



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2022] NZDT 247

APPLICANT L Ltd

RESPONDENT N Ltd

The Tribunal orders:

N Ltd is to pay L Ltd \$15,000.00 by 12 December 2022.

Background

1. L Ltd is a retail jeweller with shops in New Zealand.
2. N Ltd is an insurance company based in [City].
3. At N Ltd.'s request, L Ltd provided a valuation for items of jewellery. The valuation was for an insurance claim made by H, a customer of N Ltd, in respect of stolen jewellery.
4. L Ltd provided the valuation to N Ltd in an email on 5 July.
5. On 8 July, N Ltd replied:

Thank you for your email. Please advise which of these items would be able to [be] replaced through your business. Please also advise of any applicable insurance discount for this.

6. On 9 July, L Ltd replied:

Hi everything could be replaced on this list from our business. The only thing I could not provide is the 9ct Gold Enamelled pendant \$1980.00. We could offer a 10% discount.

7. N Ltd replied asking if the discount could be increased to 15%, which L Ltd agreed to.

8. On 19 July, N Ltd sent an email stating:

We have pleasure in authorising the replacement of the items detailed below, subject to the value limits indicated. Please send us the invoice.

[...]

Authorised value: \$37,482.13, allowing for the insurance discount applicable. Please note that there is an \$8,000.00 policy cap that applies to individual items. [...]

Please note:

1. Our member may replace the items by another item of similar type or function
9. I understand that L Ltd issued an invoice to N Ltd in response to this email, but I was not provided with a copy of that invoice.
10. On 25 July, N Ltd sent an email stating:

Thank you for your invoice. Our Member has advised us that she may not be replacing all of the items via yourselves and so can we please cancel the order at this time until she comes back to us with her preference on what she would like to replace?
11. L Ltd replied, stating that there was a contract to supply, and that they were “ready and able to supply the goods”.
12. On 1 August, N Ltd sent an email stating:

Unfortunately, due to circumstances outside my control, I need to request the cancellation of this order. I do understand that this is not the outcome that was hoped for, and would like to extend my sincere apologies regarding this.
13. L Ltd.’s claim seeks \$23,310.00, which is its assessment of the loss of profit on the transaction.
14. The hearing took place by phone on 9 November 2022. [L Ltd.’s representative] represented L Ltd. [N Ltd.’s representative] represented N LTD.

Findings

15. The relevant law is the law of contract.
16. The issues are:
 - a) Was a contract formed?
 - b) If so, is N Ltd in breach?
 - c) If so, what damages is L Ltd entitled to?

Was a contract formed?

17. Formation of a binding contract requires:
 - a) Agreement between the parties on terms that are complete and certain.
 - b) An intention to create legal relations.
 - c) Consideration.
18. Agreement is created by offer and acceptance.
19. An offer is an expression of a willingness to contract immediately on the terms proposed. In considering whether an offer has been made, courts focus on the words or conduct of the offeror considered from an objective perspective, rather than on the subjective intent or state of mind of the offeror.
20. Acceptance is a final and unqualified expression of assent to the terms of the offer. Again, the question of whether particular words or actions constitute acceptance is considered from an objective perspective.

21. In this instance:

a) L Ltd.'s email of 18 July (read together with the previous emails beginning on 8 July) constituted an offer to supply the items of jewellery detailed on the valuation (except for the 9 ct gold enamelled pendant) at the price indicated on the valuation, less 15%.

b) N Ltd.'s email on 19 July constituted an acceptance of that offer. The terms of the 19 July email are unequivocal and unconditional.

22. There was an intention to create legal relation. This was an arms' length arrangement between two commercial entities.

23. There was consideration by way of an exchange of valuable promises. L Ltd undertook to supply the jewellery. N Ltd undertook to pay \$37,482.13.

24. Therefore, I find that a contract was formed.

Is N Ltd in breach?

25. Sections 36-42 of the Contract and Commercial Law Act 2017 set out the circumstances in which a party may lawfully cancel a contract. A party may cancel a contract if the other party repudiates it, or breaches an essential term of it. A party may cancel a contract if they were induced into it by a misrepresentation.

26. None of those circumstances apply in this instance.

27. N Ltd had no legal right to cancel the contract. L Ltd affirmed its willingness to complete the contract.

28. N Ltd are in breach of contract.

What damages is L Ltd entitled to?

29. The purpose of damages in contract is to put the party who is not in breach back to the position they would have been in had the breach not occurred.

30. Had the breach not occurred, L Ltd would have supplied jewellery per the list valuation (except for the 9 ct gold enamelled pendant, and allowing for 'like for like' swaps at H's discretion, per N Ltd.'s 19 July email). N LTD would have paid L Ltd \$37,482.13.

31. The transaction would have resulted in L Ltd earning a profit.

32. L Ltd is entitled to damages calculated on the basis of loss of profit.

33. L Ltd have assessed their profit on the transaction \$24,988.00.

34. The evidence in support of this assessment is extremely limited.

35. [L Ltd.'s representative] emphasised that he is a very experienced jewellery retailer, and he is more than qualified to calculate profits. The written submissions include a copy of an email from [L Ltd's representative] to his lawyer stating:

The final, and agreed price for the sale was \$37,482.13.

Using our usual markup of jewellery of this quality we would expect to sell it for three times our cost. So cost \$1000 – sell for \$3000 – profit \$2000.

Therefore, taking the order price of \$37,000 that makes a profit of \$24,600.

36. At the hearing I suggested to [L Ltd's representative] that it should be relatively straightforward to establish L Ltd' actual loss of profit on this transaction by providing evidence of the cost price of the specific items of jewellery listed in the valuation. [L Ltd's representative] responded that this would not necessarily be an accurate calculation, because the agreement allowed H to select alternative items of jewellery.
37. I acknowledge the point, but it seems to me that evidencing the cost price of the items on the list would be a very useful starting point. Presumably [L Ltd.'s representative] could have also supplied evidence of any number of recent sales showing the cost price of the item and the sale price, to support his submission about the "usual markup".
38. I consider that it is appropriate for the Tribunal to take a cautious approach when the only evidence available on this critical question is the uncorroborated oral evidence of one of the parties.
39. I also note that L Ltd offered a 15% discount to secure the deal with N Ltd. Presumably this discount would reduce L Ltd' usual or expected profit on the deal by 15%, if the discount is a reduction from standard retail price. It does not appear that [L Ltd.'s representative] has factored this into his assessment of damages in this claim.
40. The Disputes Tribunal is required to determine disputes "according to the substantial merits and justice of the case" (section 18(6) Disputes Tribunal Act 1988).
41. My findings are:
 - a) L Ltd and N LTD entered into a binding contract.
 - b) N Ltd are in breach of that contract.
 - c) L Ltd is entitled to damages calculated on the basis of loss of profit.
 - d) The evidence available to me does not establish that the loss of profit was \$24,988.00.
 - e) Taking a cautious approach in light of the limited evidence, whilst also acknowledging that L Ltd is entitled to damages, and having regard to the substantial merits and justice of the case, my finding is that N Ltd is to pay L Ltd \$15,000.00.
42. The claim also seeks legal costs (\$500) and the filing fee for this claim (\$180). Per section 42 of the Disputes Tribunal Act 1988, the Tribunal has no power to award costs except in certain limited circumstances (as set out in s 42). None of those circumstances apply in this instance. Therefore, this part of the claim must be dismissed.

Referee: Nicholas Blake
Date: 30 November 2022



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>.