



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

**District Court**

**[2022] NZDT 158**

**APPLICANT      LI**

**RESPONDENT    MB Ltd**

**The Tribunal orders:**

Claim Dismissed.

**Brief Details of Claim**

1. On 13 July 2022 LI delivered an oil painting by FDX to XT of MB Ltd for auction on 17 July 2022. The item was photographed and included in MB Ltd's online catalogue, describing the painting as "Very early FDX Original in Frame". A reserve price of \$100.00 was set.
2. Prior to the auction, CT of TB, came to view the painting. CT advised XT that the painting was not an original. CT referred XT to the white label on the back as further proof as DQN were a firm well known for selling quality prints/copies of well-known artists.
3. XT telephoned LI to advise her what CT had said. During that conversation it was decided that the painting would remain in the auction as described.
4. The online auction commenced. The auction had been open since 2.45 p.m. on 14 July 2022. The live auction commenced at 1.15 on 17 July 2022. The online bidding reached \$250. LI observed the live auction by video link. During the auction she observed XT shaking his head several times to someone in the room. XT then paused the live auction and went and spoke to the person. LI says that XT told the person not to bid on the painting because it was a fake. XT then returned to his place, and without asking for final bids, banged his gavel. The painting was sold to the on-line bidder for \$250.00.
5. Upset by what she saw on the video link, LI telephoned XT. LI wanted her painting back. XT advised her he could not give it back as it had been sold. XT decided to forego his commission on the sale and paid the full \$250 to LI.
6. LI claims the painting was an original. LI said that during the phone call prior to the auction, she asked to take the painting back to have it authenticated but XT persuaded her to keep it in the auction to see what happened. LI claims the painting would have fetched \$2,000 if she had been able to authenticate it and claims \$1,750 from MB Ltd.

**Issues**

7. The issues for the Tribunal to determine are:
  - (a) Whether MB Ltd failed to provide its service with reasonable care and skill;
  - (b) Whether MB Ltd has engaged in misleading or deceptive conduct in relation to its dealings with LI;

- (c) If the answer to either of the above is “yes”, whether LI is entitled to damages for any loss suffered and if so, how much.

**Has MB Ltd failed to provide its service to LI with reasonable care and skill?**

8. The Consumer Guarantees Act (CGA) applies. There is a guarantee in the CGA implied into all consumer contracts, that where a service is supplied by a supplier, the service will be carried out with reasonable care and skill (S.28 CGA). That means the reasonable care and reasonable skill of a competent person in the industry or occupation.
9. The onus to prove a claim lies with an applicant. The standard of proof required is “the balance of probabilities”. That means that LI has the onus to prove it is more likely than not that MB Ltd failed to provide its service with reasonable care and skill. There must be more certainty than doubt.
10. I find that LI has not proved that XT/MB Ltd failed to provide its auctioneering services to her with reasonable care and skill for the following reasons:
- (a) LI claims that XT persuaded her to set the reserve at \$100 even though he acknowledged the painting was likely to fetch more than \$1,000. However, XT says it was LI who suggested the \$100 reserve and he would not have said how much it might sell for as he was unfamiliar with the FDX. I am faced with one person’s word against the other on the issue of who suggested the \$100 reserve. However, even if it was XT who suggested the reserve, LI believed the painting was worth at least \$2,000, and she had it within her control to set on a higher reserve no matter what XT said. Therefore, any suggestion by XT of a \$100 reserve could not reasonably be seen as a failure to provide the service with reasonable care and skill, particularly as LI is not an inexperienced buyer/seller at auction.
  - (b) LI says that when XT telephoned her to say he had been advised the painting was not an original but a copy, XT says she asked to take the painting back to have it authenticated. However, XT persuaded her to leave the painting in the auction and to see what happened. On the other hand, XT says LI did not ask for the painting back to have it authenticated. If she had done so, he would have returned it to her. XT also says it was LI who told him to leave it in the auction. Again, I am faced with one person’s word against the other. However, during the hearing, LI revealed that she has bought and sold items at auction before, including through MB Ltd. LI would have been well aware that leaving the painting in the auction with a \$100 reserve bore the risk that it only needed to reach the reserve and the painting would be sold. So even if XT did suggest leaving it in the auction, LI knew the risk that the painting would sell if it reached the \$100 reserve, so she was not relying solely on XT’s suggestion in making her decision to leave the painting in the auction.
  - (c) LI says that during the auction, she observed XT shaking his head 5 times in the direction of someone who could not be seen in the video, then XT paused the auction and went over and spoke to a bidder. LI could not hear any of the conversation between XT and the potential bidder. However, LI believes a person in the room was wanting to bid on the painting but XT told her not to bid on it because it was a fake. Then XT returned to his place and ended the auction without seeking final bids. On the other hand, XT acknowledges that he did shake his head towards a potential bidder. XT says he could hear the person asking if the painting had been authenticated, and he was shaking his head that it had not. XT said he paused the live auction (but not the online auction) to go over and explain to the potential bidder that the painting had not been authenticated. There had been no other bids at the live auction. XT returned to his place, saw the online bid remained at \$250 and he ended the auction. It seems to me unlikely that an auctioneer who derives his income as a percentage of the sale price would discourage a bid if one was available. Also, LI cannot know what was said between XT and the potential bidder. If XT was asked if the painting had been authenticated (and I have no reason not to accept XT’s evidence in this respect), XT is obliged to reply honestly that the painting had not been authenticated. I prefer XT’s evidence on what happened at the live auction and what was said between himself and the potential bidder. Given that there were no other bidders at the live auction showing any interest, there is no evidence that any other competent auctioneer would have done anything differently from XT in ending the auction with the online bid.
  - (d) LI says that XT sold her painting to a friend, and that is why he discouraged the bidder at the live auction from bidding. However, XT says he did not know who had placed the winning bid.

XT explained that at every auction, bidders must register afresh and are issued with a bidder number. XT says he did not know who had the bidder numbers and he could not see the online bidders. Therefore, he could not have recognised the bidder. LI has produced no evidence to prove her claim in this respect.

- (e) For the reasons stated above, I find no failure by MB Ltd to comply with the guarantee of reasonable care and skill.

**Has MB Ltd engaged in misleading or deceptive conduct in relation to its dealings with LI?**

11. No person shall, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive (S.9 Fair Trading Act).

12. I have considered the evidence of both parties, and for reasons set out in Clause 10 above, I find no misleading or deceptive conduct.

**Outcome**

13. LI has not proved any wrongdoing on the part of MB Ltd and therefore her claim is dismissed.

**Referee: J.F. Tunnicliffe**

**Date: 21 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 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>.