



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court

[2022] NZDT 129

**APPLICANT**      **QL**

**RESPONDENT**    **GT Ltd**

**The Tribunal orders:**

QL is not liable to pay the sum of \$5,007.83 to GT Ltd.

**Reasons:**

1. This dispute arises as a result of email hacking, more formally known as business email compromise (BEC) fraud. On 26 April 2022, GT Ltd sent a quotation to QL for the cost of carpeting her house with a [Bank 1] account number for payment. QL rang and discussed some changes, then followed up with an email that same day asking for a requote. On 28 April, she received a reply that addressed her by name and stated:

“We are currently updating our payment system, therefore you should not remit payment to the account on the invoice. I will provide you with our alternative bank account details.

Kindly confirm your understanding by return email so I can forward our alternative bank details to you for payment.”

This email used the same email address and signature as the genuine emails, but was in fact sent by the hacker, who had compromised GT Ltd’s email account and intercepted QL’s emails.

2. QL responded asking again for the requote, wondering if she had missed it. She received the requote from GT Ltd on 3 May, and immediately responded:

“Can you please let me have the account for deposit. I note an earlier email you said to use a different one than the one on the invoice?”
3. The hacker responded on 4 May with a [Bank 2] account number, and QL paid the 50% deposit of \$5,007.83 that evening. On 9 May, the [Bank 1] fraud team contacted QL to tell her that GT Ltd’s email account had been compromised, that [Bank 2] had notified [Bank 1] of QL’s payment, and that the deposit she had paid into the [Bank 2] account could not be recovered.
4. GT Ltd took the position that QL still needed to pay GT Ltd the full amount. QL paid \$5,007.84 to GT Ltd on 23 May, verifying the account number by phone, and GT Ltd installed the carpet. GT Ltd then started sending demand letters to QL for the other \$5,007.83. QL seeks a declaration that she is not liable to pay this sum to GT Ltd.
5. The issue to be determined is whether QL remains liable to GT Ltd for the sum she paid to the hacker.

## **Does QL remain liable to GT Ltd for the sum she paid to the hacker?**

6. The law regarding who bears the loss in BEC fraud cases is not clear, and is still developing. The context is also evolving, as BEC fraud is becoming a more widely known business risk and the techniques used by cybercriminals are becoming more sophisticated.
7. So far as I have been able to find, there is no New Zealand case law on the issue, and the overseas cases differ factually from the current situation. One principle that emerges from the Commonwealth decisions is that it is relevant to ask which party was better placed to prevent the fraud.
8. I have decided in all the circumstances of this claim that GT Ltd should bear the risk of what happened, and that QL is therefore not liable to GT Ltd for the sum she paid to the hacker. Factors I have considered in reaching this decision include the following:
  - a) As a business dealing with the public, GT Ltd has a duty to be aware of BEC fraud and to take precautions against it, and/or to warn its customers. This duty arises out of s 28 of the Consumer Guarantees Act 1993 (CGA), which requires services supplied to a consumer to be provided with reasonable care and skill.
  - b) The extent of a business's cybersecurity is entirely within the control and knowledge of that business and its chosen IT consultants, not its customers. Although GT Ltd provided a letter from its IT consultant stating that it had the latest internet security software, this cannot be regarded as independent evidence. Customers will generally not be in a position to disprove a business's assertion that sufficient precautions were taken, so it makes more sense for the default position to be that a business bears the risk of its own systems being compromised. If a customer is shown to have been negligent, the responsibility may be shared or the business may even be exonerated from responsibility, but otherwise the business that was hacked should generally bear the loss.
  - c) As a consumer, QL cannot be expected to have the same awareness of BEC fraud as another business might. Although GT Ltd submitted that the 28 April email should have rung alarm bells, and QL could have rung GT Ltd to verify the email, I find that this places too high an expectation on a consumer to understand business matters. Negligence requires more than just failing to be especially shrewd. If the email had borne more resemblance to the usual spam emails consumers receive, such as being full of spelling mistakes and grammatical errors but devoid of personal detail, or asking the consumer to click on a link that goes to an unrelated site, the outcome might have been different.
  - d) Given the relatively small sum involved, less vigilance can be expected from QL than if a larger sum (such as a real estate settlement) had been involved.
  - e) The fraud involved email hacking rather than "spoofing" an email address, so was more difficult for QL to detect. The email address used was the true email address, not just something similar, and the hacker was able to use personal details to make its emails convincing. Also, the hacker was able to intercept QL's email of 3 May and prevent it from reaching GT Ltd.
  - f) GT Ltd chose to send its quotations by email, which could be considered as a representation that its email is secure.
  - g) Businesses are in a better position than consumers to insure for the risk of BEC fraud. GT Ltd suggested that no such insurance was available, but a quick Google search yields multiple offers of cyber-insurance for New Zealand businesses from established insurance companies and brokers.
9. I therefore conclude that QL is not liable to pay \$5,007.83 to GT Ltd.

**Referee: E Paton-Simpson**

**Date: 9 September 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 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>.