IN THE DISPUTES TRIBUNAL **[2018] NZDT 1072**

BETWEEN	**GJG Ltd** APPLICANT
AND	**SQS Ltd** RESPONDENT
Date of Order:	26 April 2018
Referee:	Referee: Paton-Simpson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that GJG Ltd is to pay the sum of $5,451.00 to SQS Ltd on or before Thursday 10 May 2018.

Facts

[1] On 20 September 2017 at around 10 am, a telemarketer named JG working for GJG Limited (GJG) made an uninvited telephone call to the home of the directors of SQS Limited (SQS). JG spoke with SQS director QS for around twenty-five minutes concerning a Facebook marketing package offered by GJG. Near the end of the conversation, Mrs QS provided her debit card details.

[2] Immediately after the telephone call, GJG sent a copy of a twelve-month contract to SQS by email. GJG took an initial payment of $99.00 plus GST for "ad creation" using the debit card details. A couple of hours later, GJG sent through advertisements it had created for SQS's approval, and took a further $2,725.50, which was half of its twelve-month advertising fee. The next day, GJG took the remaining $2,725.50, and emailed an invoice for the total sum. Mrs QS did not believe she had authorised the advertising fee, and was also unhappy with the quality of the sample advertisements. She requested a refund, which GJG refused.

[3] SQS now claims $5,451.00, representing a full refund of the two payments that make up GJG's twelve-month advertising fee. It does not claim any refund of GJG's "ad creation" fee of $99.00 plus GST.

Issues

[4] The issues to be determined are:

a. What was agreed between the parties?

b. Did SQS suffer loss due to any misrepresentation or misleading conduct?

c. Is SQS entitled to a refund?

What was agreed between the parties?

[5] The relevant law is the law of contract, the Fair Trading Act 1986 (FTA), and the Contract and Commercial Law Act 2017 (CCLA). A contract need not be in writing; an agreement can be formed verbally or inferred from the parties' conduct.

[6] GJG argued that this was a case of buyer's remorse, and that Mrs QS had been informed about the payments that would be taken under the twelve-month contract. However, Mrs QS gave evidence that JG had reassured her several times that she would only have to pay $99.00 plus GST that day, which was the fee for GJG to prepare sample advertisements for her approval. She said JG did not initially mention further payments, but that later in the conversation JG said that a twelve-month contract would be sent to her, which would cost $395.00 per month if she approved the sample advertisements. It was her understanding that she was only committing to the "ad creation" fee, and could choose whether to go ahead with the twelve-month advertising contract once she had seen the advertisements.

[7] GJG recorded one short section of the conversation, with Mrs QS's permission. JG reassured Mrs QS that this was "just something the bank makes us do" and was for quality assurance purposes. JG started by saying "We will be running a twelve-month agreement for Facebook advertising", but immediately added that "the cost today is just $99.00 plus GST". She said GJG would take the remaining balance "once we have created the ads, once we have emailed them over, you've got them, that sort of thing". Mrs QS gave evidence that she was not concerned because of the previous assurances.

[8] In the absence of any recording of the earlier part of the conversation, I accept Mrs QS's account of what JG had told her. Her account is also consistent with GJG's practice of charging a separate fee for "ad creation". I find that the recorded words were not sufficiently clear to override the prior assurances that Mrs QS would only be committing to paying the "ad creation" fee, and that she would have the chance to approve the advertisements before committing to a twelve-month contract.

[9] In the recording, JG said that she had emailed the terms and conditions of the quotation, and that by authorising payment today Mrs QS could confirm her acceptance of those terms. However, both parties agree that the email was not in fact sent until after the telephone conversation had ended. By then, a verbal contract had already been formed, on the terms that SQS would only be liable for $99.00 plus GST unless it decided to proceed with a twelve-month contract.

Did SQS Ltd suffer loss due to any misrepresentation or misleading conduct?

[10] Although the provisions of the FTA dealing with uninvited direct sales do not apply to business-to-business sales, s 9 of the FTA does apply. It provides, "No person shall, in trade,

engage in conduct that is misleading or deceptive or likely to mislead or deceive." If a breach of s 9 causes a person to suffer loss, the Tribunal may grant a remedy under s 43.

[11] Mrs QS was clearly told that only $99.00 plus GST would be payable "today", whereas in truth, GJG was intending to take a total of $5,564.85 that day. GJG admitted that its usual practice is to take the full twelve-month payment as soon as advertisements are prepared, usually on the same day as the call unless the call is late in the day. As it turned out, it took half the payment the next day because it found the funds were not available for the full payment. Mrs QS explained that the payment pushed SQS's account into overdraft. She said she would never have provided her debit card details if she had known GJG's true intentions. I therefore find that SQS's loss of the advertising fee resulted from misleading conduct by GJG.

Is SQS Ltd entitled to a refund?

[12] Since I have found that the agreement was only for payment of the "ad creation" fee, it follows that GJG acted without authority in taking the advertising fee without SQS's agreement to proceed with a twelve-month contract. This was a breach of the contract under which Mrs QS supplied her debit card details, so I find that GJG must refund the money wrongfully taken. A refund of the advertising fee is also an appropriate remedy under FTA s 43.