



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 715

APPLICANT **SG**

APPLICANT **LN**

RESPONDENT **M Ltd**

The Tribunal orders:

1. LN is joined to the claim as an applicant.
2. M Ltd is to pay SG and LN \$8,964.00 on or before Friday 12 January 2024.

Reasons:

1. LN is the husband of SG, and the headstone in dispute was for LN's father. For this reason, and because SG and LN together arranged to pay for the headstone, I am satisfied LN has a legitimate interest in the outcome of this hearing and it is proper he be joined as an applicant.
2. In May 2021 SG made initial enquires with M Ltd about a headstone for her late father-in-law ("the Headstone"). Continuing discussions between SG and M Ltd resulted in the Headstone being ordered and paid for, but SG and LN say M Ltd could not supply what they ordered for their memorial site. They claim \$15,000.00, of which \$8,464.00 is a refund of the Headstone payment, and \$6,536.00 is compensation for emotional distress associated with these difficulties and having to delay the unveiling to honour LN's late father.
3. M Ltd, through its representative EH, says this is not a situation where M Ltd breached its agreement with the applicants but rather they have simply changed their mind about the design. In these circumstances it says M Ltd should not have to refund, or if any compensation is awarded, M Ltd should at least be able to retain its significant production costs.
4. The issues to be resolved are:
 - a. What was agreed about the design of the headstone?
 - b. Has M Ltd provided services with reasonable care and skill? and
 - c. If not, are SG and LN entitled to compensation of \$15,000.00 as claimed, or to any other sum?

What was agreed about the design of the Headstone?

5. Under contract law, 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, and what was agreed is looked at objectively, i.e., by looking at what was said and done.
6. I find the essential terms agreed between the parties are set out in the invoice dated 7 May 2022 (“the Invoice”).
7. I say that because I accept evidence provided by SG and LN that:
 - a. the Invoice outlined the description and cost of their desired headstone;
 - b. during a period of continuing discussions with M Ltd, SG and LN arranged part payments until the headstone was paid for in full in late November 2022.
8. Within the invoice, I acknowledge specifications of the glass plaque to be fitted to the Headstone are noted with some potential size variation still possible. In all other respects however, I am persuaded on the evidence this invoice fully describes the headstone SG and LN wanted, except for that size confirmation and the details to be added to the plaque and online memorial.
9. In terms of any other relevant terms and conditions, I note:
 - a. some payment obligations are recorded at the foot of the invoice; and
 - b. a statement is also provided which reads, *“For any cancellations, M Ltd reserves the right to deduct any costs incurred before any remaining monies is returned, which includes a \$300 design fee for any design work carried out.”*

Has M Ltd provided services with reasonable care and skill?

10. Contract law recognises contracts can have terms expressly agreed between the parties, and terms which are implied into the contract by law. The Consumer Guarantees Act 1993 (“CGA”) has terms relevant to this contract, because the CGA implies minimum standards (guarantees) where goods and services are supplied in trade to consumers. It also provides a scheme of remedies when those guarantees are breached. Section 28 CGA says any services provided must be supplied with reasonable care and skill.
11. I find M Ltd has not provided services with reasonable care and skill.
12. Before setting out my reasoning for that conclusion, I first acknowledge this is a contract under which M Ltd set out to provide both goods and services. The headstone itself is made up of tangible materials which are classed as goods, however I am satisfied the primary dispute with the headstone arises more from the advice and consultation services SG and LN say they relied on from M Ltd to assist them with this memorial.
13. Specifically, SG and LN say that it was not until after they had fully confirmed their design requirements and paid for the headstone that M Ltd told them a glass plaque could not be used in a [city] cemetery. This notification came in an email from M Ltd on 24 November 2023. This contrasts with other evidence on the file that shows that at least 9 months earlier, within a March 2022 email, M Ltd noted they would need to check with the appropriate local authority regarding any local cemetery requirements or prohibitions in terms of design decisions. The email includes the statement, *“We will follow this up and ensure there are no issues and it is a smooth process with the cemetery.”*
14. There is no evidence SG and LN intended to erect the headstone anywhere other than in [city] and its surrounds. I therefore find no valid reason why this information about design components was not investigated by M Ltd and communicated earlier.
15. An obvious time to consider this was before preparation of the invoice as I am satisfied the Invoice operates as a representation the product described in the Invoice can be properly

supplied by M Ltd and be used by SG and LN.

16. M Ltd say other materials can be substituted to complete the plaque and they have offered to provide a suitable alternative. SG and LN do not however wish to substitute another plaque material, saying this would completely change the look of the memorial they designed. They asked for a refund.
17. I am satisfied any decision to substitute, or not substitute, lies with the consumer. In M Ltd's view, an appropriate memorial can still be provided in another material or medium, however that is not M Ltd's decision to make. To use the language in s32 CGA, M Ltd appear to say that changing materials isn't really a chance, or, if there was a failure on their part, it is a failure they can remedy which will still result in a valued and appropriate memorial headstone. I do not however accept this argument. Generally, and specifically here given the nature of the product these consumers have ordered, it is only right that the consumer retain the right to determine the design.
18. Considering all these circumstances I am satisfied the failure to provide notice of key information which affected the consumer's design choices was a failure of reasonable care and skill in these circumstances.

If not, are SG and LN entitled to compensation of \$15,000.00 as claimed, or to any other sum?

19. If a party suffers loss resulting from a breach of contract, contract law requires, as far as is possible, that the party be put back in the position they would have been had the contract not been breached. However, section 32 CGA provides a scheme of remedies where CGA guarantees are breached.
20. I find SG and LN are entitled:
- a. to cancel their contract with M Ltd; and
 - b. receive compensation of \$8,964.00.
21. The compensation sum is made up of two components:
- a. a refund of the price SG and LN paid for the headstone of \$8,464.00; and
 - b. compensation for their inconvenience and distress in the sum of \$500.00. I decline to award the full amount of \$6,526.00 claimed in compensatory costs, however I am satisfied some recognition is warranted as a foreseeable consequence. In a situation where contracts are made for services involving families who have been bereaved, it is also a foreseeable consequence that emotions will be heightened and often deeply felt.
22. I am satisfied these awards are justified because:
- a. I have earlier found there has been a failure under s28 CGA;
 - b. I am satisfied under s32(b)(i) CGA, SG and LN have given notice they wish to cancel their contract with M Ltd, and they are entitled to do so in these circumstances because, as discussed in paragraph 17, this is a failure that was not able to be remedied;
 - c. the refund is justified in circumstances of a cancellation, and the award of compensatory costs is made here in reliance on s32(c) and s39(4)(e) CGA.
23. M Ltd have characterised these circumstances as a "change of mind". While they are entitled to their view, I am not persuaded on the evidence this is the basis of the claim, nor that this is what has occurred. I accept evidence the design change is one SG and LN did not wish to make, and that their comments about wishing to change to a local provider is perhaps an indication of the disillusionment they felt at investing so much in the design process with M Ltd, without achieving their desired result.
24. In making this award I have considered arguments which could be raised in M Ltd's defence including:
- a. that the Tribunal should consider expenditure incurred by M Ltd in supplying the services, as raised by it and provided for in s39(4) CGA;

- b. its terms and conditions regarding cancellation noted on the Invoice and discussed in paragraph 9.b;
- c. that the value of customised orders can often not be readily recovered by a supplier; and
- d. while I have referred in this decision to “the headstone”, the stone used, and the plaque used, are components which could be considered and/or dealt with separately.

25. I am not however persuaded by these arguments because:

- a. while I do not diminish M Ltd’s expenditure on this matter for material and design costs, there is no compelling evidence SG and LN have received or have retained anything of value from the contract;
- b. because SG and LN are relying on an express statutory right under the CGA to cancel, I do not accept this is a situation where “cancellation” has occurred in the sense referred to in the Invoice terms;
- c. while I acknowledge M Ltd’s comments that the stone was specifically imported for this job, where this difficulty has arisen due to a lack of communication, I am satisfied this was a risk which was within the control of M Ltd, and it had the ability to ensure its processes were sequenced in the right order to avoid this type of risk; and
- d. I am satisfied that where a memorial headstone is made up of components, it is the bringing together of those elements that allows a family to achieve their desired memorial. It is therefore not appropriate to separate such items for the purposes of commercial expediency.

26. Finally, I note discussion at the hearing about the [charity] funding which SG and LN received to assist with payment for the headstone. M Ltd disputed any refund was due but said if it was ordered to pay any sum, it should protect the interests of [charity] and pay that organisation rather than SG and LN directly. While that comment is acknowledged:

- a. I have no details about the terms of any agreement made about the [charity] loan; and
- b. that loan is not the subject of this dispute.

Legally, SG and LN will continue to be bound by any agreed terms, including any obligations regarding repayment and/or changes in circumstances. I therefore see no basis to modify the terms of this order.

Conclusion:

27. For all these reasons, M Ltd Limited is obliged to pay SG and LN \$8,964.00 in accordance with the terms of this order.

Referee: Malthus

Date: 12 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>.