial Law Act 2017 (CCLA) states that “*a party may cancel contract if another party repudiates it:*
 - (1) *A party to a contract may cancel the contract if, by words or conduct, another party (B) repudiates the contract by making it clear that B does not intend to—*
 - (a) *perform B’s obligations under the contract; or*
 - (b) *complete the performance of B’s obligations under the contract”.*
11. From the evidence provided by both parties and the copy of the note left by KQ on 1 February 2020, it is evident that KQ had no intention of continuing to perform the contract. KQ agreed that he had left the job and had no intention of ever returning for a variety of reasons.
12. I find that KQ’s refusal to proceed amounted to a repudiation of the contract with the applicants, and accordingly, that the applicants are entitled to cancel the contract pursuant to s36 CCLA and claim relief under s43 CCLA.

Have the applicants suffered loss due to the misrepresentation or misleading conduct?

13. Under s43 of the FTA it must be established that the applicants suffered loss or damage by the conduct of KQ that constitutes a breach of s13.
14. Under s43(3)(f) the Tribunal may make an order directing KQ to pay the applicants the amount of loss or damage. The loss, that the applicants suffered in relying on the representation, is that they have entered into a contract that has been repudiated part way through performance and their loss is the amount of money paid by them, over and above what they would have paid for the completed work. This can be ascertained by considering the cancellation provisions under the CCLA.

If so, what amount is payable?

15. Given the repudiation of the contract and resultant cancellation, relief is available under s43 CCLA. However certain matters must be considered in deciding the amount of that relief. Section 45 CCLA provides that in deciding what relief to grant under s43, the “*Tribunal must have regard to—*

- (a) *the terms of the contract; and*
- (b) *the extent to which any party to the contract was or would have been able to perform it in whole or in part; and*
- (c) *any expenditure incurred by a party in, or for the purpose of, performing the contract; and*
- (d) *the value, in the court's opinion, of any work or services performed by a party in, or for the purpose of, performing the contract; and*
- (e) *any benefit or advantage obtained by a party because of anything done by another party in, or for the purpose of, performing the contract; and*
- (f) *any other matters that the court thinks proper."*

16. The applicants have claimed \$6,900.00 as the amount paid under the contract plus \$90.00 filing fee. As discussed during the hearing the Tribunal is precluded from awarding costs pursuant to s 43(1) of the Disputes Tribunals Act 1988 unless a threshold is met, and it has not been met in this case.
17. KQ gave evidence that he spent approximately \$1,000.00 on paint and materials. The paint and materials left after completion of the work performed that KQ left at the applicant's house. KQ also gave evidence that he had completed half of the lower level of the house, with the exception of about \$200.00 of painting behind a heat pump and some pipes. The applicants agreed that only half of the lower level of the house was painted, and they noted they had no issue with the quality of the workmanship other than the area behind the heat pump as noted by KQ.
18. KQ stated that he believed he had completed one third of the work and was entitled to the full amount of the money already paid. The applicants noted that they believed the work done was less than one third and that they had been left in a position that they had to get in another painter, and he had been more expensive, so they should be entitled to a full refund.
19. I find that there was value in the services provided by KQ, and in the materials purchased and used or left at the property. The value of the materials I find to be \$1,000.00 and the materials not yet purchased that are included in the quote would therefore amount to a value of \$1,500.00. The value of the work would therefore be a proportion of the amount remaining after deduction for the materials, which come to \$12,822.60. From the photographic evidence and the estimates of each of the parties, I find that approximately half of five-eighths of the house had been completed. This takes into account the full chemical wash, water blasting of the lower level, and the painting of three coats on half of the lower level. From this the \$200.00 for the remedial work required behind the heat pump must be deducted. Therefore, the applicants have received the benefit of \$3,807.07 plus the \$1,000.00 of materials giving a total benefit of \$4,807.07.
20. Given that the applicants paid KQ \$6,900.00, they are entitled to a refund of \$2,092.93. For these reasons I find that KQ is to pay the applicants the sum of \$2,092.93.

Referee: N Gold
Date: 7 April 2021



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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.