



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1494

APPLICANT ME

APPLICANT NN

RESPONDENT QU Limited

The Tribunal orders:

QU is to pay ME and NN \$4,000.00 on or before Monday 24 May 2021.

Reasons

1. ME and NN purchased a [package] tour, planned for 28 April to 25 May 2020, from QU Ltd trading as QU. The price per person was \$22,696.00, based on a double vista suite cabin, inclusive of the business class airfare upgrade. The price included a \$1,000.00 non-refundable deposit. The tour was paid for in full on 13 February 2020.
2. On 18 March 2020 QU sent ME and NN an email referring to travel restrictions affecting entry into New Zealand and [overseas continent], following COVID19 developments. QU offered two options: cancel from the tour or cancel from the tour and travel on the same escorted tour in 2021. ME and NN advised that neither option suited them. On 25 March 2020, ME and NN asked QU whether the tour was on or off. On 26 March 2020, QU advised that the tour was cancelled.
3. ME and NN have received a refund of all money paid, except \$4,000.00 for [part B] of the package. ME and NN have been told by QU that the \$4,000.00 is held in future credits with a company in [Country A] and represents the land tour part of the package. This company was identified as IJ at the hearing.
4. ME and NN are unable to use future credits due to COVID19 travel risks associated with their age and health, therefore they claim a refund of the \$4,000.00.
5. The issues to be decided are:
 - a) As regards the [package] tour, did QU contract with NN and ME on its own behalf, or as an agent for a supplier?
 - b) If there was a contract between NN and ME and QU, was the contract frustrated?

- c) Is QU liable to refund the balance of \$4,000.00 and should it be allowed to retain an amount to cover expenses incurred for the purpose of performing the contract?

As regards the [package] tour, did QU contract with NN and ME on its own behalf, or as an agent for a supplier?

6. Agency is a relationship which arises when one person (the principal) authorises another person (the agent) to act on their behalf. It enables the agent to make a contract between the principal and a third party. The terms of the contract between the principal and third party must be clear and certain. An agent is not liable under the contract or entitled to enforce a contract made on behalf of a principal. An agent has a duty to carry out the instructions of the principal with due care and skill. An agent also has a fiduciary duty, which means avoiding being in a position of conflict with the principal and acting in the best interests of the principal at all times.
7. ME and NN state that they entered into a contract with QU to buy the tour package. The brochure outlined all of the inclusions, such as return air flights, 21 days cruising, guided tours (including five days in [Country A]), meals and transfers. They filled out a QU – [part A of tour] booking form. The terms and conditions did not mention that QU was acting as an agent for various suppliers. There was no mention of other suppliers, apart from [Redacted] Airlines and a cruise ship called OT, mentioned in the brochure. In summary, they believed they entered into a contract with QU to buy the entire tour package as outlined in the brochure. Their place on the tour was confirmed on 17 July 2019 and full payment was made on 13 February 2020.
8. ME and NN suggest that QU is a tour operator that buys individual travel components from their suppliers and combines them into a package tour. This package is then sold with its own price tag to the public directly and QU is responsible for arranging and delivering the services specified in the package. They may provide some of these services themselves, such as a tour guide, or can obtain the services from other suppliers.
9. Mr P, director of QU, says that QU is a travel agent that has been bonded to the [Travel Group] for over 40 years and is a member of the G Group. It put the tour package together by combining flights with [Redacted] Airlines, a cruise with IB Cruise Line and [part 2 of package] tour. QU does not own, operate or have any financial interest in these three parties. It does not influence the terms and conditions, including each supplier's response to the COVID19 pandemic. QU acts purely as an agent for each supplier and follows the terms imposed on it by each supplier.
10. The fact that QU describes itself as a 'travel agent' is not determinative of an agency relationship. The facts do not point towards QU forming multiple contracts on behalf of various suppliers with ME and NN in the capacity of an agent. There was nothing in the brochure, booking form, terms and conditions or confirmation letter to say that QU was acting as an agent for multiple suppliers. QU advertised the tour as one package being provided by it as the tour operator. I accept the evidence of ME and NN that they were unaware of any arrangements that QU had with various suppliers. They were not aware of any supplier terms and conditions that they were bound by. If ME and NN had entered into multiple contracts with suppliers, arranged by QU as an agent, I would have expected to see the individual contracts. However, I find that ME and NN were only aware of the five contract terms in the QU booking form they signed and the terms set out in the brochure.
11. It is also difficult to see how QU maintained a fiduciary relationship that involved acting in the best interests of each supplier, when it was promoting a tour package that effectively involved looking after the best interests of ME and NN and the other participants. This would seem to be a conflict of interest and a conflict of duty.
12. In summary, the facts suggest that the legal relationship between ME and NN as consumer, QU as travel agent and the suppliers was more in the nature of a series of contractual relations. I find that QU entered into a direct contract with ME and NN and the terms were those specified in the Booking Form and tour brochure. It appears that QU entered into separate contracts with

each supplier to provide the services contained in the package tour. I find that QU did not contract with ME and NN as an agent for a number of suppliers.

Was the contract frustrated?

13. A contract becomes frustrated if an event renders the performance of the contract impossible or only possible in a very different way from what the parties contemplated. It essentially involves a failure at the heart of the contract resulting from an event that occurs outside the control of the parties.
14. The parties agree that the contract was cancelled by QU in an email to ME and NN on 26 March 2020. This decision was made by QU following the COVID19 pandemic announcement by Prime Minister Jacinda Ardern on 23 March 2020, that New Zealand would be entering a level four lockdown at 11.59pm on 25 March 2020 and that borders would close to all but New Zealand citizens and permanent residents. At the same time travel restrictions were being imposed around the world, including [overseas continent], where the tour was to take place. On 28 April 2020, when the tour was due to start, New Zealand was at Alert 3 COVID19 restrictions and international travel restrictions remained in place.
15. I find that the contract became frustrated because of international travel restrictions imposed to deal with the COVID19 pandemic. QU had no option but to cancel the tour because IBD had cancelled cruise sailings due to port closures and travel restrictions. This was completely outside the control of the parties.
16. Directors, Mr and Mrs O, state that QU is not liable for any loss suffered by ME and NN as a result of the pandemic because of the 'force majeure' clause in the contract which states that:

QU assumes no liability for any loss or damage as a result of an Act of God or any other force majeure condition, including, but not limited to, volcanic disruption, earthquake, low or high water levels, flood, tropical storms or hurricanes.
17. Mr and Mrs O submit that this clause frees QU from its obligations under the contract because an 'Act of God' includes a pandemic.
18. However, ME and NN point out that a pandemic is not specifically included in the force majeure clause. The 'force majeure' clause mentions *volcanic disruption, earthquake, low or high water levels, flood, tropical storms or hurricanes*. The clause doesn't limit an 'Act of God' or force majeure condition to these events. However, I find that the geological and weather events listed are too different from a contagious human illness such as the COVID19 pandemic, and therefore it is not reasonable to include a pandemic. In any event, I find that this clause is not clear enough to prevent the contract from being frustrated if the disruption is significant enough. The clause only limits liability for loss or damage where the contract is still alive, such as if a storm caused a change of route for the tour, but the change of route was not radical enough to frustrate the contract. As a result of the finding above that the contract is frustrated, the force majeure clause is no longer of any effect.

Is QU liable to refund the balance of \$4,000.00 and should it be allowed to retain an amount to cover expenses incurred for the purpose of performing the contract?

19. When a contract is frustrated, sums payable under the contract cease to be payable and sums already paid (including non-refundable deposits) are recoverable (section 61 Contract and Commercial Law Act 2017). The frustration automatically ends the contract.
20. If it is just in the circumstances, an allowance may be made for an amount to be retained, for expenses incurred in, or for the purpose of, performing the contract (section 62 Contract and Commercial Law Act 2017). Mr and Mrs O state that they have spent many hours engaging with suppliers for this tour package to get refunds, however they do not wish to make a claim for expenses incurred.

21. It is possible that QU would be entitled to claim the amount paid to IJ as an expense. However, I find that QU should have provided for the possibility of frustration due to a pandemic in its contract with IJ, to mitigate loss in this situation. Given that QU did not include a provision for frustration due to a pandemic, it must bear the risk that its contract with ME and NN might become frustrated and require a refund.
22. Therefore, I find that QU must refund the entire balance of \$4,000.00 to ME and NN. This is money they have paid that must now be returned as the contract has ended.

Referee: Sara Grayson

Date: 5 May 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 of 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/finances/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>.