



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 318

APPLICANT TD

RESPONDENT SS

SECOND UU
RESPONDENT

The Tribunal orders:

The claim against SS cannot proceed; and

The claim against UU is dismissed.

Reasons

[1] On 27 October 2020 TD signed a contract with E Ltd for E Ltd to build him a house. TD paid a deposit of \$23,500.00 on the same day. E Ltd was placed into liquidation some eight months later, having not built the house or repaid the deposit. TD seeks compensation for his lost deposit from SS, the sole director of E Ltd and/or UU, who was employed at the relevant time by E Ltd. TD says that the two respondents aided and abetted misleading conduct on the part of E Ltd, and are liable to compensate him under s 43 (1)(b) of the Fair Trading Act 1986 (“the FTA”).

[2] TD provided a detailed written outline of his claim, which I shall summarise. TD said that he dealt throughout mainly with UU. He said that he had approached E Ltd in August or September 2020, together with family members and, after some discussions, the parties had signed a building contract. UU had signed the contract for E Ltd. TD said that UU had described himself as a director of E Ltd, which had provided a sense of security to TD. TD has since discovered that UU was not a director; he says that he would have been doubtful about signing the contract if he had been aware of that, or if he had known that UU had falsely held himself out as a director. TD provided a copy of an email, in which UU had labelled himself as “Director”.

[3] After the contract was signed, work began on the concept design for the house. TD on occasions made enquiries about progress. He said that he was told by UU that plans would be completed and provided to the [council] before Christmas. This did not happen. In response to his further enquiries in January and February 2021, TD said that he had been informed that the [council] had requested more information, and that its progress was slow. TD then called the [council] himself, and learned that no plans had been submitted at that point. At a subsequent meeting, UU told TD that he, UU, had learned that the holdup had been caused by E Ltd’s architect’s refusal to release the plans it had completed because E Ltd had not paid for them. This difficulty, said UU, would be resolved as SS had informed him that an imminent property sale by E Ltd was expected to provide funds.

[4] UU subsequently resigned from E Ltd. TD approached SS in [city], who told him that funds from completed sales were expected. The parties made a variation to their contract on 17 March. However, no progress was made, and TD then informed SS that he wished to cancel the contract and receive a

return of his deposit. In mid-May 2021, SS promised to repay the deposit but did not do so. E Ltd went into liquidation a month later.

[5] TD's claim is that SS and UU aided and abetted E Ltd in engaging in misleading conduct by:

- UU's holding himself out falsely as a director of E Ltd, and SS's condoning or permitting this; and
- contracting to build a house with the knowledge that, given E Ltd's poor financial situation, the completion of the house would be impossible.

[6] TD provided a copy of the liquidators' report, which showed a total shortfall to all creditors of \$3,453,343.00. TD said that E Ltd's inability to pay its suppliers and other creditors was, or must have been, known to both SS and UU at the time the building contract was signed; and that it would therefore have been known to them that E Ltd could not carry out the contract that UU signed on its behalf.

[7] SS did not mention at the hearing that he had been adjudicated bankrupt. I have since learned that in fact he was adjudicated bankrupt on 11 May 2023. As the Official Assignee has not contacted the Disputes Tribunal to give leave for the claim against SS to be heard or defended, TD's claim against SS cannot proceed.

[8] However, with relevance to the claim against UU, SS said that E Ltd had been carrying out building work, albeit with covid-caused financial troubles, until a dishonest employee incurred a debt that E Ltd could not pay at the time, which resulted in the creditor's placing caveats on two properties that E Ltd was on the point of completing and selling. He said that E Ltd had reached an agreement with its principal creditor, the IRD, but had been unable to comply with it because of its inability to complete the properties over which caveats had been placed. Thus, the IRD had moved to liquidate E Ltd. At the time of the liquidation, said SS, the two caveated properties had been nearly completed, and a third was awaiting a Code of Compliance certificate from the [council].

[9] SS said that UU had never been a director of E Ltd. He had, however, been given the title of "Director of Works".

[10] UU also provided a detailed written outline of his arguments. In summary, he said that he was a builder, and had been initially engaged by E Ltd as a project manager. After an office was opened in [city], and SS moved there, UU was left, together with other employees, in the South Island office, and was given the title "Director of Works", which he had used. He provided letters from suppliers of goods which stated that they had never regarded UU as a director of the company. UU said that he had never held himself out as a director of E Ltd but that he had, as soon as he realised that confusion was being caused by his designation in the company, moved immediately to alter the label he used in his documents. In any event, said UU, TD had suffered no loss by his, TD's, misunderstanding of UU's position in the company. UU said he had signed the building contract as "The Builder" with the authority of E Ltd.

[11] UU said that he had never been involved in the financial dealings of E Ltd, although he had inevitably become aware during 2021 that the company had financial problems. He said that the architect who had completed the plans for the house had been in [city] and that he, UU, had had no direct dealings with him. Rather, said UU, he had been a conduit; he had merely passed on to TD any information regarding the plans that had been supplied to him from [city] by SS.

[12] UU said that E Ltd had been continuing to carry out its operations after the contract had been signed with TD on 27 October 2020. He provided evidence that E Ltd had paid N Ltd for materials on 8 December 2020, and X Ltd for supplies on 31 December 2020. He also supplied a copy of a Code Compliance Certificate issued by the [council] in August 2020 in relation to another property built by E Ltd. This evidence, said UU, established that E Ltd was carrying out building work and paying at least some debts during the months before and after TD signed the contract.

The issues

[13] The question I must decide is whether UU is, as TD claims, liable for aiding, abetting, counselling or procuring E Ltd to engage in misleading and deceptive conduct that resulted in loss to TD.

The law

[14] The FTA provides that persons in trade must not engage in misleading or deceptive conduct, and remedies are available to those who suffer loss from such conduct. In addition, under s 43(1)(b), a person whose conduct constitutes “aiding, abetting, counselling or procuring” certain contraventions of the FTA may incur liability as well. Thus, for a person to be primarily liable for misleading or deceptive conduct, he or she must be “in trade”, but this is not the case for secondary liability under s 43(1)(b).

[15] There are many cases in which the courts have held that directors, officers or employees are themselves “in trade”. In this case, I do not think that UU can be described in that way. He was, in fact, an employee, a builder, who acted as a project manager and “director of works”. He was not the alter ego of the company; he was paid a salary, and was not involved in the company’s financial operation. I do not think that he can be regarded as himself being “in trade”. Thus, if UU is to be liable under the FTA in this case, it must be as a party to the company’s conduct which, as a prior question, must be shown to be misleading or deceptive and to have caused TD’s loss. Although UU was an employee of the company, and his acts on behalf of the company must be attributed to it, there is no reason why UU cannot, if the evidence justifies it, incur liability under s 43(1)(b). He and the company are separate legal persons.

Did E Ltd engage in misleading or deceptive conduct?

[16] I accept, of course, that TD would not have entered a building contract with E Ltd and paid a deposit to it if he had known that E Ltd would be in liquidation eight months later. I also accept that E Ltd must have been facing financial difficulty in October 2020, when TD signed the building contract. Despite this, I do not think that TD has proved that there was misleading or deceptive conduct on the part of E Ltd that led to the loss of his deposit.

[17] I accept that TD genuinely believed that UU was a director of E Ltd. Although UU was the “Director of Works” for E Ltd, it is clear that, at least on one occasion, UU described himself in an email as “Director”. Although UU may not have intended to encourage any belief on the point on the part of TD, I consider a person in TD’s position may reasonably have assumed that UU was a director of E Ltd.

[18] Despite this, I do not think that TD was misled in such a way as to have suffered loss in consequence. He signed his contract with E Ltd, not with UU, who signed for E Ltd as “The Builder”. There is nothing to indicate that TD has suffered any financial loss because UU was the “Director of Works” rather than a director of E Ltd. UU signed the contract with the authority of E Ltd, and his position in the company did not affect TD’s financial situation. TD said that he had got on well with UU, and I do not accept that TD would have declined to contract with E Ltd if he had known that UU was not a director of it.

[19] TD’s stronger argument is that E Ltd should not have contracted with him and accepted his deposit in the circumstances. He had believed that E Ltd was financially secure when, in fact it had, or was about to have, mounting debts. The question is whether E Ltd misled him as to its financial situation.

[20] I do not think that the evidence supports TD’s contention that misleading conduct or representations by E Ltd operated as a cause for his entering the contract. E Ltd appeared to him, at the time he signed the contract, solvent and stable. In fact, at that point, although it had financial difficulties, it was trading, and was working on a number of building projects. E Ltd may, looked at from a viewpoint of October 2020, have passed through a transitory period of financial instability or it may have, as hindsight has proved to be the case, ended up in liquidation. The evidence does not show that any representative of E Ltd misrepresented its position at the time the contract was signed in October 2020.

[21] TD considers that the fact that E Ltd contracted with him at a time when, it can now be inferred, it was impossible for E Ltd to carry out the building of the house was in itself misleading or deceptive conduct on E Ltd’s part. I accept that this would be so, if the evidence supported his argument that E Ltd must have known that it could not build his house. In some circumstances, silence may be misleading; and it is reasonable for one party to a contract to expect that the other would not undertake

an obligation knowing that it was impossible of fulfilment. However, in this case, I do not have evidence that E Ltd contracted in that way. Rather, as stated above, the evidence indicates that the company continued to have a number of employees on its staff, it operated two offices, and was still working on several building projects.

[22] I accept that TD was falsely led to believe in January and February 2021 that plans for his house had been submitted to the [council] when in fact this was not the case. This was, of course, some time after the contract had been signed. TD says that he would have been able to cancel the contract earlier, and obtain a refund of his deposit, if he had been made aware of the true reason for the delay in the submission of the plans. I cannot know whether that is so, or not; I do not know if that event would have justified TD in cancelling his contract or whether E Ltd would have repaid, or been able to repay, the deposit in February 2021. In any event, after he discovered that the submission of the plans had been held up because the architect had not been paid, TD did not take immediate steps to cancel the contract. Rather, he endorsed, or confirmed, its continuation by agreeing to a variation of it a month later. This was because he hoped, having discussed the matter with SS, that SS's assurance that money would shortly be forthcoming to pay the architect would be reliable. That this proved not to be so was not the fault of UU, who was not involved in these discussions. Nor, in my view, were SS's unjustified assurances about E Ltd's ability to pay the architect, or to refund TD's deposit, false as they proved to be, the cause of TD's loss.

[23] Thus, as I have found that there was no misleading conduct on the part of E Ltd that caused TD to enter the contract and pay a deposit, UU cannot be liable for aiding and abetting such conduct. I should add that if it had been established that the conduct of SS or UU as attributed to E Ltd was misleading or deceptive, I would not have held that UU was liable for aiding and abetting the conduct. I accept that UU acted in good faith, and was unaware that any information that he passed on from SS to TD, such as that concerning the submission of the house plans to the [council], was incorrect. In order to aid and abet conduct, it must be shown that the person carrying out the aiding and abetting had knowledge of the relevant facts. In this case, I accept that UU was not involved in the financial dealings of E Ltd, or the dealings in [city] between SS and the architect, and was not a party to any conduct on the part of the company that might have been regarded as misleading or deceptive.

[24] Thus, TD's claim against UU is dismissed.

Referee: C Hawes

Date: 20 July 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>.