

BETWEEN

ADH

APPLICANT

AND

ZWS Ltd

RESPONDENT

Date of Order:

28 June 2011

Referee:

Referee Davidson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Applicant's claim is dismissed. Pursuant to s 11(2)(b) of the Disputes Tribunals Act 1988 the Applicant, ADH, must pay the Respondent, ZWS Limited, \$625.00 (incl GST) within 7 days of the date of this Order.

Facts

[1] ADH required a website for his gardening business. ZWS Ltd agreed to develop a static website for ADH for \$500.00 (incl GST). ADH subsequently requested that the site be changed to match flyers that he had had printed and agreed to a dynamic database-driven website design that would cost \$2,270.00 (incl GST). On 9 April 2010 ADH gave ZWS Ltd three post-dated cheques of \$700.00 each. ZWS Ltd banked the first cheque on 13 April 2010. ADH cancelled the second and third cheques on 23 April 2010. ADH wants the \$700.00 that he has paid refunded to him. ZWS Ltd wants the balance of its invoice paid.

Issues

- [2] The issues are:
- (i) Did ADH agree to pay \$2,270.00 for the website?
 - (ii) Was the price agreed reasonable?
 - (iii) Was the website being developed a database-driven website?
 - (iv) Did ADH have cause to cancel the contract?
 - (v) What relief is ZWS Ltd entitled to?

Law

[3] The law governing this claim is the law of contract, section 11(2)(b) of the Disputes Tribunals Act 1988 and sections 7(2) and 9(2)(b) of the Contractual Remedies Act 1979.

Decision

[4] The parties initially entered into a verbal contract to have a website developed for \$500.00. The parties subsequently verbally agreed to vary both what was to be delivered and how much this would cost. Verbal contracts are as enforceable as written contracts; however in

the event of a dispute the ephemeral nature of verbal communications can present evidential challenges for the parties, as in the present case.

[5] On the balance of probabilities I find that the parties did agree to alter the scope of the contract. I find that the parties agreed that the new price would be \$2,270.00 (including GST) and in return ZWS Ltd would provide a dynamic database-driven website in place of the previously agreed static website. The primary basis for this finding is the three \$700.00 post dated cheques that ADH gave to ZWS Ltd. If ADH had not agreed to the more expensive site, he would not have given the cheques to ZWS Ltd. Further supporting the conclusion that the parties had agreed to significantly increase the price is the \$920.00 or \$1,464.95 that ZWS Ltd claims to have paid a third party to develop the database for the website. It would be unusual for a company to spend significantly more to set up a website than it had agreed to charge.

[6] ADH argued during the hearings that he would never have agreed to a \$2,270.00 website as he did not have the money to pay for it. It is difficult, however, to reconcile ADH's statement with him having written out the three \$700.00 cheques.

[7] During the hearings, ADH argued that the price charged by ZWS Ltd was unreasonable. In support of this claim he presented quotes from numerous other companies, whose quotes were generally substantially less than the price he had agreed with ZWS Ltd. As the parties' arrangements were entirely verbal there was no written agreed scope for the work that ZWS Ltd was to undertake. Inevitably this led to disagreements during the hearings as to how comparable the work quoted by the other suppliers was to the work provided by ZWS Ltd.

[8] The common law and Consumer Guarantees Act 1993 both provide consumers with protection that prices charged shall be reasonable. This protection, however, extends only to circumstances where price has not been discussed. Where the parties have discussed and agreed a price, then in the absence of other equitable considerations the law will support the price agreed between the parties. To do otherwise would be to cast doubt over the certainty of any price agreed in a contract. In this case, I find the parties had agreed a price and on this basis ADH cannot now complain that the price he agreed was too high for what he had been promised in return. For this reason, it is unnecessary for the Tribunal to make a finding as to whether the agreed contract price was reasonable or not.

[9] ADH argued that the website was unacceptable. ADH claimed that it was only one page, had numerous spelling mistakes, was missing content and that it was not a database-driven website as had been agreed. In support of his arguments ADH produced an undated letter purporting to be from RM, an expert with a Postgraduate Diploma in Computing. The letter is unsigned and curiously comprises a blend of first and third person references to ADH. I attribute this either to RM's English skills or ADH having written the letter on RM's behalf and inadvertently intermixed both RM's and ADH's views.

[10] ZWS Ltd presented the website to the Tribunal on a notebook computer during the second hearing. Despite RM's evidence, viewing the website in person made it clear that the website comprised multiple pages, had rotating graphics and a newsletter signup suggesting it was a database-driven site based on some form of content management system. Much of the content was missing, replaced by generic Latin placeholder text. ZWS Ltd argued that there were almost certainly spelling mistakes in the content of the website and many pages were incomplete because although the site had been developed, completion required content for each page from ADH. ZWS Ltd also argued that the development of websites is an iterative process with the main structure provided first followed by repeated refinements of the content and look and feel until a satisfactory result is achieved. In this regard ZWS Ltd argued that naturally the website would appear incomplete and contain spelling mistakes as it had yet to undergo this stage of further refinement.

[11] Having viewed the site in person, on the balance of probabilities I prefer ZWS Ltd's evidence that the website was a database-driven site with multiple pages and reasonable functionality. Certainly the site was missing content and required further refinement; however, I prefer ZWS Ltd's argument that no website is perfect upon the completion of initial development and certainly not prior to the provision of the substantive content for each page by the client.

[12] ADH stated that he was unhappy with the website after having viewed it again after returning home from his meeting with ZWS Ltd. Subsequently ADH cancelled the two unbanked cheques and the contract. I find that ZWS Ltd was in the process of delivering the website that had been agreed and that while further content and refinement of the website was obviously required this did not provide ADH with a basis for cancelling the contract. In the circumstances, the reasonable next step would have been to provide the missing content, specify

any errors or changes required and continue to refine the look and feel of the website rather than withholding payment and cancelling the contract.

[13] ADH stated during the first hearing that he had attempted to communicate the problems with the website to ZWS Ltd. ZWS Ltd disputes this and the verbal nature of the communications means that there is no evidence of any proposed changes to the site or of any additional content having been provided to ZWS Ltd by ADH.

[14] Section 7(2) of the Contractual Remedies Act 1979 states that if one party to a contract repudiates the contract then the other party may cancel it:

Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

[15] I find that ADH's cancellation of his cheques and refusal to proceed amounted to a repudiation of the contract with ZWS Ltd and accordingly, that ZWS Ltd is entitled to cancel the contract pursuant to s 7(2) of the Contractual Remedies Act 1979 and claim relief under s 9(2)(b) of that Act.

[16] ZWS Ltd has claimed \$2,299.72, comprising \$2,000.00 for website development, \$225.00 for website hosting, \$45.00 for domain name registration, \$450.00 for debt collection costs and \$279.72 for travel costs, less the \$700.00 already paid by ADH.

[17] The Tribunal is precluded from awarding costs pursuant to s 43(1) of the Disputes Tribunals Act 1988. Debt collection and travel costs fall into this category. The Tribunal may, however, award such costs where their recovery is provided for in the contract between the parties. As the parties elected to contract verbally in this case there is no evidence to support any such term having been discussed, and accordingly recovery of costs under the contract is also not possible. On the basis of the foregoing, I find that the Tribunal is unable to award ZWS Ltd the \$450.00 debt collection costs and \$279.72 travel costs for travel to the hearings.

[18] I note that as the website was never completed, ZWS Ltd was never called upon to host it. On this basis I find that ZWS Ltd has not suffered a loss in relation to web hosting and as such that its charge of \$225.00 for web hosting cannot be claimed.

[19] That ZWS Ltd registered a domain name for ADH is not disputed and so I find that ZWS Ltd can claim the \$45.00 cost of registering ADH's domain name.

[20] During the first hearing, ZWS Ltd claimed that it had paid \$920.00 to a third party to set up the database for ADH's website. ZWS Ltd was unable to produce any evidence to support this and that, in part, was the reason for adjourning the first hearing. At the second hearing, ZWS Ltd produced an unnumbered invoice dated 5 March 2010 from KV Ltd for \$1,464.95. The narration indicates the work was in relation to ADH's website. ZWS Ltd then produced a printout from its accounting system recording a payment of \$1,464.95 to KV Ltd on 16 March 2010, and a printout of ZWS Ltd's bank statement showing a payment of \$1,544.95 to TY on 22 March 2010. ZWS Ltd explained that TY was the account used to pay KV Ltd and that the payment was for a slightly higher amount because a small payment for other work was also included.

[21] I accept ZWS Ltd's claim that it paid a third party to set up the database for ADH's website but find that it has failed to prove to the requisite standard, the balance of probabilities, that the amount paid for this work was \$1,464.95. ZWS Ltd's documentation of its activities simply does not provide the level of certainty necessary to make such a finding. The amount that ZWS Ltd said it paid at the first hearing is different from the amount specified in the invoice that it produced at the second hearing that it says was from KV Ltd. That amount in turn is different from the amount actually paid. To these inconsistencies can be added that the payment to TY was in fact made six days after the date that ZWS Ltd's accounting system says it was made. ZWS Ltd is free to conduct its business in any way its pleases, however the Tribunal must make its decisions on the basis of the evidence provided to it, and I find that the inconsistencies in ZWS Ltd's evidence does not provide the Tribunal with a sufficiently firm basis to find that ZWS Ltd did in fact pay a third party \$1,464.95 for the database work. ZWS Ltd may have paid a third party \$1,464.95 but its records are such that this cannot clearly be shown. As noted above, however, I accept that ZWS Ltd did retain the services of a third party to set up the database for the website and find that the amount ZWS Ltd stated in the first hearing, \$920.00, is the amount that ZWS Ltd paid for that work.

[22] ZWS Ltd argued that it had also spent four hours of its own time setting up the website. It was unable to produce any time records to substantiate this, however that amount of time would appear reasonable to set the website up on top of the database and enter initial content. ZWS Ltd claimed that it typically charges \$80.00 per hour plus GST which appears reasonable (and less than the hourly rate specified in ZWS Ltd's invoice to ADH for the previous MYOB work).

[23] Taking into account the factors specified in s 9(4) of the Contractual Remedies Act 1979, in particular factors (c) and (d) in relation to costs incurred and work undertaken in the course of performing the contract, I find that ADH must pay ZWS Ltd \$625.00, comprising \$920.00 for database setup, \$360.00 (incl GST) for ZWS Ltd's own time to set up the website, plus \$45.00 for domain name registration, and less \$700.00 already paid by ADH.

[24] It was unnecessary for ZWS Ltd to file a counterclaim as the Tribunal is able to order payment to a respondent where an applicant is unable to prove its claim that it is not liable.