



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1327

APPLICANT SG

RESPONDENT H Limited

The Tribunal orders:

1. The claim is dismissed.

Reasons

1. In 2014, Mr G and a banking colleague, ST, embarked on an enterprise through a start-up company, H Limited (the company), to provide finance to companies secured by their accounts receivables.
2. In the early days of its operations, the company was short of cash to advance to customers. Mr G regularly advanced sums that matched outflows to customers and was repaid when the customer repaid. In 2015, Mr G advanced \$7,025.29 to the company to cover an advance to a customer, but due to an oversight, was not paid back. Mr G resigned as a director in October 2017. Now that he has become aware of the advance that was not repaid, he has filed a claim seeking repayment of this sum.
3. H Limited defends the claim primarily on the basis that Mr G signed a confirmation at the time he resigned as a director that the company does not owe him any money, and that he has no other claims against the company.
4. The issues to be resolved are: (a) Was the advance to the company of \$7,025.29 a loan? (b) If so, does the resignation letter preclude any claim for repayment of the advance?

Was the advance to the company of \$7,025.29 a loan?

5. A contract, or legally binding obligation, is created by an offer, acceptance, exchange of value, and an intention to create legal relations.
6. Mr G described the company as a “garage start-up”. It is common for directors and investors in such companies to make advances to cover cash flow from time to time. In the early days, this can be informal, creating difficulties in characterising the payments in the event of a dispute as to their nature. Cash injections can either be viewed as loans, resulting in a liability on the balance sheet, or equity. The latter is usually, but not always, reflected by respective shareholdings.
7. In this case, Mr G recalls making numerous advances, totalling in excess of \$50,000, all of which were repaid but for the one advance in dispute. It could be argued that each separate payment was an advance of operating capital upon which Mr G was personally taking a risk. If the company was

not repaid, he would not then be able to sue the company for repayment. The company had not signed any loan agreement with Mr G, and whilst Mr T knew of the advances, there had not been any discussion to formalise the terms of the advances.

8. Later, Mr T and Mr G formalised the nature of their advances by a written loan agreement, and each put in an agreed sum to sustain cash reserves. It is equally arguable that the intent reflected in this arrangement could support a finding that the informal advances made for earlier contracts with customers should be viewed in the same vein.
9. Looking at the arrangement objectively, despite the lack of a formalised arrangement, I consider it more probable that the advances were in the nature of a loan. I accept that the risk of non-payment may have been great, and the likelihood of Mr G seeking recovery from the company of a lost amount upon default of a customer may have been slim. However, I prefer to see the substance of the arrangement for what it really was. Mr T and Mr G were propping up the company with short term cash loans for specific customers and were repaid those specific sums upon completion of those specific loans. This was not in the nature of capital investment, but short-term cash advance.

If so, does the resignation letter preclude any claim for repayment of the advance?

10. The cash advance that Mr G made to the company of \$7,025.29 was never repaid. This was not picked up at the time due to an oversight in the management of the company's accounts and an oversight by Mr G in not realising he was still owed the money.
11. In early 2017, [Redacted] Bank then came on board as an investor, which markedly improved the fortunes of the company and injected cash reserves by way of available credit. Mr G became concerned as the year progressed about the company's risk management strategy and felt the business should be wound up. The rest of the board did not agree. Mr G resigned as a director but retained his shareholding. At the time he resigned he signed the following statement:

"I, SG, give notice that I resign from my position as a director of the Company with effect on and from the date of this notice.

I confirm that no monies are owing to me by the Company, whether by way of fees, salary or otherwise, and that I have no other claims of any nature against the Company."

12. I find that this statement is binding on Mr G according to its terms. I have reached this conclusion for the following reasons:
 - (a) The statement is clear and unambiguous and covers all sums that might be owing of any nature. It also confirms Mr G will bring no claims. I am satisfied that whilst the sum claimed in these proceedings relates to an advance to the company, rather than director's fees or salary, the confirmation made is sufficiently broad ("*or otherwise*" and "*no other claims of any nature*") that it precludes this claim.
 - (b) The resignation letter is more than just a statement of intent and is contractually binding. The elements of a contract exist. Mr G offered his resignation and it was accepted. The resignation from the board brought with it a release from the duties of a director and the accompanying liabilities that might attach to company responsibilities. Mr G in turn was asked to confirm that he was not owed any money, and would bring no claims, and he elected to depart from the board on that basis. It would have been important to the other board members that there were no "hidden loose ends", as Mr T expressed it. [Redacted] Bank had invested in the company without knowledge of any debt due to Mr G and it was entitled to obtain confirmation of a clean slate upon Mr G's exit from the board. Mr G was to remain a shareholder, and if a dynamic existed in which Mr G could end up in dispute with the board, it was wise to obtain confirmation that at least at the date of exit, the company had no unknown liability. Mr G elected to confirm this was so.
 - (c) I have given consideration to whether relief should be granted on the grounds of actionable mistake (s24 Contract and Commercial Law Act 2017). Mr G signed the confirmation letter not

knowing he was still owed money by the company, and the board also was unaware of this outstanding sum. This could be viewed as a common mistake (s24(1)(a)(ii)). However, the elements required for an actionable mistake are missing. The sum involved would not meet the test of substantiality in the overall context of the board resignation to warrant overturning the contents of the confirmation (s24(b)). More importantly, I consider that it was implied in the context of the confirmation that Mr G would bear the risk of inaccuracy (s24(1)(c)). The board sought the confirmation to take the benefit of certainty. This was a commercial decision amongst experienced businessmen. The confirmation would have no meaning if it could be overturned by a mistake made by the maker of it. Mr G was the only person with potential knowledge of all the facts, and the primary person who had the means to find the error. For the same reason, had there been an actionable mistake, I would not consider it just to enable Mr G to rely on his own error, to the detriment of others who were not in control of the information, and some of whom who had invested on the strength of how things seemed (s27, s28).

- (d) Given these findings above, I need not move forward to consider whether the resignation letter created an estoppel by representation. However, it is noted that the letter was a clear representation that no claims would be brought. There is a more difficult question as to whether the company acted in reliance of that statement to its detriment. [Redacted] Bank has made an offer to purchase the company, but it has done so conditional upon the liability being resolved. A far greater analysis would be required to consider whether there is reliance on the statement to a degree that caused detriment. The company has spent its funds after it had knowledge of the claim, and is now not in a position to make a payment, but if the company trades again, it may have funds to pay in the future. Nothing turns on this, but to say that more information would have been required to prove that the company had acted differently in its decisions as a result of the resignation confirmation that it otherwise would have, to base a defence in estoppel.
- (e) Mr G was the founder and creator of this business and has put much time and energy into its development. Mr T also spoke of his commitment to the project and the costs and risks he took to take a chance on its success. I can understand the disappointment that has ensued on both parts from the performance of the company to date. Mr G spoke of the need to put this anomaly of the unknown liability right, and that the integrity of the matter required an order in his favour. I accept he lent the company money, and that, had he realised he had not been paid back at the time, or at least before others invested in the company, he could have recovered the funds. However, now that others have come on board without knowledge of the advance, and he has exited on the basis that he has no claims against the company, the commercial reality is that he has taken the risk of an error on his part.

Conclusion

13. For these reasons, the claim is dismissed.

Referee:

J Robertshawe

Date: 29 October 2020



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 28 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 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 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>.