

BETWEEN

ABN Ltd

APPLICANT

AND

ZYR

RESPONDENT

AND

ZYQ

SECOND RESPONDENT

Date of Order:

27 May 2013

Referee:

Referee Dryden

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZYR and ZYQ are to pay ABN Ltd \$463.63. Payment is to be made directly between the parties by Wednesday, 5 June 2013. The name of the Applicant was changed from QO and UI to ABN Ltd, by agreement to correctly identify the Applicant.

Facts

[1] There was an oral contract agreed to between the parties for the construction of a driveway by ABN Ltd on the residential property of ZYR and ZYQ. This driveway was to replace an existing driveway.

[2] ABN Ltd was contracted to form the driveway so that it could be sealed by a third party contractor.

[3] Two sections of the driveway were formed by ABN Ltd and then sealed by a third party contractor. The middle section was formed by ABN Ltd but not sealed because further work was advisable to ensure that the driveway in this section did not scour away or slump.

[4] ABN Ltd gave an oral quote of \$3,852.50 for the formation of the driveway to ZYR and ZYQ and that quote was accepted.

[5] ABN Ltd advised ZYR and ZYQ that it would be sensible to construct a retaining wall below the middle section of the driveway to protect the integrity of the formation of the driveway on that section. This was because the build up of shell rock on the outer edge was over 500mm in places.

[6] ZYR and ZYQ have had the retaining wall constructed.

[7] ABN Ltd deducted \$1,175.75 from the quoted price because the formation of the middle section was not able to be completed by them.

[8] A dispute arose between the parties over the cost of completing the formation of the middle section so that it can be sealed.

[9] ABN Ltd filed a claim seeking the \$463.63 being the alleged balance of the quoted price for work done and materials supplied.

[10] The issues were decided on the evidence and law, including that of the general law of contract, Consumer Guarantees Act 1993 and Disputes Tribunals Act 1988, s 18(6), merits and justice.

Issues

[11] Was the payment made of \$1,609.87 on the basis of it being paid as a full and final payment, binding on ABN Ltd?

[12] If not, what sum, if any, is owed to ABN Ltd by ZYR and ZYQ?

Decision

Was the payment made of \$1,609.87 on the basis of it being paid as a full and final payment, binding on ABN Ltd?

[13] I find that the payment of \$1,609.87 is not full and final and that ABN Ltd are entitled to be paid any monies still owed to them for works completed.

[14] In a letter dated 5 April 2013, ABN Ltd had advised that unless payment was made of the disputed account by Monday 8 April 2013 it would be lodging a claim in the Disputes Tribunal. This claim was filed in the Disputes Tribunal on 9 April 2013, seeking the sum of \$2,073.50 plus the filing fee of \$60.40.

[15] A letter was sent to ABN Ltd by ZYR and ZYQ, dated 10 April 2013, stating that they were going to pay \$1,609.87 of the outstanding balance of \$2,073.50 by internet banking on 20 April 2013 in full and final settlement of the account.

[16] This payment was made by internet banking on 19 April 2013.

[17] ABN Ltd did not respond to the letter detailed in paragraph 15 of this Order.

[18] The payment was made by internet banking and therefore there was no opportunity for ABN Ltd to decline the payment before it was made.

[19] I am satisfied that there was no accord and agreement in respect of the payment of \$1,609.87, being considered to be a full and final payment.

[20] I am satisfied that ABN Ltd did not consider the payment of \$1,609.87 to be full and final settlement given that they continued with their Disputes Tribunal claim after this payment was made.

[21] Further, it is obvious that ZYR and ZYQ also did not consider that this was a full and final payment by their acknowledgment in a letter dated 19 April 2013, the date payment of \$1,609.87 was made, stating that this payment leaves a disputed amount of \$463.63

If not, what sum, if any, is owed to ABN Ltd by ZYR and ZYQ?

[22] I find that ZYR and ZYQ are to pay ABN Ltd \$463.63.

[23] ZYR and ZYQ disputed the quantum of the deduction made by ABN Ltd from the quoted price. This deduction was to account for the fact that the formation of the middle section of the driveway was not completed, in the sense that ZYR and ZYQ were now going to construct a retaining wall to prevent the driveway from “slumping” in the future.

[24] The deduction made by ABN Ltd was \$1,175.75.

[25] ZYR and ZYQ in the absence of knowing how ABN Ltd calculated the reduction in the quoted price did their own calculation, which was based on the original quoted price of \$3,852.50 for formation of the driveway. ZYR and ZYQ's calculation was to establish the total square metres of the total drive way and divide that area into the quoted price. This gave a cost of \$7.28 per square metre. They then multiplied the area of the two sections that were completed of 304 square metres by \$7.28 per square metre to arrive at what they considered to be the cost of the completed work of \$2,213.12.

[26] This left in their minds a reduction in the quoted price of \$1,639.38.

[27] The difference between the deduction made by ABN Ltd and the reduction as calculated by ZYR and ZYQ is \$464.63. This is the disputed sum.

[28] ZYR and ZYQ had originally disputed the workmanship in respect of the whole length of the driveway, but accepted after independent "arbitration" by another contractor, who found that that the sections either side of the middle section was of a good standard, that the work in those sections were complete and could be sealed.

[29] ABN Ltd submitted that they had carried out work on the middle section to a standard that the middle section was ready for sealing if ZYR and ZYQ had decided not to put in a retaining wall.

[30] I am satisfied that this was the case, based on the photographic evidence of ABN Ltd.

[31] It is accepted that the work on the middle section has subsequently been partially affected by the weather and the construction of the retaining wall.

[32] ABN Ltd also submitted that when upper and lower sections were ready for sealing by a third party contractor, this work was not done in a timely manner and resulting in remedial work being needed because of erosion due to rain. ABN Ltd did this remedial work at no extra cost to ZYR and ZYQ. The alleged cost of this work was \$1,045.00.

[33] I am satisfied that this extra cost was not caused by any fault of ABN Ltd. Therefore, I have considered this goodwill gesture by ABN Ltd in determining my decision.

[34] I am satisfied that not all of the work carried out by ABN Ltd in the middle section will have to be repeated. The compacting of the shell rock that was placed will still be of value as well as the spreading of most of the shell rock in that section.

[35] It is accepted that it's probable that some extra shell rock will be required as a result of the construction of the retaining wall and further preparation of that section to be ready for sealing.

[36] ZYR and ZYQ have submitted that ABN Ltd breached ss 28 and 29 of the Consumer Guarantees Act 1993 by failing to advise before work was commenced of the probable need for a retaining wall in the middle section, and that as a result the drive way work completed by ABN Ltd was not fit for its intended purpose.

[37] In denying that claim, ABN Ltd stated that the need for a retaining wall was not obvious until formation of the "new" driveway was well underway. When it became obvious to them that it would be prudent to construct a retaining wall below the middle section, they advised ZYR and ZYQ of that.

[38] There has been no evidence given that the argument of ABN Ltd was not correct.

[39] Therefore, I find that there has been no breach by ABN Ltd of the guarantee that the service will be provided with reasonable care and skill (s 28, Consumer Guarantees Act 1993).

[40] I also find that there has been no breach by ABN Ltd of s 29 of the Consumer Guarantees Act 1993, which states that the product of a service provided should be fit for its intended purpose.

[41] The driveway as constructed by ABN Ltd was fit for its intended purpose. It was just that further work was necessary to ensure that the middle section of the driveway was not affected by slumping in the future and this was not obvious until construction of that driveway had been partially completed by ABN Ltd.

[42] I am satisfied that the value of the work carried out by ABN Ltd in the middle section is probably of greater value than the disputed amount of \$463.63.

[43] I am satisfied that the deduction of \$1,175.75 from the quoted price because the middle section was not able to be completed to a standard that meant that the driveway would not slump in the future, is fair and reasonable.

[44] Therefore, I find that ZYR and ZYQ are to pay ABN Ltd \$463.63.