



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 9

APPLICANT EQ

RESPONDENT ND Ltd

RESPONDENT DQ

The Tribunal orders:

ND Ltd and DQ are jointly and severally liable to pay directly to EQ the sum of \$8,936.22 on or before 2 January 2023.

Summary of Reasons:

[1] The hearing was convened by teleconference. Only the applicant appeared at the hearing. When I called the respondent on the number advised it went straight to voice mail.

[2] On 29 November 2022 the respondents requested an adjournment. On 5 December 2022 the applicant emailed the Tribunal and advised that he did not agree to the hearing being adjourned yet again. The applicant brought to my attention that the hearing has been adjourned four times previously. The application was filed on 2 July 2022 and set down for hearing on 11 August 2022. The hearing was adjourned for administrative reasons. The respondents applied for and were granted an adjournment for the 12 September 2022 hearing after DQ claimed he was unavailable as he was travelling overseas. The hearing was set down for 26 September 2022. Unfortunately, that hearing had to be vacated when the government created a new public holiday at short notice to mark the passing of Her Majesty Queen Elizabeth II.

[3] The hearing was set down for 31 October 2022. Again, the respondents sought and were granted an adjournment due to DQ being overseas on that date. The hearing was rescheduled to 6 December 2022. Again, DQ sought an adjournment on the basis that he is currently out of country for another few weeks and would like the hearing to be adjourned to next year.

[4] On 5 December 2022 DQ was advised the adjournment request was declined. On 5 December 2022 DQ again contacted the Tribunal and again requested an adjournment on the basis that he was out of country and not reachable over the phone as he was *in a remote area and the phone and internet is very limited*. An adjournment was not granted. The Tribunal informed DQ that the hearing would proceed.

[5] Whereas DQ advised that he made the latest adjournment request *a week prior to his travel* asking that the hearing *be adjourned till 2023*, the evidence is clear that DQ left the country knowing that he was required to attend the Tribunal and simply expected the Tribunal to grant a fifth adjournment without question.

[6] The applicant is understandably upset at the Tribunal for allowing four previous adjournments¹ and requests the hearing proceed notwithstanding the respondents' decision not to appear. After giving this a great deal of thought I am persuaded that the applicant is entitled to his *day in court*, and it would be unfair to allow a further adjournment. I am satisfied that the respondents have been properly notified of the hearing, and therefore I will proceed to consider the claim in their absence.

Background

[7] The applicant seeks a refund of a deposit paid to ND Ltd on 12 January 2022, \$8,770.

[8] The parties entered into two contracts, both evidenced in writing. In the first the respondent agreed to provide resource consent plans for building work at [Address]. The contract price is \$9,500 and ND Ltd undertook to complete these plans within 20 days of the receipt of a 50% deposit.

[9] The second contract contained the same terms but ND Ltd agreed to provide building consent draughting for the agreed cost of \$5,893.75.

Issues

- i) Is ND Ltd liable to return the deposit paid?
- ii) Is DQ personally liable to return the deposit paid?

Issue 1

[10] The applicant paid the requested deposit, \$8,770 on 12 January 2022 but did not received the completed plans by the due date, 1 February 2022. After repeated attempts to contact the respondents, in June 2022, the parties fell into dispute. Whereas the respondents claim some plans were sent to the applicant in March 2022, the applicant claims he never received them or that the respondents ever contacted him to request further information as DQ claimed.

[11] By this time, the applicant had lost faith in DQ having been advised of his poor business record including past bankruptcy and successful prosecutions for fraud and sought to cancel the contract and obtain a full refund of the deposit paid.

[12] As stated above the respondents have not appeared today, nor provided the Tribunal with any evidence as to why they should not be found liable to pay the amount claimed.

[13] I am satisfied on the evidence of the applicant that the amount paid as deposit should be returned to the applicant. I accept ND Ltd breached the contract by not provided the agreed plans on or before the due date. Despite the respondents claim that the plans have now been completed the applicant is still not in receipt of the agreed drawings.

Issue 2

[14] I am also persuaded that in this instance DQ is also personally liable for this debt. I accept DQ held himself out as a registered planner and architect and as being licensed to carry out the contracted work. The evidence before me shows that this is not true.

[15] I am satisfied DQ has engaged in misleading and deceptive conduct in terms of the Fair Trading Act 1986. Whether conduct is misleading generally requires that the overall impression given by the conduct or representation is inaccurate, looked at from the point of view of the ordinary person. The current facts clearly fit within this definition given DQ's entirely false representation that he was licenced and capable of carrying out the agreed work when he was not. Any work carried out by DQ would need to be certified by an appropriately licensed person before being submitted to the relevant local authority.

¹ While acknowledging that the Tribunal had no option other than adjourn the hearing of 26 September 2022

[16] The applicant is entitled to rely on DQ's representation and if false, claim compensation, which is the cost of making good the loss suffered. While the applicant maybe entitled to further compensation over and above the deposit paid, he is also limited by his application, which in this instance is \$8,770. The applicant is not seeking an adjournment to increase the damages and costs that he may be entitled to.

[17] However, the Tribunal can award interest in appropriate cases at the Tribunal rate, under s 20 of the Disputes Tribunals Act 1988. In this instance it is appropriate to award interest given the deceptive conduct the respondents have engaged in. I allow interest of \$166.22 from 12 January 2022 to today's date.

Referee: Hannan DTR

Date: 8 June 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 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>.