



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 742

APPLICANT **M Ltd**

RESPONDENT **SN**

SECOND **LL**
RESPONDENT

The Tribunal orders:

LL and SN must pay M Ltd \$2,466.00 by 4pm on 17 January 2024.

Reasons:

1. The applicant is a mortgage broker and arranged mortgage financing for the respondents with a third party lender. The respondents moved their mortgage finance to another provider about 19 months after drawdown to secure better terms. The applicant claims that as a result it was required to repay the commission it received from the third party lender and claims \$2,466.00 from the respondents.
2. At today's hearing the parties agreed that the second respondent should be joined as she was a co-signatory to the contract with the applicant and the mortgage finance that was provided as a result of the applicant's services.
3. The issues to be determined by the Tribunal were:
 - a. What were the terms of the contract between the parties?
 - b. Did the respondents agree to the terms regarding charges in certain events?
 - c. If so, have the respondents breached the contract by not paying the applicant for these charges?
 - d. If so, what remedy is available to the applicant?

What were the terms of the contract between the parties?

4. The relevant law is the law of contract.
5. The applicant is a financial adviser providing mortgage broking services. The applicant arranges mortgage finance for its clients and receives a fee or commission either from its client or the financial services provider of the mortgage finance. In this case, the applicant received a commission from the third party lender, not the respondents.

6. On 11 January 2022 the respondents signed a declaration form regarding the services the applicant was providing which stated:

“I/We confirm that we have been provided with and have read and understood the Financial Adviser’s Disclosure Guide. I/We understand that the Financial Adviser’s Disclosure Guide details, amongst other things the commission, fees and expenses that may be received by, or payable to, the Financial Adviser / Financial Advice Provider. I/We also understand and agree the circumstances in which we may need to pay fees to the Financial Adviser / Financial Advice Provider (if applicable).”

7. The applicant’s Financial Adviser’s Disclosure Guide (which was also sent to the respondents on 11 January 2022) set out the fees and charges that were applicable. These terms included a statement that a clawback in the form of a fee would apply if the respondents’ loan was fully or partially repaid within a 28 month period and as a result the lender required that the applicant repay the commission it was initially paid in respect of the respondents’ loan. This requirement would apply for a period of 28 months from the date of drawdown of the mortgage finance.
8. The respondents said although they signed the declaration, the fees or this 28 month period were not specifically discussed with them, and as a result they were not aware that there would be a fee payable if they refinanced with another bank during this period. They thought that the applicable period was 12 months as this was how long their interest rate was fixed for. They also told the Tribunal that when they discussed refinancing with the applicant 12 months after drawdown, they were also not told about the fee that would apply if they refinanced within that 28 months period.

Did the respondents agree to the terms regarding charges in certain events?

9. On the evidence provided to the Tribunal I find that on the basis that the respondents signed the declaration which included reference to the applicant’s fees and charges, the respondents did agree to the terms regarding the applicant’s charges that applied in certain events.
10. The respondents told the Tribunal that the fees had not been specifically narrated to them, and they were unaware that a clawback fee would apply for a period of 28 months. However, this was clearly set out in the applicant’s disclosure document which, by signing the declaration dated 11 January 2022, they agreed they had read and understood.

If so, have the respondents breached the contract by not paying the applicant for these charges?

11. As the respondents refinanced within the 28 month period, pursuant to the contract between the parties, the applicant was entitled to charge the respondents for the amount of clawback commission it was required to return to the third party lender, being \$2,466.00.
12. The respondents told the Tribunal that after their fixed rate became floating which was 12 months after drawdown, the applicant had incorrectly told them that they would not be able to refinance with another bank due to their circumstances but in actual fact, they were able to. However, I do not find that the applicant’s view of the respondents’ circumstances at that time was unreasonable. I say this because:
 - a. I accept the applicant’s evidence that mortgage financing had been difficult to secure 12 months earlier due to the respondents’ circumstances and there was no evidence that these circumstances had changed.
 - b. The applicant was not asked to follow up on looking for another bank after the mortgage finance had been in place for 12 months. If the applicant had been instructed to do so, the search might have revealed there were other options.

If so, what remedy is available to the applicant?

13. The remedy for breach of contract is for the breaching party to put the other party in the position they would have been in had the contract not been breached.
14. For this reason, I find that the respondents must pay the applicant the amount owing under the contract between them, which is \$2,466.00.

Referee: K. Armstrong
Date: 13 December 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>.