



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 505

APPLICANT **KL**

RESPONDENT **DQ**

SECOND **N Ltd**
RESPONDENT

The Tribunal orders:

DQ and N Ltd, jointly and severally, are to pay the sum of \$31,207.92 to KL on or before 31 May 2023.

Reasons:

1. In July 2021, KL (the consumer) contacted DQ (the consultant) regarding a proposed subdivision of his property in [suburb]. The consultant, who was the contact person and designer for N Ltd (the supplier), prepared some sketch plans. The following month, the consumer engaged the supplier to prepare resource and building consent plans and obtain associated reports for the subdivision. Under the contract, the consumer made payments totalling \$57,270.00, including \$9,500.00 for the resource consent lodgement fee and \$8,550.00 for the building consent lodgement fee.
2. In September 2021, the consultant advised by text that he would be lodging the resource consent application shortly. On 11 October 2021 he confirmed by text that the building consent had been lodged. However, the consumer claims to have discovered a couple of months later that no applications had ever been lodged with [City] Council. He also claims that the consultant never provided him with any documents such as plans or reports.
3. In January 2022, the consumer's solicitors sent a letter giving the supplier and consultant notice that unless the applications were lodged within ten working days, time being of the essence, the consumer intended to cancel the contract.
4. There was no response, and the consumer now claims a refund of the money paid. He has reduced his claim to \$30,000.00 to bring it within the Tribunal's jurisdictional limit. The consultant filed a counterclaim for further payment under the contract, but the counterclaim was struck out at the first hearing because the consultant, not being a party to the contract, had no standing to make a counterclaim against the consumer.
5. The issues to be determined are:
 - a) Has the supplier failed to complete the work within a reasonable time? If so, is the consumer entitled to cancel the contract?
 - b) Did the consultant mislead the consumer regarding his intentions?

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6. Section 30 of the Consumer Guarantees Act 1993 (CGA) provides that, if there is no contractually agreed time for completion, there is a guarantee that services will be completed within a reasonable time. The courts have clarified that the correct approach is not to look at the length of time actually taken and determine if that period was reasonable, but instead to start with the time that the parties considered appropriate before work commenced, and consider whether subsequent events would alter that expectation.
7. The consultant said that he did lodge the consents, but the evidence clearly supports the consumer's account. I find that the parties would have expected the work to have been finished before the end of the year, so the supplier had already failed to complete the work within a reasonable time by the time of the solicitors' letter in January 2022.
8. A consumer is entitled to cancel if a delay in completion is of a substantial character. It can sometimes be difficult to determine when a delay is sufficiently substantial to warrant cancellation, but the consumer's solicitors have used a recognised mechanism for establishing this, by giving reasonable notice making time of the essence. Given that the consultant claimed to already have lodged the consents, ten days was a reasonable time for the applications to be lodged if that had not already been done. I therefore accept that the consumer was entitled to cancel the contract by filing his claim for a refund.
9. The effect of cancellation is that the consumer is entitled to a refund of any money paid for the services unless a court or Disputes Tribunal orders that the supplier may retain the whole or part of the money paid (CGA s 38(1)(a)). Since the consumer has received no value from the contract, I conclude that the supplier should provide a full refund. The consumer is therefore entitled to the maximum order of \$30,000.00.

Did the consultant mislead the consumer regarding his intentions?

10. The consultant was not a party to the contract with the consumer. However, since he was the person who communicated directly with the consumer and was acting in trade, he may nevertheless be personally liable under the Fair Trading Act 1986 (FTA). Section 9 of the FTA provides, "No person shall, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive." If a breach of s 9 causes a person to suffer loss, the Tribunal may grant a remedy under s 43.
11. Breach of a contractual promise is not in itself misleading conduct. However, entering into a contract can imply that there is an honest intention to perform the contract. I find it more likely than not that the consultant never had any honest intention of performing the contract. Even if he did initially intend to perform the contract, it seems that he misrepresented the progress of the work in order to get the consumer to make further payments. Since those further payments totalled more than \$30,000.00, I find that the consultant is personally responsible to pay compensation of \$30,000.00 under FTA s 43.

Conclusion

12. I have found the supplier and the consultant jointly and severally liable to pay \$30,000.00 to the consumer. Under s 20(1) of the Disputes Tribunal Act 1988, the Tribunal may also, if it thinks fit, award interest calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for the whole or any part of the period from when the cause of action arose to the date of the order. The restriction to \$30,000.00 does not apply to interest (s 20(4)). I find that the supplier and consultant should both pay interest on \$30,000.00 from 5 October 2021, when the consumer made the final payment. The interest comes to \$1,207.92, so the total sum to be paid is \$31,207.92.

Referee: E Paton-Simpson

Date: 14 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 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>.