



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

[2023] NZDT 594

**APPLICANT** KE

**RESPONDENT** [OI](#) and NT

**The Tribunal orders:**

**Please also email**

Application struck out.

**Reasons**

1. This was a claim filed by applicant, as executor of the estate of his late elderly father Q (known as "Q").
2. On behalf of the estate, the applicant applied for an order against the respondent, ordering the respondent to pay him the sum of \$28,275.35, being an amount, he submits, was allegedly improperly taken from Q, by the respondents.
3. A jurisdiction hearing only, was held on 14 November 2023.

***Background***

4. For a period in 2017/18, Q lived with, and was cared for by the respondents.
5. The arrangement was underpinned by a sealed Deed of Gift dated 1 September 2017 ("the Deed").
6. The Deed provided:
  - a) that in consideration for the respondents (described in the Deed as "*the Donees*") providing Q (described in the Deed as the "*the Donor*"), with accommodation and care;
  - b) Q gifts the sum of \$130,000.00 "*absolutely*" to the respondents;
  - c) for the purpose of purchasing a named residential property in Auckland; and

d) for so long as Q lives with the respondents, Q gifts the respondents the sum of \$250.00 per week towards Q's care and transport.

7. The Deed concluded with clause 2 that stated:

*"2 The intent of the Donor is that these gifts will be outright gifts and that there will be nothing owing to the Donor or by the Donees with respect to the gifts."*

8. The \$130,000.00 was duly gifted and assisted the respondents to obtain a mortgage to purchase the residential property referred to in the Deed.

9. I understand the Deed was required to be prepared primarily by the mortgage lending bank, to ensure the \$130,000.00 could be considered legally to be a sealed gift, and not a repayable loan.

10. The respondent's lawyer, who was handling the purchase of the subject property prepared the draft Deed and forwarded it to Q's lawyer (who had apparently been instructed by the applicant), for signing by Q.

11. Q duly attended at his lawyer's office (as I understand it with his son the applicant) and signed the Deed; his signature being witnessed by his lawyer.

12. There was no argument about the legality of the Deed, or it not being in the prescribed legal form.

13. However, an issue did arise later wherein the NZ Law Society became involved, and the lawyer that facilitated Q's signature, was later reprimanded, and fined for not referring Q for independent legal advice.

14. To be binding, the deed did not require the respondent's signature.

15. Indeed, at the hearing, the respondent's submitted that they only saw the Deed for the first time after Q died.

16. A set of circumstances then followed, whereby Q did live with the respondents and was cared for by them for a period and made the \$250.00 per week payments.

17. However, after travelling to the UK for a visit, he died in the UK in 2020.

18. Following his death, the applicant formed the view that the respondents, more specifically OT, had taken advantage of her care of Q to advantage her and her husband financially. He formed this view after reviewing what he described as:

*"an exhaustive source of material gathered over the last four years from 29 organisations and individuals, including a forensic analysis of Q Day's financial transactions between May 2017 and December 2018."*

19. The following statement briefly sums up the applicant's claim:

*"This is a claim for additional "double dip" subsidies OT sought and obtained, over and above the deed gifts, for her lifestyle and house during the period of. Gift care. In two instances the subsidies were opportunistically acquired and concealed in a way that is*

*ethically, if not technically, outright theft. The claim is justified on the basis that the “double dip” subsidies were extracted from Q through persistent manipulation, cajoling and coercion, in an abuse of trust which constitutes a serious breach of the effectively contracted duty of care reasonably expected under the Deed of Gift.”*

20. In support of the claims the applicant, who I understand was a forensic accountant, has submitted a very extensive, closely typed (over 100 pages), impressive carefully prepared range of background documentation.
21. While the nature of the alleged “*double dip subsidies*” has not been examined in this decision, there is reference to at least six occasions where it is alleged that the respondents took advantage of Q, to benefit themselves financially.
22. However, it needs to be noted that both respondents appeared at the hearing and very strongly denied the allegations. It was apparent there is much bitterness between both parties.

***Is the Deed of Gift a contract or a quasi-contract?***

23. In this case, this is a vexed question, the answer to which determines whether or not the Tribunal has jurisdiction.
24. The Tribunal has jurisdiction with respect to claims founded on contract or quasi-contract.
25. The applicant submitted strongly, that the Deed of Gift was essentially a business contract and that the respondents breached their duty of care pursuant to it, and that the Tribunal therefore does have jurisdiction.
26. It would have been equally open to the applicant, to submit that the Deed of Gift was a simple contract, or a quasi- contract (an obligation arising where one person has been unduly enriched at the expense of another, as if the arrangement were a contract).
27. However, the content of the deed, and the arrangement contained therein, is not in dispute, rather the subsequent conduct of the respondents pursuant to it.
28. There is much confusing mixed commentary around the question of whether a deed is a type of contract.
29. The confusion seems to arise, because a deed can be a contract constructed in the form of a deed, or it can be solely a bare legal instrument called a deed, which has a legal standing of its own e.g a gift in the form of a deed, or a promise in the form of a deed.
30. An example of the former, would be where the parties intended their arrangement to be a contract involving all the essential elements of a contract such as offer and acceptance, consideration, and an intention to enter into a legal relationship i.e., a contractual relationship, sealed in the form of a deed.
31. Whereas a deed, can also be a mere sealed promise, signed only by one party that is enforceable without consideration and intended to take effect and be enforceable solely as a deed. That is, it can stand on its own.

32. So, I am obliged to ask myself, what did the parties intend?
33. Although, as submitted by the applicant, there are strong elements in the deed that imply a contract, my finding is on balance, that it was not intended primarily to be a contract, as that term is normally understood.
34. It was primarily intended to be a Deed of Gift, which sealed a gift. It is explicit and clear about that and stands on its own to that effect.
35. Indeed, I could surmise that if it were merely a contract sealed as a deed, and not constructed as a Deed of Gift, which asserted absolutely a gifting arrangement was intended, then that may not have been sufficient for the bank, who I would assume were looking for more certainty than a contract.
36. And that is what a Deed of Gift can provide.
37. That is not to say the Deed of Gift is not enforceable or cannot be breached.
38. It's just that I find any dispute in reliance on this deed, cannot in the circumstances of this case, be determined in the Disputes Tribunal. It was not primarily intended to be a sealed contract but rather a Deed of Gift, which has its own legal propriety.
39. Therefore, I find the Tribunal does not have the required jurisdiction to determine the application.
40. Finally, I did not raise this question with the applicant, and it only occurred to me belatedly.
41. The claim being "struck out," does not prevent the applicant from pursuing a claim in another jurisdiction, should he choose to.
42. However, if he intends to do so, he may need to firstly obtain legal advice, as to whether or not he can act on behalf of Q's estate, in a New Zealand jurisdiction pursuant to letters of administration granted by a United Kingdom Court. He may need to have his authority sealed in a New Zealand Court before he can file further proceedings.

**Referee: John Hogan**  
**Date: 4 December 2023**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made.

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>.