(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2021] NZDT 1439**

APPLICANT **KQ & WQ**

RESPONDENT **EN & MN**

The Tribunal orders:

The claim is dismissed.

Reasons:

1. EN and MN wanted to subdivide their property and sell two sections. KQ and WQ entered a contract with EN and MN to purchase a section, subject to subdivision. The agreement had a sunset clause that allowed EN and MN to cancel the agreement if title had not been obtained by a certain date. Prior to settlement, KQ and WQ spent money clearing an area of trees on the property where a driveway was to be constructed. They say they did so based on strong assurances from EN that the sale would proceed. EN and MN say no such assurances were given, and that KQ and WQ decided to use a different driveway to the one constructed for the subdivision and then expected EN and MN to fund the new entry. When the sunset date arrived, EN and MN cancelled the contract.

2. KQ and WQ claim $4,140 from EN and MN in relation to the trees that they paid to have removed from the property.

3. The applicant in the proceedings is KQ and WQ. However, it is noted that the purchaser was in fact KQ, WQ and NX as trustees of the [Redacted] Trust. KQ and WQ rely on having entered a contract in bringing this claim, and so it appears the correct applicant would be the trustees.

4. There is a preliminary jurisdictional issue to be addressed before the substantive matter may be determined. The Disputes Tribunal has jurisdiction to hear claims founded on contract, but not claims regarding the recovery of an interest in land or where the title to any land is in question (ss 10(1)(a) and 11(5) of the Disputes Tribunal Act 1988 (**DTA**)).

5. These proceedings concern a contract between the parties that does not relate to the recovery of an interest in land or a question as to the title to the land. Therefore, the Tribunal has jurisdiction to hear the matter.

6. Therefore, the substantive issues to be determined are:

    a) Are KQ and WQ entitled to a refund for the arborist works under the contract?

    b) If not, is there a remedy for KQ and WQ in quasi-contract?

    c) If not, can KQ and WQ claim relief under an equitable jurisdiction?

d) If not, should KQ and WQ be entitled to relief under s 18(6) of the DTA?

Are KQ and WQ entitled to a refund for the arborist works under the contract?

7. The general law of contract applies. A legally binding contract is formed when both parties intend to contract on agreed terms and intend for those terms to be legally binding. The terms of a contract are formed at the beginning, not at the end. What was agreed is looked at objectively, i.e. by looking at what was said and done. The law of contract requires parties to a contract to adhere to the terms of that contract unless there is a legal reason not to do so.

8. The contract is governed by the terms contained in the signed ADLS Agreement for Sale and Purchase (**Agreement**).

9. The Agreement makes express provision for cancellation in relation to the exercise of the sunset clause, which means its terms have effect in place of the provisions of the Contract and Commercial Law Act 2017 (s 34, CCLA). Clause 20.9 of the Agreement provides that "…if a separate Certificate of Title for the Property has not issued on or before 20 November 2020, either party shall be entitled to avoid this agreement by giving written notice…".

10. Clause 23.2 states "This agreement may only be amended by the parties in writing". Therefore, the Agreement cannot be not amended by oral variations.

11. In addition, there is no provision in the Agreement that provides for reimbursement to a party for acts taken in reliance on the contract prior to settlement.

12. During or prior to January 2020, discussions took place regarding creating a new driveway entrance to the lot to be purchased. The existing subdivision scheme had 2 driveway options. EN and MN say KQ and WQ wanted to move the driveway in order to have an exclusive single use driveway and that they agreed subject to the proviso that KQ and WQ meet the additional cost. They submitted two written statements from third parties supporting their position. KQ and WQ say that EN and MN were informed that the existing driveway in the scheme plan was not compliant with engineering requirements and it was them that sought the change.

13. KQ and WQ say that in February 2020 EN encouraged them to use a local arborist to remove trees from the property where the new driveway was to be constructed. KQ and WQ say the arborist was a friend of EN's, which he denies. KQ says he was told the arborist was moving away and should be used before he left the area.

14. KQ says he was concerned to spend money on a property he didn't yet own and therefore sought specific assurances that the sunset clause would not be invoked, and the purchase would go ahead. KQ says that EN said on more than one occasion, "MN and I chose you as our neighbours." He says he asked for confirmation in writing that the sunset clause would not be exercised, but that EN said he did not want to accrue legal fees to make the change.

15. EN denies this and says he never said he chose them neighbours. EN also says he offered to remove the sunset clause. KQ says he would have taken up such an offer and that he would never have expended funds on the property unless he was 100% confident that the purchase would proceed.

16. The arborist work was carried out on 24, 25 and 29 February 2020 and KQ was invoiced $4,140 for the service. (Payment for the arborist works may support that it was they who sought the change to the scheme plan for the new driveway.)

17. Not long thereafter EN and MN say that KQ advised them that he and WQ no longer believed that they were responsible for the costs of constructing the new driveway. It is understood the change in position (if this was a change) related to land that was originally located within KQ and WQ's section reverting to EN and MN with a right of way easement in its place (although the total area of the section did not decrease). KQ and WQ say they became aware of the change to the

section in September 2020, however, EN produced a text from January 2020 that refers to the easement. EN and MN also noted that the Agreement specifically allowed them to create easements (cl. 20.2) and to adjust the lot boundaries prior to issue of title (cl. 20.6).

18. In the event, EN and MN did invoke the sunset clause when the date for its exercise arrived and cancelled the agreement.

19. EN and MN say they were put to expense to change the scheme plan of the subdivision to meet the driveway request of KQ and WQ. They say they have not received any benefit from the trees being cut down. Instead they say that 40 large mature native trees were cut down which they estimate will cost in the vicinity of $8000 to replace and that in the meantime they have lost a lot of privacy, as has a neighbouring property. In the final scheme plan, the driveway entry reverted to the former driveway plan.

20. KQ and WQ raised other issues during the hearing, such as the delay of EN and MN in progressing to title and covenants changing during the consenting process. These issues are generally not relevant to the claim for reimbursement for arborist costs. However, the Agreement specifically provides that there was no requirement on EN and MN to proceed with haste. There was no vendor warranty as to a timeframe for depositing the LT Plan or when a transfer could be registered, and these were specifically "not essential conditions of this agreement" (cl. 20.8).

21. KQ and WQ say that they were induced to spend money felling trees by assurances given by EN and MN that they would not cancel the Agreement.

22. However, the Agreement does not provide for oral variations. It also does not provide for a party to be reimbursed for acts taken in reliance on the contract.

23. Therefore, I find that KQ and WQ have no right to reimbursement and are not entitled to a refund for the arborist works under the terms of the Agreement.

If not, is there a remedy for KQ and WQ in quasi-contract?

24. Section 10(1)(a) of the DTA gives the Disputes Tribunal jurisdiction in respect of a claim founded on quasi-contract. This term is used to describe situations where one party has been unduly enriched at the expense of another and is required as if from a contract to make restitution.

25. In the present case it cannot be said that EN and MN have been unduly enriched by the felling of the trees. Indeed, their evidence is that they have suffered a loss.

26. Therefore, the claim is not one where quasi-contract applies and I am satisfied that there is no remedy available to KQ and WQ in quasi-contract.

If not, can KQ and WQ claim relief under an equitable jurisdiction?

27. KQ and WQ have not succeeded under contract law, but consideration may be given to whether there is scope for relief under an equitable jurisdiction.

28. The application of equitable remedies was considered at the hearing.

29. However, on further reflection, it does not appear that equitable remedies are available in the Disputes Tribunal.

30. The DTA is prescriptive in setting out the areas where the Tribunal has jurisdiction. Section 10 of the Act specifies functions of the Tribunal in determining claims relating to contract law, torts and under specific empowering legislation. There is no reference to an equitable jurisdiction.

31. In contrast, the District Court Act 2016 is specific in providing for that Court's jurisdiction in equity (s 76). It therefore may be interpreted that there is a deliberate legislative intent to exclude an equitable jurisdiction within the DTA.

32. Instead, the Disputes Tribunal is given a statutory authority to consider the substantial merits and justice of a case. Under section 18(6) of the DTA, the Tribunal has discretion to determine disputes:

> *"…according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities."*

33. This provision gives a wide discretion to balance the overall equities of the matter with legal considerations. That discretion is not encumbered by an obligation to know and apply the maxims of equity, which express the collected wisdom of equitable principles.

34. This is in keeping with the goal of the Disputes Tribunal to deliver practical and efficient justice. As noted in *Trotman v Disputes Tribunal* [2020] NZHC 2040 (at [24] and [25]):

> *"…the Disputes Tribunal exists to provide a speedy, cheap, and informal way of resolving disputes for relatively small amounts not requiring the oversight by lawyers nor their involvement as advocates…That overall approach can be seen from a number of provisions in the Act, including primarily s 18(6)…"*

35. It is in the interests of 'speedy justice' that the Disputes Tribunal is not required to apply the law of equity yet is granted discretion to determine matters according to the "substantial merits and justice". The statutory authority provides a simple direct way to balance the overall equities, which makes sense in the absence of advocates to plead equitable remedies.

36. For those reasons I am of the opinion that the Tribunal does not have equitable jurisdiction. It does however have discretion to balance the overall equities of the matter pursuant to section 18(6) of the DTA.

37. Therefore, I am satisfied that KQ and WQ cannot claim relief under an equitable jurisdiction in the Disputes Tribunal.

If not, should KQ and WQ be entitled to relief under s 18(6) of the DTA?

38. The Disputes Tribunal is granted a wide discretion under s 18(6).

39. There is an analogous section in the Residential Tenancies Act 1986 that applies to the Tenancy Tribunal, but the Courts have distinguished between the two and interpreted that the Disputes Tribunal has a wider berth in decision making.

40. The corresponding provision in the RTA says the Tenancy Tribunal must:

> *"…determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities" (s 85(2), RTA).*

41. The High Court has observed that "[u]nlike the Tenancy Tribunal, the Disputes Tribunal was not required to determine the dispute according to the general principles of law at all. In contrast, in the Tenancy Tribunal the general principles of law must be applied" (*Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417 at [71]; see also *Welsh v Housing New Zealand Ltd* (High Court, Wellington, AP 35/2000, 9 March 2001, Doogue and Goddard JJ) at [31]).

42. To "have regard to the law" under s 18(6) includes considering legal principles that the referee is aware of in a fair and unbiased manner and applying the law in an impartial manner, save when strict observance would in the referee's view, prevent determining the case in accordance with its substantial merits and justice (*NZI Insurance New Zealand Ltd v District Court, Auckland* [1993] 3 NZLR 453).

43. The Disputes Tribunal has jurisdiction to apply common sense and this is not limited to technical requirements. Nevertheless, it is a discretion to be exercised, and in general the exercise of such discretion is likely to be used sparingly. In my view it is fitting that in exercising the discretion, while the berth is wide, the bar is high.

44. To be entitled to relief under this provision, and to exercise such discretion I would need to find that the terms of the contract when applied to these facts produced an injustice.

45. In the present case, KQ and WQ say that they were induced to carry out works on property they didn't own based on assurances from EN and MN that they would not invoke the sunset clause and cancel the agreement.

46. However, there was a conflict of evidence regarding whether such assurances were given.

47. In considering the substantial merits and justice of the case, it is observed that EN and MN gave evidence that the dispute had come at a cost to them.

48. KQ and WQ acknowledged that they knew it was risky to spend money on a property they did not own. KQ and WQ should not have incurred cost in reliance on the contract prior to settlement. They must bear the consequences of that decision.

49. There is no definitive evidence that supports that the substantive merits and justice of the case warrant a departure from the application of contract law to the proceedings. Without needing to prefer one party's evidence over the other, it is sufficient to say that the threshold has not been reached whereby it has been shown that it is more than likely that the justice of the case warrants intervention under s 18(6) of the DTA.

50. I am satisfied that KQ and WQ are not entitled to relief under s 18(6) of the DTA and it follows that they are not entitled to the sum claimed.

51. For these reasons, the claim is dismissed.

Referee: **T Baker**
Date: **27 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 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.