



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1380

APPLICANT RC

RESPONDENT LUD Group Limited

The Tribunal orders:

LUD Limited is to pay \$19,523.70 to RC before 20 May 2021.

Reasons

1. RC purchased a motorhome and cruise tour of North America from LUD Group Limited (LUD) on 5th August 2019 via its website. The total cost was \$21,523.70 which was paid in full. The tour was due to commence in May 2020.
2. On 18th March 2020 LUD advised RC that the tour would not be going ahead due to the worldwide Covid pandemic. LUD advised that it would not know for some time what amount might be refunded to RC as it had just started the process of cancelling bookings it had made with its suppliers.
3. On 28th July 2020 LUD offered RC a refund of \$9,324.30 in full and final settlement of all claims against it, stating that this amount was the 'unused' portion of the tour. RC did not accept this offer and LUD withdrew it on 5th September 2020.
4. On 5th February 2021 LUD offered RC a refund of \$1,431.16 saying it was his portion of the total cash refund LUD received from its suppliers. RC rejected this offer.
5. RC claims \$21,523.70 from LUD being reimbursement of the full amount he paid to them.
6. LUD was represented by its directors Mr and Mrs HU. It advises that it had no insurance cover for such a situation.
7. The issues to be decided are:

Contract and Commercial Law Act 2017 – Frustrated Contracts

- a) Were there any clauses in the contract that were intended to have effect in the circumstances (worldwide Covid pandemic).
- b) What expenses were incurred by LUD for the purpose of performing the contract?

Fair Trading Act 1986

- c) Did LUD mislead or deceive RC?
- d) If so, what loss did this cause to RC?

Were there any clauses in the contract that were intended to have effect in the circumstances (worldwide Covid pandemic).

8. The relevant law is that of Frustrated Contracts under Subpart 4 of the Contract and Commercial Law Act 2017 (CCLA). Section 60 of the CCLA provides that a contract is frustrated if it has become impossible to perform. Section 67 provides that if there is a provision in the contract that is intended to have effect in the circumstances then regard must be given to it. Otherwise section 61 provides that money paid under a contract may be recoverable by a party, subject to section 62 which provides for expenses incurred by the other party prior to the contract being frustrated.
9. I find that the contract was frustrated because it had become impossible to perform due to the Covid pandemic. This finding is supported by LUD advising RC on 18th March 2020 that the tour would not be going ahead as "... these are extraordinary events beyond our control and prevent us from fulfilling our obligations to you."
10. RC was unclear as to the terms of the contract. LUD provided a copy of the online booking form completed by RC where he answered 'yes' to having read and understood the LUD Travel Group Terms and Conditions. LUD say that these terms and conditions included the following, however RC does not remember reading these:
 - a. Cancellation policy – *Prior to final payment* – Loss of deposit if you change your mind or cancel – *After final payment* – Up to 100% of tour cost. Refunds are subject to supplier cancellation terms and conditions: processing and penalty fees may be payable. LUD tour fees and charges are non-refundable (subject to and not intended to limit your rights under the Consumer Guarantees Act and Fair Trading Act).
 - b. Itinerary Alterations – no refunds will be given for voluntary itinerary alterations. Participants are advised it may be necessary to alter the itinerary for operational reasons such as campground and road closures. Refunds are not generally available in these circumstances and participants should ensure their travel insurances cover such events.
 - c. Travel Insurance – All participants are required to have a comprehensive travel insurance policy covering North American travel and loss of deposits.
11. I find, on the balance of probabilities, that the terms listed in 10a, 10b and 10c above were those that RC agreed to at the time of the on-line booking. This is because these terms have been referred to consistently by LUD, firstly in its offer letter of 28th July 2020, secondly in its response to the group dated 5th September 2020, and finally in its submission to the Tribunal dated 8th February 2021. RC did not dispute these references at the time.
12. I find, on the balance of probabilities, that the terms/provisions outlined in 10a and 10b above were not intended to have effect in the circumstances of a world-wide pandemic. This is for the following reasons:
 - a. The cancellation provision outlined in 10a above makes it clear that it is to apply if the customer changes their mind or cancels, not if LUD cancel.
 - b. The alteration provision outlined in 10b above would be read by a reasonable person to apply to changes to the itinerary, that is something that makes the itinerary different, rather than a complete cancellation of the tour. This is because the word 'alteration' doesn't normally signal complete cancellation but rather a much lesser degree of change. This finding is supported by the provision itself stating it is for operational reasons such as campground and road closures. These are localised events and quite different in nature to a worldwide pandemic which resulted in government advice not to travel, suspension of international flights and border closures.

13. I have had regard to LUD's belief that the alteration provision in 10b above applied when it found it was necessary to cancel the tour due to the Covid pandemic. However I have not found that this is more likely than not for the reasons outlined in paragraph 12b above.
14. I find that it is more likely than not that the travel insurance term outlined in 10c above was intended to have effect in the circumstances and regard must therefore be had to it. This is because insurance is usually taken out to protect against hazards that are outside the control of the parties, such as the situation encountered here of a worldwide pandemic. Further, section 66 of the CCLA requires that when insurance is an express term of the contract that has been frustrated (as was the case here) regard must be had to any insurance money that has become payable when recovery of monies by a party is being considered.
15. RC advises that he did have a comprehensive insurance policy however his insurer has declined his claim. On the documentation provided the insurer declined the claim on the basis that "the losses incurred due to the financial default of the suppliers will not be covered under your policy." LUD advised the Tribunal in its submission dated 8th February 2021 that it is not in 'financial default' and during the hearing it confirmed this statement. The Tribunal can only act on the information in front of it, which is that RC's insurer has declined his claim. It is not the place of the Tribunal to enquire into whether or not the insurer's refusal to pay the claim is valid.
16. To summarise, I have found that the contract was frustrated and so under the CCLA the amount of \$21,523.70 paid by RC is recoverable subject to any expenses incurred by LUD (the value of expenses is considered in the section below). I have found that the terms in the contract regarding cancellation and alterations to the itinerary were not intended to have effect in the circumstances of a worldwide pandemic, however the term requiring insurance was. The Tribunal has noted that RC had a comprehensive insurance policy for North America covering loss of deposits as required by the contract, however no insurance money has become payable as his insurer has declined his claim.

What expenses were incurred by LUD for the purpose of performing the contract?

17. The relevant law is section 65 of the CCLA which provides that in estimating the amount of expenses incurred by a party, the Tribunal may include an amount that appears to be reasonable for overhead expenses and any work or services performed.
18. LUD advise that it had incurred direct costs for administration, marketing, staffing, operations and organising refunds. It stated that these costs came to \$5,849.70 per person, which for the 16 people booked on the tour comes to approximately \$93,000 in total. LUD repeatedly refused to quantify this amount, saying that it was unable to calculate it other than as follows:

a. Tour price per person charged to RC.	\$10,761.85
b. Less direct costs per person (motorhome, camp fees, cruise, etc)	- \$ 4,912.15
	\$ 5,849.70

19. I have been unable to find, on the balance of probabilities, that this expense amount of \$5,849.70 per person is a reasonable estimate of LUD's overhead expenses and work performed. This is because LUD did not provide the Tribunal with a reasonable indication of what this amount was made up of. I have had regard to LUD's belief that it did not need to provide this information, however I advised it during the hearing that the Tribunal did require it and LUD said it was unable to give it. I considered the statement by LUD that an Australian based tour operator operating similar tours charges a similar amount to it, and that all things being equal would have similar indirect costs. However I did not accept this as evidence as there was no supporting documentation provided or way of comparing the product offerings. I have also considered LUD's statement that a 60/40 indirect to direct cost ratio is pretty much industry standard however again there was no supporting or corroborating documentation to back up this claim. I accept LUD's statement that the tour requires around eighteen months work to plan, market and deliver however no information was offered as to the quantity of time spent doing work across this timeframe.
20. During the hearing RC indicated his estimate that \$1,000.00 per person would be a reasonable amount to pay based on his experience in organising tours.

21. As there was insufficient evidence to persuade me that \$5,849.70 per person is a reasonable amount for overhead expenses and work performed by LUD, and in the absence of any other information, I find that an amount of \$1,000.00 per person appears to be reasonable.
22. For the above reasons RC is able to recover \$19,523.70. This amount is made up of the \$21,523.70 he paid to LUD before the contract was frustrated, less \$2,000.00 (\$1,000.00 per person) for expenses incurred by LUD .

Did LUD mislead or deceive RC?

23. RC claims that he was misled three times by LUD and so that it had breached the Fair Trading Act 1986 (FTA).
24. The first occasion was when LUD advised RC, in an email dated 28th July 2020, that it was unable to provide a full refund of costs as “the supplier had already supplied the service.” RC points out that as the tour did not go ahead service was not provided before the trip was cancelled. I find, on the balance of probabilities, that this was not a misleading statement as I accept LUD’s explanation that it was the supplier referred to and that it had already provided sales and administrative services to him.
25. The second occasion was when LUD advised him (and the group), in an email dated 5th September 2020 that LUD “will undertake a restructure of the company and its subsidiaries.” RC points out that he believes that LUD had already restructured its business as in July 2020 changes to the shareholding in LUD were made. I find, on the balance of probabilities, that this was not a misleading statement as I accept LUD’s explanation that the restructure it referred to in its email was a sale of assets to be made to its subsidiary and a winding down of trading operations.
26. The third occasion was when, in its submission to the Tribunal dated 5th February 2021, LUD stated that “subsequently a decision was made to restructure and wind down the company and the company is no longer trading.” Again RC points out that he believed that LUD had in fact already restructured its business as in July 2020 changes to the shareholding in LUD were made. I find that this was not a misleading statement as I again accept LUD’s explanation that the restructure it referred to in its email was the later sale of assets to its subsidiary and the later winding down of trading operations.
27. For the above reasons I do not find that LUD mislead or deceived RC, and so I do not need to consider whether this caused a loss to RC.

Conclusion

28. For completeness I note that during the first hearing on 23rd February 2021 RC had indicated that he wished to make a claim against LUD for breach of the Consumer Guarantees Act 1993 (CGA 1993). During the hearing on 16th April 2021 RC withdrew this claim. In its submission sent to the Tribunal on 5th April 2021 LUD stated that it thought that RC’s CGA claim was frivolous as that it did not address in any way the matter at issue. I find that RC’s CGA claim was not frivolous, but was made with genuine intent as a result of his frustration at LUD being unable to quantify its fees and charges, however on reflection he felt this was adequately covered by his claim that the contract was frustrated.
29. For the above reasons LUD Travel Group Limited is to pay \$19,523.70 to RC before 20 May 2021.

Referee: L Thompson
Date: 20 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 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/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>.