(Disputes Tribunal Act 1988)

ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 626

APPLICANT **HA**

RESPONDENT **CQ Limited**

The Tribunal orders:

HA's claim against CQ Limited is dismissed.

Reasons:

1. The applicant and her mother entered into a property management agreement with the respondent in respect of an apartment. The applicant claims that the respondent breached the property management agreement by moving furniture and items out of the apartment that were later destroyed by flood damage and the apartment was damaged by tenants due to poor management by the respondent. The applicant initially claimed $4,999.00 from the respondent.

2. After the first hearing, the parties came to an agreement regarding the damage to the apartment. Therefore, the applicant's outstanding claim was in respect of the furniture and items that were removed from the apartment by the respondent. The applicant provided evidence before the second hearing that her losses in this regard were $2,467.00 which was the replacement value of the items, discounted by 50 per cent for fair wear and tear.

3. The issues to be determined by the Tribunal were:

    a. What were the respondent's obligations under the agreement?
    b. Has the respondent breached the agreement by moving the applicant's furniture?
    c. If not, is the respondent responsible for the loss of the furniture?
    d. What remedies, if any, is available to the applicant?

4. Any applicant to the Tribunal has the task of establishing the legal and factual elements of its claim to the required standard. That standard is the balance of probabilities which means that it is more likely than not.

What were the respondent's obligations under the agreement?

5. The relevant law is the law of contract.

6. The contract between the parties is set out in agreement which is entitled 'Appointment to act as property manager' which was signed by both parties and was dated 22 September 2019.

7. Clause 2.2 of the agreement required that the "Manager will endeavour to maximise the rental income for the premises in the prevailing market and ensure continuity of occupation….The

Manager shall not be liable for any default in payment of rent or any damage to the property caused by the tenant or for the lack of continuity by failing to secure a tenant."

8. Pursuant to clause 3.1 of the agreement, the owner of the property agreed to place adequate insurance cover for the property and chattels. The applicant told the Tribunal that she had not purchased insurance but, in any event, told the Tribunal that her expectation was that insurance would cover damage by the tenant as opposed to damage caused because items were removed by the property manager. I have no evidence as to whether the applicant's claim is correct so have not accepted this claim.

Has the respondent breached the agreement by moving the applicant's furniture?

9. On the evidence provided, I do not find that the respondent breached the agreement by moving the applicant's furniture. I say this because:

    a. I accept that the period the property was in the hands of the respondent included years when the rental market in central [city] was difficult with no foreign students and a general desertion of the central city due to Covid-19 lockdowns. I also accept that the respondent removed some of the furniture and other items at the request of tenants who had their own furniture and personal items and in doing so ensured that the property was able to be rented out given the lack of demand for fully furnished rental properties. In doing so, I also accept that the respondent was ensuring compliance with clause 2.2 of the agreement and acting in the best interests of the applicant.

    b. I accept that the applicant was not told about this removal and storage of the furniture. However, this in itself does not constitute a breach of the agreement. While it may have been better for the respondent to have communicated the furniture removal to the applicant, I am not able to assess if the applicant would have accepted this or not, given that I accept that it meant there was a better chance of renting the apartment on a semi furnished basis. I also note that the fact that the respondent did not ask before removing the furniture items before the apartment was rented is not the cause of the applicant's loss. My reasoning for this finding is set out below in paragraphs 10 and 11 below.

    c. The applicant told the Tribunal that the respondent had breached several clauses of the property management agreement by removing the furniture and other items from the property. However, the clauses the applicant relied on related to property inspections, repairs and maintenance and repairs and alternations that the applicant may have wanted to do. I do not find that any of these clauses would have prevented a property manager from removing items at the request of tenants to ensure the apartment was successfully rented and provided an income to the owner.

If not, is the respondent responsible for the loss of the furniture?

10. I do not accept that the respondent was responsible for the loss of the furniture. The furniture was locked in a storage cupboard in the basement of the apartment building. The basement of the apartment building was flooded during [a flooding event] which impacted large areas of [the city].

11. I accept the respondent's evidence that the basement of the apartment building was declared a biohazard due to contaminated water flowing through it and no items were able to be removed other than by a specialised team who removed all of the items in storage lockers, including all of the cars that were in the basement, and dumped then. The flood was the cause of the furniture and other items being destroyed. While the applicant has argued but for the respondent's actions, the furniture and other items would not have been destroyed, as there is no evidence that the respondent was negligent in any way by moving the furniture and other items to a secure storage unit on site, I cannot find the respondent responsible for the loss of the applicant's furniture.

12. I also note that if there had not been a flood, or if the applicant had insured the chattels as agreed to pursuant to the agreement, the applicant would not be making a claim in this regard as it is more likely than not that an insurance policy would have covered items destroyed by a flood. If there had not been a flood the items would have been moved back to the apartment when the applicant took back possession.

What remedies, if any, is available to the applicant?

13. As I have not found that the respondent breached the agreement with the applicant by removing the applicant's items from the apartment to enable it to be rented, it follows that the applicant's claim must fail and is accordingly dismissed.

Referee: **K. Armstrong**
Date: **13 November 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.