



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2017] NZDT 1381

APPLICANT DE

RESPONDENT FX

The Tribunal hereby orders:

FX is to pay the sum of \$2,350.00 to DE on or before Tuesday 21 February 2017.

Reasons:

1. DE, an artist, sublet a space from FX in a collective non-profit studio for around eleven months until 27 January 2014. When she left, she asked if she could leave two sculptures there and FX agreed. DE was waiting to find a space with large enough storage space to accommodate the sculptures, which were two hand-painted cane chairs that were the only unsold items from DE's first solo show since returning to New Zealand.
2. On 30 December 2015, DE contacted FX to pick up the chairs, having found storage space for them, and he told her that he had thrown them in a skip around a month ago.
3. DE now claims \$12,000.00 in damages for the loss of the chairs.
4. The issues to be determined are:
 - a) Were the sculptures abandoned? What communications were there between the parties before disposal?
 - b) If the sculptures were wrongfully dumped, was there any contributory negligence?
 - c) What was the value of the sculptures?

Were the sculptures abandoned? What communications were there between the parties before disposal?

5. The relevant law is the tort of conversion, which applies where someone intentionally asserts rights or dominion over goods which is inconsistent with the owner's rights. Also relevant is the law of bailment, which governs the situation where a person is in possession of property belonging to someone else.
6. Although FX admitted disposing of DE's sculptures, he argued that she had abandoned them. Abandonment can be a valid defence to a claim in conversion, but FX bears the onus of proving that the goods were abandoned. Neglect and inaction can amount to abandonment if it represents "a giving up, a total desertion, and absolute relinquishment" of the goods.
7. FX presented statements from two tenants of the studio space stating that the sculptures were a nuisance and had to be shifted on a regular basis so that other tenants could access their own items. He pointed to a text DE sent on 28 January 2014, stating that she would remove the

chairs after her show on 5 February. He gave evidence that he spoke to her a couple of months later and allowed her to retain the keys on the understanding that the sculptures would be collected reasonably shortly. In January 2015, he commented on a Facebook page "I still have your chairs but now might drop them at Y's". This was in the context of light-hearted banter, and DE responded "Oh shiz! I forgot that hehe!"

8. FX claimed to have told DE in March 2015 that the chairs had survived a spring clean the previous November, but there was another spring clean booked for November 2015 so she would need to collect them or they would not be so lucky. However, DE denied that any such conversation took place. She claimed that the sculptures were carefully bubble-wrapped, and that FX's quip about Y's auctions showed he was aware that the sculptures were of commercial value.
9. I find insufficient evidence to conclude that DE had abandoned her rights to possession of the sculptures, taking into account the conflict of evidence regarding whether FX gave adequate warning of his intention to dispose of the sculptures.

If the sculptures were wrongfully dumped, was there any contributory negligence?

10. Where someone suffers damage as the result partly of their own fault and partly of the fault of someone else, section 3 of the Contributory Negligence Act 1947 allows liability to be apportioned between the parties. The courts have held that failure to act reasonably prudently amounts to contributory negligence if it was reasonably foreseeable that it might result in harm to oneself, taking into account the possibility of others being careless.
11. Although I have found DE's neglect of her sculptures insufficient to amount to clear abandonment, I accept that she exhibited a degree of nonchalance regarding her property and was negligent in leaving the sculptures in FX's care for longer than originally arranged while failing to communicate clearly her intentions. It was reasonably foreseeable that the chairs might be damaged or disposed of by FX or one of his tenants, especially given the communal nature of the space.
12. Since either party could have avoided what happened simply by better communication, I find that the parties should bear the loss equally. Therefore FX is only liable for fifty per cent of the value of the sculptures.

What was the value of the sculptures?

13. There was some discussion of replacement value, but it was unclear whether the chairs could be replaced for less than the market value or whether replacements would have the same value as the original art works. I find that DE's loss must be measured by the market value of the sculptures at the time of conversion in November 2015.
14. DE gave evidence that she originally listed the sculptures for sale at \$3,500.00 each. This evidence is of limited help in establishing a market price, since a market requires a willing buyer as well as a willing seller, and the sculptures were unsold. However, DE also produced a valuation from TC of CO Limited, estimating that the sculptures were worth \$3,500 each. On the other hand, FX obtained an estimate of \$500 to \$1,000 from JBD or \$1,400 to \$1,800 from BP.
15. Despite hearing evidence from the parties regarding the experience of the different valuers and the information or assumptions on which their valuations were based, it remains unclear which valuation is most accurate. Given the large element of uncertainty in valuing an art work, I have simply taken a rough average of the estimates obtained by each party. FX's estimates average roughly \$1,200. The midpoint between this figure and DE's estimate of \$3,500 is \$2,350 per chair. Since I have found that FX is liable for fifty per cent of the total loss, the amount payable to DE is \$2,350.00.



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.

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 outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the 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 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, and 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>.